



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

1866
E.R.A.

THE LIBRARY
OF THE



LAW SCHOOL



E. R. A.

1866.

ENGLISH REPORTS ANNOTATED

1866

(IN TWO VOLS.)

VOL. 2, PART I.

(Cited as [1866] E. R. A.)

ANNOTATED TO FEBRUARY, 1914.

EDITOR :

MAX ROBERTSON,

Of the Inner Temple and the Midland Circuit, Barrister-at-Law.

Editor of "The English Reports" and "The Irish Reports."

LONDON :

THE REPORTS & DIGEST SYNDICATE, LTD.,

14, BELL YARD, TEMPLE BAR.

STEVENS & SONS, LTD.

SWEET & MAXWELL, LTD.

CANADA LAW BOOK CO., LTD.

I

=

;

5

;

2

;

1

1

1

1

1

1

1

ENGLISH REPORTS

ANNOTATED

[1866] E. R. A.

[IN THE COMMON PLEAS.]

(Appeal from Revising Barrister's Court.)

Nov. 21, 1865.

DODDS, appellant, v. THOMPSON, respondent.

35 L. J. C.P. 97; 1 H. & R. 319; H. & P. 285; L. R. 1 C.P. 133;
14 W. R. 476; 12 Jur. N.S. 625.

Parliament—County Vote—Freehold Tenement, 8 Hen. 6. c. 7.—Rent charged on Lands without express Power to Distrain.

ELECTION LAW.—The grant of a rentcharge in fee of 40s. a year issuing out of land of sufficient value to pay the same confers a county qualification as a freehold tenement under 8 Hen. 6. c. 7, though there be no power of distress contained in the deed granting such rentcharge.

Consolidated appeal from the decision of the Revising Barrister appointed to revise the list of voters for the Northern Division of the county of Northumberland. William Thompson, on the register of voters for the township of Morpeth, in the said division, duly objected to the names of Robert Dodds, junior, and of several other persons stated in the case, being retained on the Alnwick list of voters for the said division.

The qualifications of the persons so objected to appeared on the register as "freehold rent issuing out of freehold dwelling-houses."

The several persons so objected to claimed to be entitled to vote under or by virtue of certain deeds which were produced and proved before the Revising Barrister. A copy of one of the deeds was as follows: "This indenture, made the 22nd day of January, 1851, between Robert Dodds the elder, of Alnwick, in the county of Northumberland, blacksmith, of the one part, and Robert Dodds the younger, of Alnwick, aforesaid blacksmith, and Adam Dodds, of the same place, grocer and tobacconist, sons of the said Robert Dodds the elder, of the other part, witnesseth, that in consideration of the natural love and affection which the said Robert Dodds the elder bears towards the said Robert Dodds the younger and Adam Dodds, he, the said Robert Dodds the elder doth hereby give and grant unto the said Robert Dodds the younger and Adam Dodds, their heirs and assigns, one annual sum, or yearly rentcharge of 4l. 4s. of sterling money, to be charged, and chargeable upon and yearly issuing and payable out of all those messuages, burgages, or

tenements, situate, standing and being in Clayport-street, in Alnwick aforesaid, late in the occupation of William Gibb and Henry Fairbairn " [describing the messuages by bounds.] " To have, hold, receive, take, and enjoy the said annual sum or yearly rentcharge of 4l. 4s. unto and by them, the said Robert Dodds the younger and Adam Dodds, their heirs and assigns for ever, in equal shares as tenants in common, and to be paid on the 25th day of January in every year free and clear from all deductions whatsoever, the first payment thereof to begin and be made on the 25th day of January now instant. In witness," &c.

All the other deeds were to the same effect, and were to be taken *mutatis mutandis* as if stated as part of this case. It was proved that each of the grantors named in the several deeds was seised in demesne as of fee of and in the lands and tenements in those deeds respectively described, and out of which respectively the annual sums, or rentcharges therein respectively mentioned, were therein respectively expressed to be issuing; that the same annual sums had been received by the several grantees, and that the annual value of the lands and tenements out of which the same annual sums or rentcharges respectively were to issue, was sufficient to answer and pay the same annual sums or rentcharges respectively.

It was contended, on the part of the objector, that there was no power of distress, and that therefore there was no sufficient qualification. On the other hand, the claimants contended that these deeds were quite sufficient without any power of distress being contained in them to confer a qualification to vote for a county; that the statute, 4 Geo. 2. c. 28. s. 5, gives the grantees a power of distress.

The Revising Barrister decided that without a power of distress the grants were respectively insufficient to confer a qualification to vote, and that there was no power of distress; and he therefore disallowed the claims of the said several persons so objected to, and erased their names from the said list of voters.

If this Court should be of opinion that the deeds, in the absence of an express power of distress, were respectively sufficient to confer a qualification to vote, the names of the several persons therein mentioned, and who were those who had been so objected to, were to be restored, and the register to be altered accordingly.

Joshua Williams, for the appellant.—The words of the statute, 4 Geo. 2. c. 28. s. 5, are very plain; it gives to every person the like remedy by distress in case of rent-seck as in case of rent reserved upon lease. It was admitted by the Court in *Bradbury v. Wright* (Doug. 627) that the distress might have been supported for rent-seck if the case had been brought within this statute. So, in *Saward v. Anstey* (2 Bing. 521), Best, C.J. said that, " that statute has now given a distress to the owners of rents-seck," and in *Buttery v. Robinson* (3 Ibid. 392) the distress made by the annuitant was expressly supported by the Court, though the will creating the annuity gave no power to distrain. It is stated in *Blackstone's Commentaries*, vol. 2, p. 43, and vol. 3, p. 6, that the statute 4 Geo. 2. c. 28. has, in effect, abolished the distinction between rent service, rentcharge and rent-seck, and that persons now may have the like remedy for all these rents. *Stephen's Commentaries*, 5th edit. vol. 3, p. 356, contains a passage to the like effect, with this remark by the author: " So that now we may lay it down as an universal principle that a distress may be taken for any kind of rent in arrear the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it." Probably the case of *West v. Robson* (3 Com. B. Rep. N.S. 422; s. c. 27 Law J. Rep. (N.S.) C.P. 262) has given rise to the present decision of the Revising Barrister. There the claimants, who were fellows of a college, claimed to vote as the owners of a rentcharge of 10l. a year issuing out of certain lands in different counties, and the Court said that it was not a rentcharge, there being no power of distress. In that case there was merely a

trust to pay the yearly sum to each of the fellows of the college, and the decision, moreover, turned on another point, because the whole profits of the lands in the county for which the votes were claimed were insufficient to pay 10l. a year to each of the claimants.

Manisty, for the respondent.—There is no case exactly in point. The question really is, whether, looking to the deed and the language used in it, the claimant had a freehold tenement to the annual value of 40s. within the meaning of the statute 8 Hen. 6. c. 7. It is submitted that what is claimed here is not a freehold tenement, but only a rent-seck—*Co. Litt.*, 143, b., where the difference is pointed out between a rentcharge and a rent-seck. It was not a tenement in the nature of land, or which could have been enforced on the land.

[**ERLE**, C.J.—There is nothing in the passage in *Co. Litt.* which shews that it is not a freehold tenement because it is a rent-seck. **BYLES**, J.—What were the remedies at common law to recover rent-seck?]

It is not clear that there would be any means of enforcing it against the land, and probably the only remedy would be a personal one by action on the covenant.

[**WILLES**, J. referred to *Webb v. Jiggs* (4 M. & S. 113), where it was held that debt did not lie at common law for arrears of an annuity for life devised payable out of lands, so long as the estate of freehold continued, because of the higher remedy by writ of assise.]

But the remedy by assise is now gone; all real actions (except writ of right of dower, and *quare impedit*) having been abolished by the 3 & 4 Will. 4. c. 27. s. 36. Therefore, if the statute of 4 Geo. 2. c. 28. had never been passed, the deed in the present case would have created only a dry rent-seck, not enforceable by entry on the land, and the only remedy for the recovery of it would have been by personal action on the covenant, express or implied. The appellant relies on this statute of 4 Geo. 2. c. 28, which he says has made the rent a rentcharge. It is not denied that the rent is within that statute, and therefore recoverable by distress; but that is a collateral remedy given by that statute, and does not make the interest which the party claiming here took under the deed, that of a freehold tenement, and the question therefore still remains whether the deed created such a tenement and conferred the qualification claimed for the voter. It is submitted that it did not do so, and that it is not because that statute gave a right to distrain that therefore this was a tenement.

Williams was not heard in reply.

ERLE, C.J.—I am of opinion that the decision of the Revising Barrister should be reversed. The claim is a qualification of a freehold tenement, namely, a rent of 40s. charged on freehold land, and in the grant of such rent there is no mention of a remedy to the grantee for enforcing payment; and, therefore, before the statute of the 4 Geo. 2. c. 28. I take it it would have been a rent-seck, and at the time of the passing the statute 8 Hen. 6. c. 7. it would have been a rent-seck of 40s. per annum. I have not been convinced by Mr. Manisty that for enforcing the payment of a rent-seck charged on land, there would be no remedy, for upon looking at the passage in *Co. Litt.* 160, a, sec. 236, to which my Brother Willes has drawn my attention, it seems to be clear that there was a remedy by real action for a rent-seck at the time when the statute 8 Hen. 6. c. 7. created the qualification. Then, the remedy by real action having been taken away by statute, and no other remedy provided, it seems to me that it would have been incumbent to have found a remedy for the enforcement of the right either in Chancery or in the Queen's Bench; but one need not now resort to such ultimate remedy, because the statute 4 Geo. 2. c. 28. has provided a remedy by distress for rent-seck. That statute applies to the rent in question, which is, therefore, capable of being enforced by distress on the land, and, consequently, there is every requisite to make it a valid qualification.

WILLES, J.—I am of the same opinion. I do not agree with Mr. Williams that this case was not reserved for our opinion after much consideration, for I believe it to be that sort of question which one would not answer without consideration, seeing that it raises some nice points, especially that connected with the statute 3 & 4 Will. 4. c. 27, which abolished real actions; still a personal action will not lie against the terre-tenant, and I have no doubt that these cases were in the mind of the Revising Barrister, and that he felt this difficulty, that whereas the remedy by real action had been done away with, there was a doubt whether there was a remedy *ex necessitate rei*. This knot has, however, been cut by the statute of the 4 Geo. 2. c. 28, which gives a remedy out of the land. I own, therefore, that the opinion of the Revising Barrister cannot be sustained, and that his decision must be reversed.

BYLES, J.—I am of the same opinion. I think it is clear that before the abolition of real actions the rent in this case would have been a freehold tenement, and would have been payable out of the land. The difficulty which has been raised is, that apart from the statute of 4 Geo. 2. c. 28. there was no remedy by distress. At common law the remedy was only by real action; whether any remedy could be obtained in equity, or whether, as my Lord has suggested, the Court of Queen's Bench might possibly interfere by mandamus, it is not necessary to say, for the statute 4 Geo. 2. c. 28. applies (and mandamus would only be applicable if there were no other remedy), and then we have here a freehold tenement issuing out of the land.

KEATING, J.—I also am of the same opinion. This was a freehold tenement within the meaning of the statute 8 Hen. 6. c. 7, and though real actions have been abolished by the 3 & 4 Will. 4. c. 27, it remains still a freehold tenement, and the effect of that statute in doing away with real remedies has no application to such tenements by reason of the statute 4 Geo. 2. c. 28, which gave the remedy by distress. I, therefore, think that the Revising Barrister was wrong, and that his decision should be reversed.

Decision reversed.

[IN THE COMMON PLEAS.]

(Appeals from Revising Barrister's Court.)

NORRISH, appellant, v. HARRIS, respondent.

GILLHAM, appellant, v. THE SAME. MASON, appellant, v. THE SAME.
ADAMS, appellant, v. THE SAME. PROUT, appellant, v. THE SAME.
BERRY, appellant, v. THE SAME. HODGES, appellant, v. THE SAME.

Nov. 20, 1865, Jan. 18, 31, 1866.

35 L. J. C.P. 101; 1 H. & R. 328; H. & P. 305; L. R. 1 C.P. 155; 13 L. T. 762;
14 W. R. 479; 12 Jur. N.S. 627.

Parliament—Borough Vote—"Building"—2 & 3 Will. 4. c. 45. s. 27.

ELECTION LAW.—As far as the purpose for which a structure may be used in order to constitute "a building," within the statute 2 Will. 4. c. 45. s. 27, there is no distinction between agricultural and commercial industry, and a building really used for warehousing manure, kept there for the purposes of the land, is sufficient to qualify, as far as its use is concerned.

When the amount required for a borough qualification, under section 27. of the Reform Act, is made up partly by building and partly by land, there is nothing to define the proportion which the building must bear to the value of

the land; and it is therefore sufficient to give such qualification, so far as the value of the building is concerned, if the building bona fide add to the land's real annual value to let, though in a small degree.

NORRISH, appellant, v. HARRIS, respondent.

This was an appeal from the decision of the Revising Barrister for the borough of Totnes.

The facts of the case were as follows: The voter occupied a piece of land, at the rent of more than 10l. per annum, with a stone building roofed upon it; the building had four walls and a door, which was kept locked. The voter kept in the building guano and other manures, which he used for the purposes of the land. The building was full. It was objected that the building was not a building within the meaning of the 27th section of the Reform Act, 2 Will. 4. c. 45.

The Revising Barrister held that it was not a building within the meaning of the said section, and expunged the voter's name.

If the Court was of opinion that the decision of the Revising Barrister was wrong, the name of the said John Norrish was to be restored to the list of voters for the parish of Totnes, in the said borough of Totnes.

Mellish (Kingdon with him), for the appellant.—The building in this case is not like a shed erected by an electioneering agent for the purpose of creating a vote, and to which the landlord had never assented, as was the case in *Powell v. Boraston* (18 Com. B. Rep. N.S. 175; s. c. 34 Law J. Rep. (N.S.) C.P. 73). The building here is a substantial one, adapted for the agricultural purposes of storing guano, for which it was erected, and it ought fairly to be considered as a "building" within the meaning of section 27. of the Reform Act (2 Will. 4. c. 45). It would not be consistent with the decision of this Court in *Whitmore v. the Town Clerk of Wenlock* (5 Man. & G. 9; s. c. 1 Lutw. 10; 13 Law J. Rep. (N.S.) C.P. 55) if a distinction were drawn between a building used for agricultural and a building used for commercial purposes. The purpose for which the building is used is immaterial. It was capable of being used for commercial purposes, and was very much like a warehouse. The case of *Powell v. Farmer* (18 Com. B. Rep. N.S. 168; s. c. 34 Law J. Rep. (N.S.) C.P. 71) is precisely in point, and the only distinction between that case and the present one is, that there the claimant was a market-gardener, and the building was used by him for storing potatoes and other things connected with his business of a market-gardener; whereas, here, he is a farmer, and the building is used by him for warehousing guano and manure for the purposes of his farm.

W. H. Cook, for the respondent.—This structure was not a "building" within the meaning of the act, and the decision of the Revising Barrister was right. "The legislature intended," says Erle, C.J., in delivering the judgment of the Court in *Powell v. Boraston* (18 Com. B. Rep. N.S. 175; s. c. 34 Law J. Rep. (N.S.) C.P. 73), "that 'building' should give the primary qualification, and that 'land' should be a secondary resort, if the building was not worth 10l. per annum. But land would become the primary qualification if a shed of no value added to land of the required value was held to qualify." Here the building is only an adjunct to the land, which is here the primary qualification. Moreover, the legislature intended by "other building" something similar to those previously described in the 27th section, and consequently such as would be used for commercial, and not merely agricultural purposes.

Mellish replied.

Cur. adv. vult.

ERLE, C.J., now (Jan. 18) delivered the following judgment.—According to the statement of this case, the building now in question was not deficient in respect of form and durability, and it was used for the purpose of keeping

guano. It was suggested on the argument that the Revising Barrister decided against the qualification, because the guano was to be applied to the claimant's own farm, and the building was used solely for an agricultural purpose, and that, in thus deciding, he intended to follow an opinion of this Court, supposed to have been expressed in the case of *Powell v. Boraston* (18 Com. B. Rep. N.S. 175; s. c. 34 Law J. Rep. (N.S.) C.P. 73). In that case we held that a few boards nailed to some posts, for the sole purpose of pretending to the Revising Barrister that it was a shed, did not qualify; and we dissented from the opinion expressed in *Lutwyche*, p. 58¹: "That any building, however slight and unsubstantial, would be sufficient to qualify, provided it had a roof, and was capable of holding any articles." We drew attention to the words of the statute to which we and the Revising Barristers have to give effect, and under which we are bound as much to prevent lawful votes from being neutralized by fictitious pretences, as to support the franchise where the legislature has given it; and we came to the conclusion "that the pretence of a shed was not a building within the residentiary class, or in the class connected with commercial industry to which the statute related." In this language we did not mean to contradistinguish commercial from agricultural industry, so as to exclude agriculture. On the contrary, in applying this statute, we consider that an agriculturist carries on at the same time what may be termed a commercial business, using the word commercial in its widest extension, and taking all products of industry having value to be subjects of commerce, and that a building really used or intended to be really used for the purpose of keeping such products may qualify, whether they are intended for home consumption or for exchange: see *Whitmore v. the Town Clerk of Wenlock* (5 Man. & G. 9; s. c. 1 Lutw. 10; 13 Law J. Rep. (N.S.) C.P. 55). Then as the building now in question appears to have been really used for warehousing guano, we are of opinion that it was sufficient to qualify, as far as its use was concerned, and the decision to the contrary is reversed.

With respect to the other cases, from the borough of Totnes, we are unable, without further information, to come to a decision. We therefore send them back to the Revising Barrister, and would thank him to answer the following question at his earliest convenience: "Is the land with the building of more real value to let than it would be without the building?" In answering this question, all notions of value for a vote are to be excluded. The descriptions of the buildings are not the same in each of these cases; and the Revising Barrister may adapt his answer accordingly, if he thinks there is any substantial difference between them in respect of value.

The other cases were accordingly sent back to the Revising Barrister, who afterwards returned them amended by inserting in each case the value of the building, and as so amended they were as follows:

GILLHAM, appellant, v. HARRIS, respondent.

The facts of this case were as follows: The voter occupied during the electoral year a piece of land at the rent of more than 10*l.* per annum, on which he grazed a cow and other cattle, with a stone building roofed upon it, which he used for the purpose of milking his cow in, and for keeping hay. The building had three sides, was open in front, and had a loft over it, which was not used except for fowls to roost in. The voter was a dairyman. The building was worth about 10*s.* a year to the tenant. It was objected that the building was not a "building" within the meaning of the 27th section of the Reform Act (2 Will. 4. c. 45). The Revising Barrister held that it was not a building within the meaning of the said section, and expunged the voter's name.

(1) *Watson v. Cotton*; see that case also reported 5 Com. B. Rep. 55; s. c. 17 Law J. Rep. (N.S.) C.P. 58.

MASON, appellant, v. HARRIS, respondent.

The facts of this case were as follows: The voter occupied a piece of land at the rent of more than 10*l.*, on which there was a stone building, roofed. The building was a linhay, open to the field; there was a crib in it; one side of the linhay was prolonged, and formed the back of a large tank, which contained from 60 to 80 hogsheads of water. The roof of the tank was lower than that of the linhay; the water flowed from the roof of the linhay into the tank. There was an internal communication between the linhay and the tank; the water was used to water the cattle which fed upon the land, and was drawn from the tank by means of a ball. The linhay was worth to the tenant about 5*s.* a year. The value of the tank was not proved before the Revising Barrister, but was worth something. It was objected that the building was not a "building" within the meaning of the 27th section of the Reform Act (2 Will. 4. c. 45). The Revising Barrister held it was not a "building" within the meaning of the said section, and expunged the voter's name.

ADAMS, appellant, v. HARRIS, respondent.

The facts of this case were as follows: The voter occupied a piece of land of the value of more than 10*l.* per annum, with a stone building, roofed, upon it; the building had three walls, and was open in front; there was a loft over the building for the purpose of keeping hay; the land was used for depasturing the voter's own cattle, and the lower part of the building was useful as affording shade and shelter to the cattle. The building was worth to the tenant about 5*s.* a year. It was objected that the building was not a "building" within the meaning of the 27th section of the Reform Act (2 Will. 4. c. 45). The Revising Barrister held that it was not a "building" within the meaning of the said section, and expunged the voter's name.

PROUT, appellant, v. HARRIS, respondent.

The facts of this case were as follows: The voter occupied a piece of land with a stone building upon it, roofed, of the value of more than 10*l.* per annum. The building had three walls and was open in front, with a loft over for the purpose of keeping hay; the land was used by the voter for the purpose of depasturing other people's cattle, and the lower part of the building was useful as affording shade and shelter to them. The building was worth about 5*s.* a year to the tenant. It was objected that the building was not a "building" within the meaning of the 27th section of the Reform Act. The Revising Barrister held that it was not a building within the meaning of the said section, and expunged the voter's name.

BERRY, appellant, v. HARRIS, respondent.

The facts of this case were as follows: The voter occupied a piece of land, at the rent of more than 10*l.* per annum, with a building upon it. The building had three stone walls, and a roof, and was open in front; the land was used for grazing the voter's cattle, and the building was useful as affording shade and shelter to them. It was objected the building was not a "building" under the 27th section of the Reform Act. The Revising Barrister held it was not, and expunged the voter's name. In this case, the building was worth about 5*s.* a year to the tenant.

HODGES, appellant, v. HARRIS, respondent.

The facts of this case were as follows: The voter occupied a piece of land, with a building on it, at the rent of more than 10*l.* per annum. The building had three stone walls and a roof, but was open in front; the land was used by the voter for the purpose of taking in other people's cattle to

graze, and the building was useful as affording shade and shelter to them. The building was worth about 5s. a year to the tenant. It was objected that the building was not a "building" within the meaning of the 27th section of the Reform Act. The Revising Barrister held that it was not a "building" within the meaning of the said section, and expunged the voter's name.

In each of these cases—

Mellish (*Kingdon* with him) was for the appellant, and
W. H. Cook for the respondent.

KEATING, J., now (Jan. 31) delivered the following judgment of the Court (Erle, C.J., Willes, J., Byles, J., and Keating, J.).—In the remaining registration cases from the borough of Totnes, we have had considerable difficulty in arriving at a satisfactory decision. The statute describing the qualification for a vote for a borough, according to our construction, requires, amongst other things, that there should be a building having some permanence, some utility, and some real value; but does not define either the form or materials essential for permanence, or the kind of utility intended; nor does it specify the proportion which the value of the building should bear to the value of the land when the amount of 10*l.* is made up partly by building and partly by land. Looking to the statements in the several cases, and the return of the Revising Barrister to the question put to him, it appears that the buildings in question are of a permanent nature; that they are useful for the occupation of the land on which they are placed, and *bona fide* add to its real annual value to let, though in a small degree. If under these circumstances we held they were insufficient, it seems to us that we should be defining what the legislature has left indefinite, and should be doing an act of legislation when the powers intrusted to us authorize interpretation only. We feel ourselves therefore constrained to hold that the qualification in each case was sufficient, and that consequently the decision of the Revising Barrister must be reversed. We think it right, however, to add, in justice to him, that the consideration of this question has caused much discussion amongst us, and that the opinion of more than one member of the Court has undergone a change upon the true construction of the statute. In pronouncing this decision we do not intend to interfere with the discretion of the Revising Barrister in deciding whether a building by means of which it is sought to qualify fulfils the requisites which we think the statute requires, namely, permanence, utility, and as contributing to the beneficial occupation of the land, and thereby increasing its real and annual value to let; nor do we mean to lay down as a rule that all buildings of the present value as returned by the Revising Barrister necessarily give a qualification, unless that value be *bona fide* combined with permanence and utility, and thereby add to the real annual value of the whole.

Decisions reversed.

[IN THE EXCHEQUER CHAMBER.]

(*Appeal from the Court of Common Pleas.*)

Nov. 29, 1865.

BULLEN AND ANOTHER v. SHARP.*

35 L. J. C.P. 105; 1 H. & R. 117; L. R. 1 C.P. 86; 14 L. T. 72; 14 W. R. 338.

Referred to, *Easterbrook v. Barber*, [1871] E. R. A.; 40 L. J. C.P. 17; L. R. 6 C.P. 1; 23 L. T. 535; 19 W. R. 208 (C.P.). Applied, *Holme v.*

* *Coram*, Pollock, C.B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., Pigott, B., and Shee, J.

Hammond, [1872] E. R. A.; 41 L. J. Ex. 157; L. R. 7 Ex. 218; 20 W. R. 747 (Ex.); *Mollino v. Court of Wards*, 1872, L. R. 4 P.C. 419; *Noakes v. Barlow*, 1872, 26 L. T. 136; 20 W. R. 388 (Ex. Ch.). See *Ross v. Parkyns*, [1875] E. R. A.; 44 L. J. Ch. 610; L. R. 20 Eq. 331; 24 W. R. 5 (M.R.); *Ex parte Tennant*, 1877, 6 Ch. D. 303; 37 L. T. 284; 25 W. R. 854 (C. A.). Applied, *Badeley v. Consolidated Bank*, [1888] E. R. A.; 57 L. J. Ch. 468; 38 Ch. D. 238; 59 L. T. 419; 36 W. R. 745 (C. A.).

Partnership, What constitutes — Annuity out of Profits — Underwriting Business.

PARTNERSHIP.—*The defendant's son having been elected a member at Lloyd's, on a representation made to the committee with the defendant's sanction, that the defendant would place 5,000l. at the disposal of F. (an underwriter), and would never let his son stand in want of further aid, if needed, the son entered into an arrangement with F., whereby the latter was to manage the underwriting business in his, the son's, name, and was to be paid a salary for doing so. The son, in consideration of the defendant so guaranteeing him to the extent of 5,000l., agreed to pay the defendant an annuity of 500l., which, on a given state of the profits, was to be increased to a yearly sum equal to one-fourth of the profits; but it was stipulated that the defendant should not be considered as a partner in the said business. The son afterwards married, and by the marriage settlement all the monies and profits of the business were assigned to the defendant and one D. upon certain trusts, the first being to pay the said annuity to the defendant. The son kept no banking account, but paid such cheques as F. gave him to the defendant's bankers, on whom he was allowed to draw, until the defendant put a stop to it:—Held, by the majority of the Court of Exchequer Chamber, reversing the judgment of the Court of Common Pleas, that, assuming the above arrangements to be real and not colourable, the defendant was not liable as a partner with his son in the underwriting business.*

This was an appeal by the defendant from the decision of the Court of Common Pleas, giving judgment for the plaintiffs upon a special case stated for the opinion of that Court, and which is set out in the report below—*34 Law J. Rep. (N.S.) C.P. 174.*¹

The question raised was, whether the defendant was liable as a partner with his son on a marine policy of assurance effected by the plaintiffs, and which had been underwritten for 100l. in the name of the defendant's son by a Mr. Fenn, who managed the son's underwriting business and had the son's authority to subscribe policies in his name. The facts were shortly these:

In March, 1857, the defendant's son was elected a member at Lloyd's, on a representation made to the committee by Mr. Fenn, with the defendant's sanction, that the defendant would place 5,000l. at Fenn's disposal, and would never let his son stand in want of further aid, if needed. At the same time an agreement was entered into between Fenn and Sharp the younger, by which an underwriting account was to be carried on, in the name of Sharp the younger, under the management of Fenn, who was to receive for this a salary of 300l. a year, which was afterwards, by a fresh agreement in November, 1858, increased to 350l.

On the 1st of January, 1859, Sharp the younger wrote to his father, the defendant, a letter, by which, in consideration of the defendant guaranteeing him to the extent of 5,000l., he agreed to pay to the defendant during their joint lives an annuity of 500l., to be increased at the end of the first three years to a yearly sum equal to one-fourth of the average profits, in case that amount of profits should, during those years, exceed 500l. The letter also

(1) Also reported in 18 Com. B. Rep. N.S. 614.

contained a statement that the defendant was in no case to be considered as a partner with his son in the said business of an underwriter.

On the marriage of Sharp the younger, which took place in August, 1859, a deed of settlement was executed between him, his intended wife, the defendant and one Donnison. By this deed, after reciting the said agreement between Sharp the younger and Fenn for carrying on the underwriting business, and the said letter of the 1st of January, 1859, from Sharp the younger to the defendant, Sharp the younger assigned to the defendant and Donnison all monies, earnings and profits then in Fenn's hands, or which should thereafter come into his hands on account of the business, with a power of attorney to sue for, receive and give discharges for the same, and with a direction to Fenn and the other agent for the time being in the business, to pay all the monies to the defendant and Donnison, upon trust, first, to pay the defendant his said annuity; next, to pay Sharp the younger an annuity of 500*l.*, to be increased to 750*l.* if the accumulated profits at the end of two years should amount to 3,500*l.*; next, to accumulate the surplus profits until they should amount to 8,500*l.* and remain at that amount for two years; and then upon trust to re-assign the monies to Sharp the younger. The deed contained a power to the trustees, upon the request of Sharp the younger or his manager for the time being, to raise out of the assigned property monies required to meet emergencies in the underwriting business, and a covenant by Sharp the younger that he would, in the event of Fenn's death, appoint another competent person to act as manager of the business.

After the marriage Sharp the younger kept no banking account; but Fenn, who received and paid all monies, gave him cheques from time to time, which he paid into the defendant's banking account with Messrs. Hankey, on whom the defendant allowed his son to draw until November, 1859, when the defendant put a stop to his doing so.

On the 22nd of December, 1859, the plaintiffs' policy was effected at Lloyd's in the usual way, and underwritten in the name of Sharp the younger. On the 19th of February, 1860, Sharp the younger stopped payment, and he was made bankrupt on the 29th of March following.

There being a total loss under the policy, the question was, whether the defendant was liable thereon as a partner with his son, and the case stated that the Court were to be at liberty to draw any reasonable inferences of fact.

The case on appeal was argued in Trinity Term last, by—

Lush (*Mellish* and *Sir G. Honyman* with him), for the plaintiff in error (the defendant in the action), and by—

J. Brown (*Bovill* with him), for the defendants in error (the plaintiffs in the action).

Cur. adv. vult.

There being a difference of opinion amongst the learned Judges, they now (Nov. 29) delivered their judgments *seriatim* as follows:

SHEE, J.—The question in this case is, whether, when the policy on which the action is brought was effected, the underwriting business carried on in the name of William Sharp the younger was, in fact, the business of the defendant, or of the defendant in partnership with William Sharp the younger; in other words, whether the policy underwritten by William Sharp the younger was underwritten by him, acting on behalf of the defendant and as his agent. The establishment of William Sharp the younger in his underwriting business at Lloyd's was permitted by the committee at Lloyd's, on an assurance given to them by Fenn, acting as agent for William Sharp the younger, but with the authority of the defendant, who had refused to give a formal guarantee, that the defendant would advance to William Sharp the younger a capital of 5,000*l.*, and never let him stand in want of further aid, if needed.

The committee, after William Sharp the younger had on that assurance

been admitted a member, inquired of Fenn, by their secretary's letter of the 20th of May, 1857, if the money had been advanced, and Fenn, in answer to that inquiry, by the use, in his letter of the 22nd of May, 1857, of language more studiously than scrupulously chosen, had led them to believe that the 5,000*l.* had, in fact, been advanced, and was in his hands. The defendant William Sharp the younger and Fenn seem to have considered that the assurance given to the committee at Lloyd's was, although the defendant had refused a guarantie, an engagement binding in honour upon him; and virtually, as between him and the committee, an undertaking, to the extent of 5,000*l.*, for the underwriting losses of William Sharp the younger. Treating apparently this assurance of the defendant to the committee that he would advance 5,000*l.* as equivalent to, or good security for, the actual advance of it, William Sharp the younger had agreed to pay to the defendant, during their joint lives, 10*l.* per cent. per annum upon that amount; and in lieu of it, after the expiration of three years, one-fourth of the average profits realized by the business during those three years, should that fourth amount to more than 500*l.* Thus far we have the defendant establishing his son in a business to be carried on by his son or his son's agent, Fenn, for his son's benefit—the defendant guarding himself, should the business become unprosperous, against eventual loss, under his promise to advance 5,000*l.*, by a stipulation that he should receive a fixed annuity of 500*l.*, to commence immediately, and to be increased contingently to a fourth of the annual profits, should they average during the next three years more than that sum. There is nothing before us which points to any source other than the underwriting business, out of which this 500*l.* annuity could flow; but it was to be payable half-yearly, and at the expiration of the first half-year after the date of the agreement to pay it, whether profits were made or not, in consideration of the defendant's promise to advance 5,000*l.*, to be applied, should need be, to the discharge of debts which might be incurred in the underwriting business. Though, fixed therefore, apparently on an estimate of the probable amount of profits, and to increase with an increase of profits, it was not necessarily, or even probably, in the first instance, payable out of profits; and regard being had to the consideration for it, was not within, or was barely within, the mischief to prevent which the sharing of the profits of a business has been considered in many cases cogent, though not conclusive, evidence of a partnership liability for its debts. Whether the 500*l.* annuity was in fact paid to the defendant out of the profits of the business, or not, he would not, *rebus sic stantibus*, have been liable for its debts. The definition of a partnership "*contractus consensualis de re vel operis communiandis lucri in commune faciendi causa*"—L. 63 *pr. ff. 'De Societate,'* was not satisfied by the relation between him and his son. They did not intend to be partners, and the business was not carried on by the defendant, or by any person on his behalf, in partnership or not in partnership with him.

This state of things, however, was materially altered under the marriage settlement after the marriage of Sharp the younger. Fenn, who, up to that time, had carried on the business as agent of Sharp the younger, accounting to him for its proceeds, at a salary payable by him, became, in my judgment, the agent to hold the proceeds of and the means of carrying on the underwriting business, and the agent to carry on the business for the defendant and John Donnison, to whom, besides other property of Sharp the younger, all monies belonging to him in the hands of Fenn, and all monies, earnings, profits and emoluments thereafter to come into Fenn's hands, on account or in respect of the underwriting business, including, as I read it, any claim Sharp the younger might have had on the 5,000*l.* advanced, were, with full power and authority to ask, demand, sue for, recover and receive, and give effectual receipts and discharges for the said monies, proceeds and premises, assigned in trust for Sharp the younger until his marriage; on trust after his marriage, primarily and solely, should the profits not exceed 500*l.*, to pay that

sum annually out of the proceeds of the underwriting business to the defendant; on further trust, but without prejudice to the defendant's annuity, to pay Sharp the younger an annuity of 500*l.*, and after the continuance for two years of an accumulation of profits of the extent of 3,500*l.*, an annuity of 750*l.*, together with interest on the sum accumulated, and the proceeds and dividends of other the property assigned; on further trust, when the accumulation of profits should have arrived, and for two years continued, at 8,500*l.*, to apply that accumulation to the emergencies of the underwriting business, and the repayment of the defendant of any monies he might have advanced under his guarantee of the 21st of May, 1857; on further trust for all the purposes of a family settlement, and to provide for the intended wife of Sharp the younger, and for his and her children. Previously to the date of the marriage, unless we assume, which there seems no ground for doing, the whole scheme to have been illusory and collusive from its inception, the defendant had no more to do with the carrying on, by himself or his agent, of the underwriting business than Cox or Wheatcroft, in the case of *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 125), had in the carrying on of the business of the new firm of "the Stanton Iron Company," for the benefit of the creditors of the old firm of Smith & Co. After the date of the marriage, the defendant had as much to do with the carrying on of the underwriting business as the trustees in *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 125) had in carrying on, by any agents they might employ, the business of the Stanton Iron Company, for the benefit of the creditors of Smith & Co. The business of the Stanton Iron Company, in *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 125), was the business of the trustees, carried on by them, for objects with which the parties dealing with them had no concern; the trustees were therefore held liable for its debts. In this case the underwriting business had become the business of the defendant and John Donnison, and they, as I think, had become liable for its debts, not because they shared the profits, which one of them did not share, but because it was their business, carried on for them with their funds by Fenn as their agent, in the name of William Sharp the younger, at a salary to be paid to Fenn by himself out of their capital which he held, or out of the profits which he made for them. That the business was carried on in the name of William Sharp the younger, and partly by him, and probably for his ultimate benefit, is, as respects the liability of the defendant, a circumstance wholly immaterial; the material and governing circumstance is, that the business, which before the marriage was carried on by Fenn as agent for William Sharp the younger, he being the owner of all the monies, earnings, profits and emoluments derived from it, was after the marriage carried on by Fenn as agent for and on behalf of the defendant and John Donnison, to whom, by the marriage settlement, all the monies belonging to the business in Fenn's hands, and all the earnings, profits and emoluments of it thereafter to come into his hands, and all the benefit of antecedent arrangements between the defendant Fenn and William Sharp the younger were assigned. The mode of conducting the business and the relation between Fenn who, in fact, conducted it, and William Sharp the younger, were in other respects much changed after his marriage. Before his marriage William Sharp the younger had, or, if he had not (as to which some doubt may arise on the terms of the case), was entitled, under his agreement with Fenn of the 17th of March, 1857, to have an account with a banker, into which the premiums and other monies received by Fenn in respect of the underwriting business were to be paid, William Sharp the younger supplying Fenn with the necessary funds to make all payments and advances in respect thereof. After his marriage William Sharp the younger kept no banking account, Fenn giving him cheques from time to time for the sums which he was allowed to draw *i. e.*, which were drawn for his purposes out of the business, such cheques being paid by Sharp the younger into the defendant's banking account with Messrs. Hankey, on whom the defendant permitted William

Sharp the younger to draw cheques until November, 1859, when the defendant put a stop to his son's drawing cheques. Before the marriage, under the agreement of the 17th of March, 1857, the salary of Fenn was to be paid by Sharp the younger, who alone, under that agreement, was liable to Fenn for it. After the marriage Fenn drew his salary out of the funds of the underwriting business with the sanction and authority of the defendant and Donnison, to whom those funds had been assigned, and to whom Fenn was accountable for them. Add these facts to the fact of the original restriction, which was never relaxed, upon Sharp the younger's taking any risk without the consent of Fenn, and to the fact that Fenn, who before the marriage settlement had held all the monies, earnings, profits and emoluments of the underwriting business which came to his hands as agent for Sharp the younger, held them after the marriage settlement for the trustees of it, and the absolute nullity of Sharp the younger as a principal, though held out as such in the carrying on of the business from the date of his marriage and at the date of the policy sued on will be manifest. His position as between him, the defendant and Fenn was little better than that of an under clerk whose part it was to pretend to be a principal at Lloyd's, and underwrite such policies as Fenn told him to underwrite. We must look at the substance of the new arrangement, and it seems to me impossible, though there was no formal attornment to dispute, that a man who, holding as manager of the business and agent for the owner of it the funds of the business, consents under an arrangement to which the owner of the business is a party to continue to manage the business and to hold the funds of the business in his hands, and which may thereafter come into his hands for a third person as the assignee of the former owner of them, and to take his salary for the future out of those funds, becomes the agent of such third person. There is nothing in the statement before us which renders it necessary, if we affirm the judgment of the Court of Common Pleas, to impute any greater blame to the defendant than the blame which may be thought, under such circumstances to attach to the fact of his defending this action. He had entered into an honourable engagement with the Committee at Lloyd's to supply his son with funds, to meet any losses he might sustain, to the extent of 5,000*l.*, with a promise that he would never let his son stand in want of further aid, if needed; and up to the date of his son's bankruptcy he does not appear to have departed from the spirit and intention of that engagement. If he did not revoke it when the marriage settlement was executed, or give notice to the Committee at Lloyd's of the new arrangement then made, it may be fairly taken to have been because he intended at that time to assume the entire responsibility of the business. He has probably, since his son's bankruptcy, been induced to hope that because the defendants in *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 125), though they shared in an indirect and exceptional way (as the only means open to them of mitigating a loss already sustained) the profits of "the Stanton Iron Company" were held not liable for its debts—the defendant here, though he shared under a voluntary and express agreement to share, and in the plain and ordinary sense of sharing, and with the advantage of an absolute preference and priority, the profits of the underwriting business, might also escape liability. His advisers have not adverted to the fact that the defendants in *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 125) did not, and that he, the defendant, in this case did, through an agent appointed and paid by him, carry on the business out of the profits which he shared, and which in a very probable state of things, he was entitled to engross when made. In the course of the argument much, as it seems to me, of undeserved disparagement was bestowed upon the case of *Waugh v. Carver* (2 H. Black. 235) and other cases, decided by learned Judges of the highest authority, in which persons shewn to have been participators in the profits of a business, have, in the absence of counter-vailing evidence, on account of the great improbability that they to whom a business does not belong should be allowed, by those who have the active

management of it, to take its profits, been held liable for its losses. The judgment of the House of Lords in the case of *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 125) was treated as an unexpected manifestation of a concealed or forgotten principle, at length happily discovered and invoked for the correction of an obstinate error. But in the cases which have been thus decried, the doctrine in *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 125), that the law of partnership is but a branch of the law of principal and agent, does not appear to have been overlooked, nor, as is well explained in that case by Lord Cranworth, has a participation of profits, in determining the question of partnership liability as respects third parties, ever been relied upon except for the purpose of assisting in the inquiry, whether the person benefiting by the profits of a business was, in truth, though not ostensibly, a principal, on whose behalf, by an agent, it was carried on. That the defendant, after his son's marriage, did, in his son's name carry on the underwriting business is, I think, the right inference to be drawn from the facts before us. In this view of them, the case of *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 125), expressly recognized as sound by the Court of Common Pleas in the judgment appealed against, is in favour of the plaintiffs, and that judgment ought, in my opinion, to be affirmed.

PIGOTT, B.—This case comes before the court of error by way of appeal from the judgment of the Court of Common Pleas; and the question raised by it is, whether the defendant is liable on a policy as a partner with his son, in whose name it was underwritten for 100l. The facts are stated, and the Court is at liberty to draw any reasonable inferences from them. The effect of them seems to be as follows: On the 17th of March, 1857, the defendant, through Fenn, an underwriter, got his son admitted as a member at Lloyds', upon a promise made to Fenn, to place at Fenn's disposal 5,000l., and further aid, if necessary. In May in the same year there was an agreement made between Sharp junior and Fenn as to the mode of carrying on the business. It contained ten heads of agreement, the material effect being that policies were to be subscribed in the name of Sharp junior, but the entire business was to be transacted by Fenn at his counting-house in the same way, and to the same extent only, as he acts on his own account. For these services Fenn was to be paid 300l. a year, and Sharp junior stipulated that no risk was to be taken by him without the consent of Fenn. In May, 1857, three letters passed between Lloyd's Committee, Fenn and Sharp senior. They shew that Lloyd's Committee were anxious to be assured that Sharp junior really had the 5,000l. Thereupon the defendant agreed with Fenn "to hold" that sum for his son, as "freely available for his underwriting account"; and Fenn informed the Committee that "he had the 5,000l. for the use of the son, with a further assurance of more funds, if necessary." And in November, 1858, it was agreed by Fenn and Sharp junior to extend the business by "writing double." "In consequence of this arrangement" (it is said) Sharp junior wrote to Sharp senior (the defendant) a letter, dated the 1st of January, 1859, agreeing, in consideration of his guarantee of 5,000l., to pay him an annuity of 500l. (with a possible increase at the end of three years in case the business proved profitable to an extent mentioned), and stating, in conclusion, that in no case is Sharp senior to be considered a partner. On the 2nd of July, 1859, there was a further agreement between Sharp junior and Fenn, whereby Fenn's agency was to be continued till December, 1870, with power reserved to Sharp junior to put an end to it after December, 1864, by six months' notice. In August, 1859, on the marriage of Sharp junior, there was a deed of settlement executed, of which the defendant and John Donnison were made trustees. It recites the before-named agreement, and provides that "all the earnings, profits and emoluments now in Fenn's hands, or which should thereafter come into them, are thereby assigned to the trustees; a power of attorney to them to sue and give discharges for the same being added." And Sharp junior thereby also directs and orders Fenn and other his agents

for the time being in the business to pay all the monies, earnings and profits to the trustees. The trusts are, first, to pay Sharp senior's annuity under the agreement of the 1st of January, 1859, and next to pay Sharp junior an annuity of 500*l.*; then to invest the profits till they amount to 3,500*l.*, and remain at that for two years; then to pay Sharp junior 750*l.* instead of 500*l.* per annum; and, further, to accumulate the profits till they amount to 8,500*l.*, and remain at that amount for two years; then to re-assign the profits to Sharp junior. There is also a power to pay off the 5,000*l.*, with further trusts for the benefit of Sharp junior's family. Sharp junior covenants also with the trustees, in case Fenn should die, to appoint immediately another competent person to act in the same capacity; after this Fenn continued to act as agent in carrying on the business. Sharp junior had no banker; Fenn, in fact, received and paid, all monies, giving Sharp junior cheques from time to time, which were taken by him, and paid into the defendant's banking account at Messrs. Hankey & Co.'s, defendant allowing him to draw cheques on his bankers till November, 1859, when he put a stop to his son's power of drawing cheques. On the 22nd of December, 1859, the plaintiffs' policy was underwritten by Fenn's clerk in Sharp junior's name, and in February, 1860, he stopped payment. The case does not state whether any part of the guaranteed 5,000*l.* still remains in the hands of Sharp senior.

Upon these facts, we are asked if the defendant is liable on this policy as a partner with his son. The principle of law applicable to the case is stated in *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 125), in the very clear judgment of Lord Cranworth, thus: "The real ground of liability (as a partner) is, that the trade has been carried on by persons acting on his behalf (that is, of the person sought to be made liable), so that he would stand in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made." Now, applying the exposition of the law of partnership to the facts of the present case, I find that the contract in question is made by Fenn in Sharp junior's name; and the question therefore is, whose agent was Fenn; or, in other words, although apparently acting for Sharp junior alone, was he really acting for both the Sharps? Now, the facts shew that the machinery was originally designed by Sharp senior; that he set Fenn in motion to treat with Lloyd's Committee for the son's admission there; that he found the whole capital, and was to provide more if necessary; that he tied up the actions of Sharp junior by the agreement between himself and Fenn, so that the son might be truly said to be in leading-strings as regards any management of the business. So far the defendant had planned only the future conduct of the business. But then in the course of it we find that he is actively taking some, though it may be a slight, part. For instance, it would be necessary that application should be from time to time made to him, as capital was wanted by Fenn. He would have to satisfy himself of the necessity of these advances, and to make them. Then, as he is expressly to receive all the proceeds under the settlement, and did so, in fact, at his bankers' from the commencement, this would necessarily involve him to some extent in the accounts of the business. But beyond this it is clear to my mind that the effect of the indefinite promise to give further aid beyond the 5,000*l.* would be to keep in his own power a large control over the business and the agent; for, having regard to the large profits which were calculated upon in the settlement, it is manifest that further capital would be required, and the defendant's promise of further aid, being of the very vaguest kind, would be of no real binding obligation in law. When, therefore, further capital was wanted, it would rest with the defendant to advance it or stop the business. But beyond all these facts the defendant, by the marriage settlement, is the first (after deducting the agent's salary) to be paid out of the profits, and by possibility might engross them all. Now this, though alone not the perfect test of partnership, yet it is still to be taken into consideration as one circumstance with others; and in Lord Cranworth's judgment he says

on this subject, "A right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for and on behalf of the person setting up such a claim." What, then, is the fair inference to draw from the foregoing facts? I think it is clearly that the defendant is not a mere mortgagee of the profits, but a large sharer in them, with a control over the business, and, as I think, having a further interest,—that he had, in fact, a twofold interest, one consisting in the capital embarked and the return of 10*l.* (and possibly more) per cent. thereon; the other the object of advancing his son by establishing a business as underwriter, ultimately for the son's benefit, without incurring in course of doing so a risk of loss through his son's inexperience. Further, it seems to me that the son's position throughout points to the same conclusion. For if the defendant is not a partner, it follows that the son is the only principal, a supposition very difficult to reconcile with the following facts, viz., he would be a sole principal yet not intrusted with either possession or disposition of a shilling of the entire capital of his business. Then, even assuming that he had nominated the agent Fenn, he is bound to him for a long term of years without the power of displacing him. He contracts with his own agent that he will not incur a risk in his own business without that agent's consent, a term evidently imposed upon him by his father, it not being for the benefit of the other contracting party. The result of the whole seems to me to be that by a circuitous mode Fenn has been placed by the defendant in a position to carry on this business with an intention on the defendant's part, doubtless, to allow his son to participate in the profits of it for a term, and ultimately, when established, and himself repaid, then for the benefit of his son altogether. I do not in coming to this conclusion find it necessary to impute fraud to the defendant. The utmost to be urged against him is, that he has endeavoured (if the law will permit it) to carry on a business without making himself responsible for its losses as a partner. But (invoking again the language of Lord Cranworth) "this is no reason for holding him not to be liable, if on strict principles of mercantile law he is so." The difficulty mainly consists in the nature of the business and the form in which the question is presented to the Court. But on the whole it seems to be only a proper use of the power of drawing reasonable inferences to say, as a matter of fact, that this business does appear to have been carried on on behalf of both the defendant and Sharp junior, and consequently that there is a partnership, with all the ordinary consequences of that relationship. I therefore think that the judgment of the Court of Common Pleas should be affirmed.

BLACKBURN, J.—This was an action on a policy of insurance against the defendant as underwriter. The policy was actually underwritten in the name of the defendant's son. The question in the cause is, whether the defendant was a partner in the underwriting business carried on in his son's name, so as to make him liable to third persons on contracts made in the course of that business. On the trial a verdict was taken by consent for the plaintiffs, subject to a special case, as part of which it was agreed that the Court might draw any reasonable inferences of fact. The Court below have determined the question in favour of the plaintiffs. The case is brought before the Court of Exchequer Chamber under the 32nd section of the Common Law Procedure Act, 1854, by which this Court is required to give the same judgment as ought to have been given in the Court below, and to draw any inferences of fact which the Court below ought to have drawn. And in the fulfilment of this duty I have come to the conclusion that the judgment below ought to be reversed, as I think that the defendant is not shewn to have been a partner in the business carried on in his son's name. The case of *Cox v. Hickman* (8 H.L. Cas. 268; c. c. 30 Law J. Rep. (N.S.) C.P. 125), being a decision of the House of Lords, the ultimate Court of appeal, overrules all earlier authorities inconsistent with that decision, and so far as the judgment goes fixes the law in this country. We are not bound by all that is said in the course of a judgment of the House of Lords, but that which appears to

be the rule established by the decision of that tribunal is binding not only on all inferior tribunals in this country, but even on that House itself when sitting judicially. In *Kilshaw v. Jukes* (3 Best & S. 847; s. c. 32 Law J. Rep. (n.s.) Q.B. 217) there was a difference of opinion in the Court of Queen's Bench as to the effect of the decision of *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (n.s.) C.P. 125); Wightman, J. expressing an opinion that the circumstances of that case were so peculiar that the decision was hardly applicable to any other, whilst my Brother Mellor and I thought that the decision of the House of Lords was of general application. This case was referred to in the argument in the Court below, but does not seem to have been much considered in any of the judgments. It seems, however, so far as we can collect from the reasons given by the different Judges below, that they rather agreed with Wightman, J. than with the majority of the Court of Queen's Bench.

The first point, therefore, to be determined in the present case is what really was the effect of the decision of the House of Lords in *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (n.s.) C.P. 125)? Prior to that decision the dictum of De Grey, C.J., in *Grace v. Smith* (2 W. Black, 998), that "every man who has a share of the profits of a trade ought also to bear a share of the loss," had been adopted as the ground of the judgment in *Waugh v. Carver* (2 H. Black. 235), where it was laid down "that he who takes a moiety of all profits indefinitely shall, by operation of law, be made liable to losses if losses arise, upon the principle that by taking a part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." This decision had never been overruled. The reasoning on which it proceeds seems to have been generally acquiesced in at the time, and when more recently it was disputed, it was a common opinion, in which I for one participated, that the doctrine had become so inveterately part of the law of England, that it would require legislation to reverse it. In *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (n.s.) C.P. 125) the creditors of a trader had agreed that their debtor's trade should be carried on for the purpose of paying them their debts out of the profits; and the composition-deed, to which they were parties, secured to them a property in the profits. The rule laid down in *Waugh v. Carver* (2 H. Black. 235), if logically followed out, led to the conclusion that all the creditors who assented to this deed, and by so doing agreed to take the profits, were individually liable as partners; but when it was sought to apply the rule to such an extreme case it was questioned whether the rule itself was really established. There was a very great difference of opinion amongst the Judges who decided the case in its various stages below, and also amongst those consulted in the House of Lords. In the result, the House of Lords (consisting of Lord Campbell, Chancellor, Lords Brougham, Cranworth, Wensleydale and Chelmsford,) unanimously decided that the creditors were not partners.

The judgments of Lord Cranworth and Lord Wensleydale bear internal evidence of having been written. Lord Campbell and Lords Brougham and Chelmsford said a few words expressing their concurrence. It is, therefore, in the written judgments, and more especially in the elaborate judgment of Lord Cranworth, that we must look for the *ratio decidendi*. Now, we find Lord Cranworth says, "It was argued that as they would be interested in the profits therefore they would be partners. But this is a fallacy. It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is nevertheless in contemplation of law a partner, is, whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test, for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case he is liable to the trade

obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say, that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf, that is to say, that he stood in the relation of principal towards the persons acting ostensibly as the traders by whom the liabilities have been incurred, and under whose management the profits have been made. Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustee for their debtor to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefits of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors; though their consent is necessary in such a case, for without it all the property might be seized by them in execution. But the trade still remains the trade of the debtor or his trustees; the debtor or the trustees are the persons by or on behalf of whom it is carried on." He afterwards adds, "The authorities cited in argument did not throw much light upon the subject. I can find no case in which a person has been made liable as a dormant or sleeping partner, where the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when, therefore, he would stand in the position of principal towards the ostensible members of the firm as his agents."

And Lord Wensleydale says, "A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent; and the principal is liable for the agent's contracts in the course of his employment. So if two or more agree that they should carry on a trade and share the profits of it, each is a principal and each is an agent for the other, and each is bound by the other's contract in carrying on the trade, as much as a single principal would be by the act of an agent who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract, by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability. Perhaps the maxim that he who partakes the advantage ought to bear the loss, often stated in the earlier cases on this subject, is only the consequence, not the cause, why a man is made liable as a partner. Can we then collect from the trust deed that each of the subscribing creditors is a partner with the trustees, and by the mere signature of the deed constitutes them his agents for carrying on the business on the account of himself and the rest of the creditors? I think not." And he afterwards gives us the reason of his decision, that in the particular case there was not "such a participation of profits as to constitute the relation of principal and agent between the creditors (the defendants) and the trustees," who actually made the contract sued on.

I think that the *ratio decidendi* is, that the proposition laid down in *Waugh v. Carver* (2 H. Black. 235), viz., that a participation in the profits of a business does of itself, by operation of law, constitute a partnership, is not a correct statement of the law of England, but that the true question is, as stated by Lord Cranworth, whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being, in the language of Lord Wensleydale, whether it is such a participation of profits as to constitute the relation of

principal and agent between the person taking the profits and those actually carrying on the business. I do not think it is proper for us to inquire, whether this rule of law is more or less expedient than the rule laid down in *Waugh v. Carter* (2 H. Black. 235). That is a question for the legislature, who may alter the law as to them seems right. We have only to administer it, and to proceed to apply what we consider to be the judgment of the House of Lords to the facts in the present case. The case contains a power to draw inferences of fact, and therefore it is open to the plaintiff to contend that we should draw the inference, that the transactions stated in the case were not really what they appear to be. I shall afterwards deal with the question how far I think such inferences ought to be drawn; at present I shall consider the case on the supposition that the various transactions between the parties really were what they purport to be.

It appears, then, that in March, 1857, the son of the defendant entered into a written agreement with Mr. Fenn, an underwriter, which is set out in the case. By this agreement the son was to be an underwriter, but the management of the business was to be confided to Fenn, who, in consideration of a salary of 300*l.* a year, was to act for the son. On the same day on which this agreement was made, the defendant authorized Mr. Fenn to state to the committee of Lloyd's that he, the defendant, had placed at Mr. Fenn's disposal 5,000*l.*, and intended to give his son further aid if needed. In November, 1858, it was resolved to extend the business carried on by Fenn, in the name of the son, and by an agreement between them Fenn's salary was raised to 350*l.* On the 1st of January, 1859, the son signed a letter addressed to the defendant, which is set out in the case. By it, in consideration of the defendant's guaranteeing the son to the extent of 5,000*l.* in his business of underwriter, until by such business he should acquire the clear sum of 5,000*l.*, the son promised to pay during their joint lives an annuity of 500*l.* a year, to be increased in case one-fourth of the son's average annual net profits during the first three years should exceed 500*l.*, to a sum equal to one-fourth of such net average annual profits. This arrangement, as worded, would not increase the annuity unless the son's average net profits during the first three years exceeded 2,000*l.* a year, so that it would seem the parties contemplated carrying on a business much more extensive than was justified by a capital of 5,000*l.*, and it is not very surprising to find, that before the three years' end the son was a bankrupt. It was expressly stipulated in the letter, that the defendant should not be a partner with his son in his business. This last stipulation is binding between them, but does not affect third parties; and consequently, the first question we have to determine is, whether this agreement did constitute a partnership as to third parties. And I think that, assuming it to represent the real transaction, it did not constitute a partnership. It is not an arrangement by which the defendant agrees to carry on the trade in the name of his son, nor even one in which he stipulates for a portion of the profits of that trade; but it is a purchase of an annuity, secured only by the personal promise of the son; the consideration being, that the defendant binds himself to make advances to the son, to the extent of 5,000*l.*, when required in the business.

In August, 1859, the son married, and prior to his marriage he executed a deed of settlement, which is made part of this case. This deed was between the son of the first part, the intended wife of the second part, and two trustees (of whom the defendant was one) of the third part. It recites the agreements between the son and Fenn, for carrying on the son's business under the management of Fenn, and also the agreements between the son and the defendant, by which the son bound himself to pay the defendant an annuity, and an agreement in contemplation of the marriage, by which the son engaged to convey some railway shares and other property, and also all the proceeds of his underwriting business, to trustees on certain trusts; and then the son does, by the deed, assign over to the trustees (one of whom is the defendant) all monies, the proceeds of the underwriting business, then in the hands of Fenn, or any other person who might be substituted as manager of the son's business,

or thereafter so to be, and gave them a power of attorney to recover such monies from the manager. And then the indenture declares the trusts on which the monies are to be held: these are, in the first place, to pay the annuity to the defendant; next to pay the son an allowance of 500*l.* a year, to be increased if the business prospered, to 750*l.*; then to accumulate the surplus until it amounted to 8,500*l.* and so remained for two years without reduction, when the engagement to pay over the future proceeds of the business to the trustees was to cease. There is a proviso, that at any time during the continuance of the engagement the trustees were, upon the request of the son, or his manager for the time being, to raise out of the property assigned by the son and the accumulated fund, any sum required to meet emergencies occurring in the underwriting business. The ultimate trusts of the accumulated fund, when it should have remained two years without reduction at the sum of 8,500*l.*, were to repay any advances made by the defendant under his guarantie, and, subject thereto, for the benefit of the wife and children.

Such a settlement as this would be very inconvenient in most trades, but when the peculiar nature of an underwriting business, as carried on at Lloyd's, is borne in mind, it seems a prudent enough arrangement. The course of business was stated in *Xenos v. Wickham* (14 Com. B. Rep. (n.s.) 460; s. c. 33 Law J. Rep. (n.s.) C.P. 104), and we were informed during the course of the argument that it was stated accurately. The premiums are received by the broker, and out of those, losses and returns of premium are paid by him, the balance being paid over to the underwriter at stated intervals. So long, therefore, as the losses do not exceed the ordinary and expected average, the underwriter only receives money. But if the losses exceed the average, so that the whole premiums in the hands of the broker are absorbed by these losses, the underwriter has to find the funds to meet the excess, and it is to be anticipated, that at irregular intervals such extraordinary losses will occur. The underwriter, therefore, ought not to spend the annual proceeds of his trade, as if they were clear gain, but should keep a considerable reserve fund. Now, if by a settlement, an underwriter binds himself to his trustees to limit his personal expenditure, and to put the residue of the proceeds of the trade in their hands as a reserve fund, to meet the emergencies of his trade, and, subject to meeting those emergencies, to form a fund for the benefit of his family, he does not bind himself to do that which a prudent man ought to do of his own accord. It is true that by entering into this agreement, the trustees do take the profits of the trade; and whilst *Waugh v. Carver* (2 H. Black. 235), was considered as unqualified law, it would have been difficult to say, that they did not thereby, by operation of law, make themselves partners in the trade and personally responsible, though it may be observed, that they do not by this arrangement withdraw the profits from the reach of the creditors, but rather secure that the trader should not spend them, and that they should remain as a fund to meet emergencies. But when we find the object of their taking the profits of the trade is to keep them as a reserve fund to meet the emergencies of the business, I think it becomes clear, that though they take the profits, they do not cause the business to be carried on for them; that the participation is not such as to constitute the relation of principal and surety between the trustees of the settlement and the underwriter; and that, according to *Cox v. Hickman* (8 H. L. Cas. 268; s. c. 30 Law J. Rep. (n.s.) C.P. 104), is the true question. I think, therefore, that such a settlement does not of itself make the trustees partners in the business.

In the present case, the first trust was to pay the defendant his annuity, and it was argued that, though his co-trustee, Mr. Donnison, might not be a partner or a principal in the underwriting business of the son, yet that the defendant, being not only a trustee, but also beneficially interested in the profits when received by him, and his co-trustee, was a partner. But if the previous arrangement between the defendant and his son was really what it purported to be, and the defendant really was an annuity creditor of his son,

this arrangement goes no further than that did in *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 104). There is only one creditor instead of many, but in every other respect the words of Lord Cranworth, already cited, are strictly applicable: "The debtor" (in this case the son) "is still the person solely interested in the profits, save only that he has transferred them" (or in this case a part of them) to his creditor, the defendant. The son receives the benefit of the profits as they accrue, though he has precluded himself from applying this portion of them to any other purpose than the payment of this annuity, for which he was already liable. The trade is not carried on by or on account of the annuitant creditor. I think therefore, that assuming that the transactions were what they really purport to be, the defendant was not liable as a partner in the business carried on in his son's name.

We have now to consider whether, in the exercise of the power to draw reasonable inferences of fact, we ought to draw the inference that in reality the transactions were not such as they purport to be, but that they were a cloak for a scheme, by which the defendant really carried on the business for himself. This seems to have been the view of the matter taken by Mr. Justice Byles in the Court below, and to have to some extent influenced the judgment of the Lord Chief Justice Erle. And I think that there was evidence, which, had the case gone to the jury, must have been submitted to them in support of this view of the matter. The son was not intrusted with the management of his own business, which was confided entirely to Fenn; and the 5,000*l.*, which the defendant had stated was placed at Fenn's disposal, was kept in the hands of the defendant; and the arrangement by which the father was to receive an annuity of 500*l.* a year, is based on what seems to me a very exaggerated estimate of the probable profits of the business; and all this is evidence tending to shew that the original intention was that the business should be the father's, carried on for him and under his control. But these facts are also quite consistent with the supposition that there was a distrust of the son's steadiness and experience, and that therefore, though he was started in business on his own account, it was judged prudent to prevent his having for a time the full control of his business and his funds. And on the point which presses more strongly against the defendant, namely, the taking what seems to me so large a return for his advances to the business, we are left in ignorance as to what are the usual rates of interest allowed for money employed in the business of an underwriter, or what profits might honestly be expected to arise from the business. On these points, a jury would themselves probably have had some personal knowledge—we have none. They would also have had the benefit of hearing the evidence of the two Sharps and of Fenn, who might have been examined and cross-examined, and, no doubt, would have been so had the case gone to the jury. It was urged, by Mr. Lush, on the argument before us, that when the parties, instead of going to a jury, agree that the facts shall be stated for the Court, they do impliedly admit that there is no fraud or deceit in the matter, and that the power reserved to the Court to draw inferences of fact should be understood as qualified by that implied admission. There is much force in this argument, and without going so far as to say that the Court should never draw an inference of fact, that transactions stated in a special case were a colour and a cloak to conceal something really different, I certainly think that no such inference should be drawn unless it is very clearly made out. In the present case, I think we are not justified in drawing any such inference. For these reasons, I think that the judgment should be reversed.

The Lord Chief Baron requests me to say that he concurs in this judgment, and it is to be considered as his as well as mine.

CHANNELL, B.—The question for our decision in this case is, whether the defendant is liable on a policy of insurance. The policy was not subscribed by him or in his name, and the defendant can only be liable upon it on the ground that the policy was subscribed by some person acting as his agent by authority, either express or to be implied from the defendant's conduct. If it

were subscribed in the due course of the business of a partnership, of which the defendant was a member, then the person subscribing would be the defendant's agent, and would derive his authority by operation of law from the existence of the partnership. In all the cases the reason why a man is held to be liable as being a partner in a business, for contracts not personally entered into by him, is to be found in the fact of the relation of principal and agent being assumed to exist between partners. Whatever doubt the cases of *Grace v. Smith* (2 W. Black. 998) and *Waugh v. Carver* (2 H. Black. 235) may have given rise to must be taken, I think, to be set at rest by the case of *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (n.s.) C.P. 104) in the House of Lords. I agree with my Brother Blackburn in his remarks on that case, that we are not bound by every reason given by the learned Lords in delivering their opinions. Of course, we are bound by the *ratio decidendi* in that case. It is to be collected principally from the judgments of Lord Cranworth and Lord Wensleydale, with whose opinions, however, the other learned Lords who took part in the decision entirely agree. As my Brother Blackburn has cited at length the more important passages from the elaborate judgment of Lord Cranworth, and as I agree with my Brother Blackburn as to the *ratio decidendi* in that case, I content myself with saying that I adopt, without repeating at length, his views as to the effect of that decision. I think that, henceforth we may take it that the true test, where a person is sought to be made liable on the ground of his being a partner, is to see whether he has constituted the other alleged partner his agent in respect of the partnership business, and that taking a part in the profits, though cogent evidence of this, is not conclusive. Mere participation in the profits is not sufficient to make a man bound by alleged partnership contracts, if the facts shew that he had not constituted the others his agents. Now, in the present case, taking the facts stated in the case to be the actual facts, I cannot see any agency constituted. It is clear, in the first place, that care was expressly taken that it should not be done, and certainly none can be implied from the conduct of the defendant on the ground of his having held himself out as a partner, for it is stated that the plaintiff did not at the time of the insurance know the facts upon which it is now sought to make the defendant liable. In what other way, then, could authority be conferred? Only, as it seems to me, if the facts shewed that the business was really the business of the defendant, carried on for the benefit of himself, and not of his son, or for his benefit together with his son. In that case, having accepted the benefit of contracts made on his behalf where beneficial, he would be precluded from repudiating the authority of the person making them, where they proved unprofitable. Such a state of things does not, however, appear from the case as the facts are there stated. It was the business of the defendant's son. The defendant received an annuity of 500*l.*, in consideration of his guarantie or advance of 5,000*l.* If the business had prospered, the surplus would have gone to the benefit of the son, always assuming the facts stated to be the real facts, and not colourable. It is true that the defendant, as one of the trustees of the marriage settlement referred to in the case was to receive the profits; but in considering the effect of this, we must look at the trusts of the deed and the nature of an underwriter's business. The trustees had not to manage the business, as the trustees of the creditors' deed in *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (n.s.) C.P. 104) had: they had to apply the funds first in payment of 500*l.* a year to Sharp senior, the defendant. This, if we accept the statement in the case as to its origin, is a mere debt incurred by Sharp junior, in obtaining capital to start him in business. So far, there is a mere mortgage of profits, which, according to *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (n.s.) C.P. 104), will not make the mortgage liable. Next, there is to be a payment of 500*l.* a year to Sharp junior, on which, I think, nothing turns, in considering the liability of Sharp senior. Then comes the trust for the accumulation or reserve fund. This is to provide for the losses which, in their particular business, are to be expected in some years to exceed

the profits, and which must be paid out of capital or accumulated profits of previous years. Can the fact that the profits are to be paid to the trustees for such a purpose as this make the business that of the trustees, any more than an agreement to pay them to a particular bank would make the bankers partners? If profits had been made and the money accumulated, no doubt those funds could have been made available for the benefit of creditors; but the question here is, no profits being made, can the acceptance by the trustees of the trust to take the profits and hold them for such a purpose, without any powers of management, make the business that of the trustees, and carried on on their behalf? I think it cannot be so, upon the facts of the case, taking them to be precisely as stated. We have, however, power to draw inferences, and we are asked, on behalf of the plaintiff, to draw the inference that the business was really the business of the defendant. I believe the difference of opinion which exists on the bench of this Court is more as to the extent of this power, and the use we ought to make of it, than as to the law applicable to the case. The judgment of my Brother Byles in the Court below was expressly founded on the inference drawn by him. Now, the view I take of such a power is, that from the facts stated we may draw any inference fairly arising as to other facts not stated: but I do not think we are at liberty for that purpose to vary the facts stated to us, and to infer that the facts stated are merely colourable, and the real transaction a different one. A jury may, of course, discredit any portion of the evidence before them, and by doing so as to part of a case, they have a much wider range within which to find an interpretation to place upon it than we have under a mere power to draw inferences. For the reasons which I have stated, and which are more fully explained by some of my learned Brothers, I think, taking the facts literally as stated, the plaintiffs have not made out the liability of the defendant. I see no inference fairly arising as to additional facts, which would strengthen the plaintiffs' case, and I decline to draw the inference that the facts stated are merely colourable, and the business really that of the defendant. I therefore think the judgment ought to be reversed.

BRAMWELL, B.—In this case the plaintiffs declare that they made a policy of insurance, and that "the defendant, in consideration of a certain premium paid to him by the plaintiffs, subscribed the said policy for 100*l.*, and became an insurer thereon to the plaintiffs for that amount." The defendant pleads that "he did not subscribe the said policy or become an insurer as alleged"; and the question is, whether the plaintiffs have proved the allegation so traversed. This is the real and ultimate question. Because though this, like many other cases, has been argued as though the questions were, whether the defendant was a partner with somebody else, and though this way of arguing is reasonable enough, as *primâ facie* a partner is liable for the acts of his co-partner, within the ordinary scope of partnership authority, yet, inasmuch as a man may be a partner and not liable, or not a partner and yet liable, the determination of partnership or no partnership does not settle the question which still remains, "did the defendant subscribe the policy and become an insurer"? Now he did not subscribe it with his own hand, nor is he liable on the ground of holding himself out as a partner or principal in this matter, for he has not done so. The only other way in which he can be liable is by reason of his having given authority to the person who signed it, so to sign and bind him. The person who did sign it is described in the case as a "clerk"; he signed the name of the defendant's son. Then did the defendant give that person any authority so to sign and bind him? That he did not in words is certain, nor did he in intention, nor did the clerk intend to bind him; nor did his son, nor Fenn, nor did the plaintiffs suppose he was bound, nor intend to deal with or trust him, but his son. If then he is liable, if he has given such authority, it is against the intentions of all parties, it is in spite of their meaning the contrary, and must therefore be from some force in the nature of the transaction itself—and this may be. If the defendant was

really the principal, or one of the principals in the transaction, if those who acted really were his agents, if on the truth appearing he had a right to say the contract was made with him, and to enforce it, he ought to be and would be liable: as, for instance, if there was a business which required the buying of goods on credit, and of a person there to carry it on in the name of an agent, whether such agency was an agency of a partnership or any other, so that upon the purchase of goods by the agent or partner the property vested wholly or in part in the first-named person, then he would, as it seems to me, be liable, though he had stipulated with his agent or partner he should not be. Because he would have tried for an impossibility, for a thing repugnant in itself, viz., that the contract should be made with him, for his benefit, but not to bind him. It becomes necessary then to examine the facts. I think it not open to us to find that there is fraud or that the arrangements were colourable; questions of that character are essentially for a jury. We have power to draw only reasonable inferences. I think that does not extend to enable us to infer fraud. It is not intended to disable us from drawing unreasonable inferences, but from drawing inferences of matter which it would not be reasonable to leave to inference, and I think it would not be reasonable to leave to inference whether the apparent facts were the real facts when the defendant and his son and Fenn have not been called as witnesses, and when we scarcely know anything that has taken place during the three years the business was carried on. Nor can I suppose such a thing is left to us in face of the statement in the case that the underwriting business of the son was carried on by Fenn, and that Fenn carried on the underwriter's business for Sharp junior, until and at the time of making the policy. At the same time, if I had to find whether the arrangement was fraudulent or colourable, I should say it was not. I think the arrangements, though complicated, are intelligible, and such as might well be honestly made. The facts are as follows: Fenn and Sharp junior agreed in March, 1857, that Fenn should do an underwriter's business for Sharp junior, on certain terms. With this the defendant had nothing to do, except giving a guarantie to the extent of 5,000*l.*, not to find capital, which, I believe, is not needed in such a business, but to be liable to losses to that amount. He had no claim to profits, or in any way to meddle with the business. In November, 1858, the business having proved profitable, a fresh arrangement was made between Fenn and Sharp junior, whereby the business was to be increased and Fenn's salary also. On the occasion, and in consequence of this, the defendant bargained with his son for an annuity for their joint lives of 500*l.*, or of a sum equal to one quarter of the profits if that quarter exceeded 500*l.* This may have been unfatherly and extortionate, as is said, if real, but clearly would not make the defendant a partner in or proprietor of the business. I do not say it was either extortionate or unfair. If the son was making large profits, he might well be able to pay the annuity, and the defendant ran the risk of that which has happened, viz., receiving nothing and paying a great deal. If the matter had stopped here, there would be no pretence for saying the defendant was liable. The next thing is the marriage settlement. What is its separate operation? If of itself it makes the defendant liable to this action, so it does Donnison, and would prove that he subscribed the policy and became an insurer. Does it then make both of them so liable? Now, it seems to me to be an elaborate contrivance for insuring the son's life for the benefit of his intended wife and their children, and if he lived of raising a round sum of 10,000*l.*, i. e., shares worth 1,500*l.* and money 8,500*l.*, for the same purposes. The deed contains appropriate clauses for this purpose, the majority of which need not be noticed, except that they are such as might be expected in a *bona fide* instrument. But it contains an assignment to the defendant and Donnison of all the money, earnings, profits, and emoluments then in the hands of Fenn, and of such as should thereafter come to his hands as agent of Sharp the younger. To know the effect of this, it should be known what Fenn would have in his hands belonging to Sharp junior, a description

of which will be found in the judgment of my Brother Blackburn in *Xenos v. Wickham* (14 Com. B. Rep. (N.S.) 460; s. c. 33 Law J. Rep. (N.S.) C.P. 104). But, no doubt, it is an assignment of all the profits of the business, and, indeed it might be an assignment of capital; thus, in one year there may be a balance of loss, which, of course, must come from capital, in the next year a balance of gain, which replaces capital: so on one account there may be a loss, on another profit. Anyhow, everything is taken, but there is a trust, which I take to be obligatory, to return out of the assigned property, including the railway shares, any money from time to time required to meet exigencies in the business. The trustees then are to return what they receive till the business can spare it. So for the deed seems very intelligible. It is as though the defendant and his son and Donnison had said the son shall be made to save to the extent of 10,000*l.*; for that purpose he shall hand all he gets to the defendant and Donnison till they have got 10,000*l.*; but as he may want it back for the business, all or part is to be returned to him when wanted for that purpose. But then, if everything is taken from him he can neither maintain himself nor pay his debts, accordingly provision is made for paying the father his annuity, and for the son's maintenance, and for repayment of any part of the 5,000*l.* the defendant may have to advance. What is the difference between this deed and a deed by which Sharp junior should have covenanted to pay to trustees of his marriage settlement what he could spare after maintaining himself, paying his debts and providing for the emergencies of his business? There is none except that the trustees secure his doing so, by giving themselves as far as they can, a right to take everything, handing back what he would otherwise have to deduct, and agreeing how much that shall be. Now suppose the defendant had not been a trustee, would this deed have made Donnison a partner in or proprietor of the business? and if so, why? If it would not, would it make the defendant so because there are trusts in it for his benefit? and if so, why? And if he is not liable in his character of trustee, nor in his character of *cestui que trust* separately, does it make any difference that he is both, and if so, why? I cannot see. Suppose the covenants had been with the defendant and Donnison to pay the monies to other persons as trustees, A. and B,—who would be partners or proprietors of the business then? A. and B., or defendant and Donnison, or all four? Would they all have subscribed the policy and become insurers? It is to be observed that it does not appear that the defendant or Donnison ever received anything. It does appear the defendant paid something under his guarantee. Reliance is placed on the statement that Sharp junior kept no banking account; that Fenn received and paid. But that was to be expected. Also on this, that Sharp junior paid what he drew out of the business into his father's account, and drew in his own name, on the same bankers of course, to be paid out of his father's account. But I really see nothing in this. It is not suggested he did not draw out as much as he paid in. Why, then, the deed being *bona fide*, is the defendant a partner or principal in the business? He can make no contract, nor order one, nor forbid one, nor enforce one, nor release one. If the profits were 10,000*l.* in the year, he would get nothing but his annuity: the residue would go to his son and trust fund. His annuity would be larger indeed, but that is unimportant. If there were no profits in any year he would still be entitled to his 500*l.* annuity. How can this state of facts prove that the defendant "subscribed the said policy and became an insurer"? It seems to me, therefore, that if the defendant is held to have "subscribed this policy and become an insurer," it will be so held, though, as I have said, he has not done so in form, nor in substance, and that he has so done, somehow, though there is no fraud, without his or any one else concerned intending it. Surely it seems enough to state this to shew that it cannot be true, and that therefore the defendant is not liable. The burden of proof to the contrary is on the plaintiffs. Now what reason do they give? They say that the defendant is a partner with his son,

and that if not partners *inter se* they are so as regards third parties—a most remarkable expression. Partnership means a certain relation between two parties. How then can it be correct to say that A. and B. are not in partnership as between themselves? They have not held themselves out as being so, and yet a third person has a right to say they are so, as relates to him. But that must mean *inter se*, for partnership is a relation *inter se*, and the word cannot be used except to signify that relation. A. is not the agent of B; B. has never held him out as such, yet C. is entitled as between himself and B. to say that A. is the agent of B. Why is he so entitled, if the fact is not so, and B. has not so represented? But, “partnership,” and a “right to call a person partner as regards third parties,” are words, and the *thing* must be looked at, viz. the taking or sharing of profits, which it is said gives C. a right as against B. to say B. is a partner of A. Why should it? I trust that in the present state of authority this question may be freely handled without presumption, and that the goodness of such a rule may be examined. Because, though we are bound to administer the law as we find it, yet, when we are considering what is the law, we may not improperly inquire into the reasonableness of that suggestion. Why then does a taking or sharing of A.’s profits by B. entitle C. to demand payment by B. of A.’s debts in the trade? How, if there is such taking and sharing in this case, does it prove that the defendant “subscribed the policy, and became an insurer”? If A. agrees with B. to share profits and losses, but not to interfere with the business, and not to buy or sell, and does not interfere, nor buy nor sell, and C. knowing this, deals with B, he would have no claim on A. Why should he, if he does not know of it? Why, upon finding out something between A. and B, which has in no way affected or influenced him, should he who has dealt with B. have a claim on A? It is said because profits are what the creditors trust to, they are his fund for payment. This would be a bad reason if true; in fact a man who trusts another generally has a claim on his profits and capital too. How does a man who trusts the former only more affect the creditor’s fund? But, further, it really is not true in substance, only in words. It is not a receipt of profit in substance that makes a man liable. If I agree to receive a sum in proportion to profit, as for instance a sum equal to a tenth, I am not liable. If I receive a tenth I am. What is the difference except in words, at least as far as creditors are concerned? How can one set of words between A. and B. give C. a right, and the same thing in other words not? How many men in a thousand, not lawyers, could be got to understand that of the two servants of a firm, the one, who received a tenth of the profits was liable for its debts, the other, who received a sum equal to a tenth was not. This Mr. Justice Storey calls “satisfactory.” Satisfactory in what sense? In a practical, business sense? No, but in the sense of an acute and subtle lawyer, who is pleased with refined distinctions, interesting as intellectual exercise, though unintelligible to ordinary men, and mischievous when applied to the ordinary affairs of life. Lord Eldon did not think it satisfactory.² Such a law is a law of surprise and injustice, and against good policy. It fixes a liability on a man contrary to his intent and expectation, and without reason, and gives a benefit to another which he did not bargain for and ought not to have, and prevents that free use of capital and enterprise which is so important. It is said, this is true of a dormant partner; but it is not. His existence may be unknown to the creditor. But the dormant partner knows he is liable and means to be, and the creditor trusts all such persons. He means to deal with all real partners. It may be said, that if this reasoning is right a man might bargain to receive all the profit of a business and not be liable. The answer is, the thing is impossible. There never was and never will be a *bona fide* agreement by one man to carry on a business, bear all its losses and pay over all its profits. Should such an agreement appear, it would obviously be colourable. When there is a chance of profit to the trader then such an agreement may be honest, and when honest ought not to make him

(2) *Ex parte Hamper*, 17 Ves. 404.

liable who is certainly to receive some of the profits, and perhaps all. I have hitherto dealt with the case on principle. I proceed to examine the authorities. The labour formerly needful is now rendered unnecessary by *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 104). That case has settled the law, I may be permitted, I hope, to say in a perfectly satisfactory manner. It is there laid down that the question in such cases as the present is one of authority, one of agency. Lord Campbell says, "The defendant can only be liable upon the supposition that the person who wrote the acceptance on the bills of exchange was their mandatory for that purpose." Lord Wensleydale says, "And the simple question will be this, whether Haywood was authorized by either of the defendants as a partner in that company to bind him by those acceptances." His Lordship proceeds, "Haywood must be taken to have been authorized to accept for them by those who actually carried on business under that firm. Were the appellants partners in it?" And further, "The question then is, whether this deed makes the creditors who sign it partners with the trustees, or, what is really the same thing, agents to bind them by acceptances on account of the business"; and generally I refer to his whole judgment, particularly to the passage beginning, "Hence it becomes a test of the liability," down to "liable as a partner." Lord Cranworth puts the same two arguments together—I refer to the passage beginning, "It was argued," and ending "to have been made." This, then, is our guide for the future. The question here is, was the underwriter's business carried on by persons acting on the defendant's behalf? Now, it certainly was not. The clerk who signed the policy, Fenn and the son, acted on the son's behalf. That is, unless the whole is a sham, which, as I have before said, I think is not open to us to consider; nor true if it were open to us. This ought to dispose of the case. But even if we assume that the law supposed to exist before *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 104) remains untouched, that is to say, the supposed law of *Waugh v. Carver* (2 H. Black. 235), I think the same conclusion ought to be come to. Lord Wensleydale does not notice that case; Lord Cranworth does, and, with submission, gives a better reason for the decision than is to be found in the case itself. The Chief Justice there says the question is, whether they have not constituted themselves partners in respect to other persons, and puts his decision on the ground that "he who takes a moiety of all the profits indefinitely, shall by operation of law be liable to losses." Let us hope that this notion is overruled,—one which I believe has caused more injustice and mischief than any bad law in our books. But even if not, how is this case within it. By the letter of the 1st of January, 1859, after the business had proved profitable, the son agreed to pay his father for their joint lives 500*l.* a year absolutely, not out of profits nor dependent on them; with a provision for an increase in proportion to profits if they reached beyond a certain amount. This would not make the defendant a receiver of profits nor give him a right to an account, nor in fact bring him within any of the old fancied rules of liability. Then comes the settlement in which the defendant is a trustee. As far as the settlement alone is concerned the defendant is no more liable than the other trustee, and why is he to be liable? It remains to notice the judgment of the Court below. With great respect I think *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 104) was not followed. The Chief Justice says the deed made the defendant a partner by giving him an interest in the business, and finishes by saying the question is, whether the creditors may come on the defendant in respect of the profits. But according to the judgment in *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 104), the question does not turn on that. Mr. Justice Byles seems to consider the case as a contrivance for giving the defendant the profits,—that in reality it was his business. If so, of course he is liable. Mr. Justice Montague Smith says he thinks the deed an arrangement by which the defendant was to have the profits as profits, *eo nomine*, and that he is liable as a partner. But if Lords Cranworth and Wensleydale have laid

down the true rule, it is not that indicated in this last expression. It seems to me, then, there is here no partnership, no taking of profits which could have brought the case within what was supposed to be law before *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (n.s.) C.P. 104); that on reason and principle that supposed law was wrong: that it is now condemned by the authority of *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (n.s.) C.P. 104): that anyhow *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (n.s.) C.P. 104) is the governing case, and that it lays down rules which decide this in favour of the defendant. I hope I shall not be charged with arrogance for the way I have spoken of bygone opinions. The law had drifted into the condition from which it was rescued by *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (n.s.) C.P. 104). No one in particular was responsible for, and probably no one person would have put it at once in the position it was. But the true line had been departed from, at first but a little, and for a good reason, and every subsequent move took it further away in a wrong direction, till it was happily brought back by *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (n.s.) C.P. 104). The majority of this Court are of opinion the judgment should be reversed; therefore, judgment will be pronounced accordingly.

Judgment reversed.

[IN THE COMMON PLEAS.]

Nov. 25, 1865.

GRAY v. WILSON.

35 L. J. C.P. 123; L. R. 1 C.P. 50; 14 W. R. 584.

Arbitration—Reference to Master—Power to appoint Surveyor.

ARBITRATION, REFERENCE AND AWARDS.—*An action on a builder's bill was referred to the Master:—Held, that the Master might appoint a surveyor to report as to value, but that he must receive the report in the same way as other evidence, and could not refuse to hear any additional evidence tendered by the parties.*

This was an action on a builder's bill referred to the Master under 17 & 18 Vict. c. 125.

The Master, before witnesses were called, intimated that he should send a surveyor to view the work and report its value, and should give his certificate accordingly. This being objected to by the defendant, the Master *pro forma* gave a certificate for the whole amount, that the opinion of the Court might be taken.

Robinson, Serj. appeared on behalf of the defendant.

Laxton, on behalf of the plaintiff.

The Master stated that he had acted in conformity with the usual practice of the Masters. By order of the Court and consent of the parties, the matter was referred back to the Master,—

The Court (Erle, C.J., Willes, J., Byles, J. and Keating, J.), approving of the practice of thus sending an independent surveyor to report, but laying down that the report must be received just like other evidence, and that the Master must hear in addition such evidence as the parties tendered.

[IN THE COMMON PLEAS.]

Nov. 23, 1865.

ROBINSON v. THE GREAT WESTERN RAILWAY COMPANY.

35 L. J. C.P. 123; 1 H. & R. 97; 14 W. R. 206.

Follow, *D'Arc v. London & North Western Railway*, 1874, L. R. 9 C.P. 325; 30 L. T. 763; 22 W. R. 919 (C.P.).

Carriers by Railway—Damage to Horses by Delay—Condition "at Owner's Risk"—Alternative Methods of Carriage—Parol Evidence as to Meaning of Terminus mentioned in Contract—Parol Evidence to raise Inference of Contract for Carriage.

CARRIERS.—Horses sent from Shipton by the defendants' railway to Wolverhampton, to be delivered there, were sent to a station called Herbert Street station; if booked through to Manchester (as they might be), they were sent to Bushbury Junction, a mile beyond Wolverhampton, to meet a train on another railway, to be carried to Manchester. Horses might be sent either by horse-boxes and passenger train, when the company charged more money and took more risk, or by cattle-trucks and goods train, when they charged less and took less risk. The plaintiff went to the station-master at Shipton, and required twelve horses to be carried to Manchester by the latter method; the station-master told him he could not book through, but would telegraph to Wolverhampton to have the horses sent on to meet the train on the other railway. The plaintiff paid the fare to Wolverhampton, and signed a contract, on which was the direction "Shipton to Wolverhampton," and a declaration that the horses were carried "at owner's risk." The trucks were directed to Wolverhampton; the horses were taken to the Herbert Street station, and it was clear that if they ought, under the contract, to have been carried to Bushbury Junction, there was a delay of twenty-four hours, and consequent injury to the horses:—Held, first, that there was some evidence that "Wolverhampton" meant "Bushbury Junction"; secondly, that as there was an alternative method of carriage, the condition as to risk was reasonable; thirdly, that the condition did not apply to a failure to carry in a reasonable time.

The plaintiff, in order to prove a contract to carry six horses from Shipton to Manchester, relied on a conversation at Manchester with the station-master there, in which he, the plaintiff, said he was going to send the horses, and the station-master said he would telegraph about them; on the fact of the arrival of the horses; and on the station-master conducting himself as if there were such a contract; but the plaintiff did not put in any written contract, though it was clear there was one:—Held, that there was no evidence to go to the jury of a contract to carry the horses.

This was an action against the defendants, as carriers, for not carrying certain horses of the plaintiff safely and within a reasonable time.

The first count of the declaration alleged that, in consideration that the plaintiff would deliver to the defendants, as carriers of goods for hire, certain goods, that is to say, twelve horses of the plaintiff, to be by the defendants carried from Shipton to Manchester, and there delivered, for the plaintiff, for reward to the defendants, the defendants promised the plaintiff to carry the said goods safely and with due care from Shipton to Manchester aforesaid, and there deliver the same for the plaintiff, within a reasonable time in that behalf; and the plaintiff delivered the said goods to the defendants, and the defendants received the same for the purpose and on the terms aforesaid, and all conditions were performed and all things happened to entitle the plaintiff to have the said goods safely and with due care carried and delivered within a reasonable time in that behalf as aforesaid; yet the defendants did not safely and with due care convey and deliver the said goods for the plaintiff as aforesaid within a reasonable

time, whereby certain alleged damage accrued to the horses, and the plaintiff was put to certain alleged expenses.

The second count of the declaration was in similar terms with respect to six other horses.

The defendants pleaded, first, a denial of the alleged promise; and, secondly, that they did safely and with due care carry and deliver the said goods for the plaintiff within a reasonable time.

At the trial the following facts appeared: Shipton is on the West Midland Railway, which forms part of the Great Western Railway system, and which runs through Shipton to Wolverhampton. At Wolverhampton there is a station belonging to the defendants, called the Herbert Street station, and about a mile beyond Wolverhampton (strictly so called) there is a junction called the Bushbury Junction, where the defendants' railway runs into the London and North-Western Railway which goes to Manchester, but where there is no station. Horses and cattle booked from Shipton to Wolverhampton to be delivered there are taken to the Herbert Street station, but those booked through to Manchester are taken to Bushbury Junction, and the responsibility of the defendants continues to the termination of the transit. There are through-rates, and animals are booked through Wolverhampton to Manchester. Horses may be sent either by passenger or goods train, the charge in the latter case being much cheaper than in the former.

The plaintiff went to the station-master at Shipton with respect to sending twelve horses from that place to Manchester by goods train, and was told by him that there was no through-rate, but that he would telegraph to Wolverhampton for the horses to be forwarded to catch a certain goods express train on the London and North-Western Railway. A ticket was prepared, which, among other matters, contained on its face the number of horses, the amount of the fare (to Wolverhampton), the plaintiff's name, and the words "from Shipton to Wolverhampton" and "two drovers free"; and on its back was the following declaration, signed by the plaintiff: "Declaration, to be signed when horses are conveyed in waggons.—I hereby declare that the value of the horses this day delivered by me to the West Midland Railway Company for conveyance in cattle-waggons by luggage trains does not exceed 10*l.* per horse; and in consideration of the rate charged for conveyance of such horses I hereby agree that the same are to be carried entirely at the owner's risk." Instead of availing himself of the free pass, the plaintiff went by an earlier passenger train; arranged, at the nearest station to Wolverhampton on the London and North-Western Railway, for the horses going on, booked them, paid the fare, and then proceeded on his journey. The waggons were labelled "Shipton to Wolverhampton," and no servant of the plaintiff went with them. They were taken to the Herbert Street station, and there remained till inquiries were made and directions received; they were then sent on to the Bushbury Junction, and it was clear that if, under the circumstances, the defendants were bound to have taken them to Bushbury Junction there was an improper delay of twenty-four hours. The horses eventually arrived in Manchester, much injured, it was alleged, by the length of time they had been on their journey.

With respect to the six horses, the plaintiff proved that he informed the defendants' manager at Manchester that he (the plaintiff) had six horses which were to be delivered the following morning at Shipton, that the manager said he would telegraph and see that they were properly loaded and booked through, that they arrived injured by their journey, and that the manager expressed his surprise that they had not arrived before, and conducted himself as if this ought to have been the case. But no direct evidence was given as to when these horses were delivered to the defendants, or how the delay (if any) occurred; nor was any written contract produced, though, from certain matters which took place at the trial, it was clear that there was one.

The first count was amended by substituting "Wolverhampton" for "Manchester."

A verdict was found for the plaintiff as to all the eighteen horses for 90*l.*,

calculated at 5*l.* a horse. But the learned Judge gave leave to the defendants to move in manner set forth in the following rule.

A rule was obtained calling on the plaintiff to shew cause why the verdict found for him on the first count of the declaration should not be set aside, and instead thereof a verdict entered thereon for the defendants, and the damages found in this cause be reduced by the sum of 60*l.* accordingly, pursuant to leave reserved, on the ground that there was no evidence of any breach of the contract, or of any negligence by the defendants to deliver the horses in that count mentioned, or on the ground that by the condition in the contract the defendants were exempted from the liability complained of; and why the verdict found for the plaintiff on the second count of the said declaration should not be set aside, and instead thereof a verdict be entered thereon for the said defendants, pursuant also to leave reserved, on the ground that there was no evidence of any contract for the conveyance of the six horses in that count mentioned, nor any evidence of any breach of that contract, or of any negligence by the defendants; or why the verdict should not be set aside and a new trial be had, on the ground that the verdict was against the evidence.

E. James and R. G. Williams now shewed cause.—First, as to the twelve horses. The facts (which they reviewed at length) shew that both the intention and the contract was to carry them to Bushbury Junction, that by mistake they were sent to Herbert Street station, and that delay and damage were thereby occasioned. With respect to the provision that the horses were to be carried at "owner's risk," this protects against injuries by accident on the way, and not against delay to carry in a reasonable time. And further, if it does, then it is unreasonable. Thus in *M'Cance v. the London and North-Western Railway Company* (7 Hurl. & N. 477; s. c. 31 Law J. Rep. (n.s.) Exch. 65), Bramwell, B. held a condition that horses should be carried entirely at owner's risk was unreasonable. In *Aldridge v. the Great Western Railway Company* (15 Com. B. Rep. N.S. 582; s. c. 33 Law J. Rep. (n.s.) C.P. 161) the Court seems to have thought a provision against "loss, detention and damage," was unreasonable; and in *Allday v. the Great Western Railway Company* (34 Law J. Rep. (n.s.) Q.B. 5) it was expressly held, that a provision against liability for delay was unreasonable. With respect to the six horses, what took place at Manchester clearly shewed that the defendants had undertaken the carriage of these horses, and that there was delay in the transit.

Pickering and Crompton, in support of the rule.—First, as to the twelve horses. The evidence relied on by the other side to shew a contract to carry to Bushbury Junction is the conversation at Shipton, where the note was signed; and the directions given by a consignor cannot be allowed to affect the written contract. The whole cause of the delay and damage in reality was the plaintiff's neglect in sending no one with these horses on so long a journey. The condition as to the owner's risk also was quite reasonable, because here there was an alternative, viz., to send at a greater expense with less risk, or at a less expense with a greater risk; and where such an alternative exists, such a condition as is contained in the present contract is reasonable—*Peek v. the North Staffordshire Railway Company* (10 H.L. Cas. 473, 588; s. c. 32 Law J. Rep. (n.s.) Q.B. 241). In *Aldridge v. the Great Western Railway Company* (15 Com. B. Rep. N.S. 582; s. c. 33 Law J. Rep. (n.s.) C.P. 161) all that was held was, that a provision against loss, &c., on another line was reasonable. In *Simons v. the Great Western Railway Company* (18 Com. B. Rep. 805, 826; s. c. 26 Law J. Rep. (n.s.) C.P. 25) it was held that a condition against loss or damage from any cause to goods carried at a special and peculiar rate was reasonable; and so, in the matter of telegraphing, a provision as to repeating, in order to insure accuracy, has been held reasonable—*M'Andrew v. the Electric Telegraph Company* (17 Com. B. Rep. 3; s. c. 25 Law J. Rep. (n.s.) C.P. 26). In *Allday v. the Great Western Railway Company* (34 Law J. Rep. (n.s.) Q.B. 5) the words were stronger than the present; and the only case where the same were used is *M'Cance v. the London and North-Western Railway Company* (7 Hurl. & N. 477; s. c. 31 Law J. Rep. (n.s.)

Exch. 65); but in both those cases no alternative course was shewn to exist; and this distinction was clearly pointed out by the learned Judge at the trial, and by Cockburn, C.J. in the former of these cases. With respect to the six horses, there was not a particle of evidence of a contract, of the time of starting, or of any delay: it is the clear practice of railway companies, in ordinary course, to have a written contract, and none was produced here, though it is clear there was one.

ERLE, C.J.—I am of opinion that this rule, so far as it relates to the twelve horses, should be discharged. It appears to me that there is great force in much that has been urged on behalf of the defendants, as to “Wolverhampton” meaning the Herbert Street station; but it seems to me there was some evidence to go to the jury that it meant the Bushbury Junction. This matter was left to the jury; the learned Judge is not dissatisfied; and I do not think it would benefit the railway company to have a new trial on the ground of the verdict being against evidence. With respect to the provision that the horses were to be carried at the owner’s risk, I think that the stipulation is entirely free from the decision of the House of Lords in *Peek v. the North Staffordshire Railway Company* (18 Com. B. Rep. 805, 826; s. c. 26 Law J. Rep. (N.S.) C.P. 25); for it seems to me that the learned and noble Lords who decided that case recognized the doctrine that it is reasonable for a railway company to have two modes of carriage—one, by which they take a great responsibility, and carry by horse-boxes, and another, by which they carry at a cheaper rate, but at a greater risk to the bailor. The contract of the railway company is to deliver the horses in a reasonable time at the owner’s risk. Whatever may happen to them on the journey is to be at the owner’s risk. But where the contract is to deliver within a reasonable time, there is a duty entirely distinct from the question of damage which may arise from accident on the journey. If a railway company are bound to carry horses in twenty-four hours at the owner’s risk, and the horses do not arrive accordingly, then, whether the horses are damaged or not, there is a breach of contract, for which the company are liable. With respect to damage to the horses on the road, in my opinion the company would not be liable for extra damage, but would be liable for all damage which might arise from the breach of contract in not arriving within a reasonable time. This is the total result of the trial in respect of the twelve horses and the 60*l*.

With respect to the six horses, which are alleged not to have been delivered in a reasonable time, the ground the plaintiff relied on was, that because the horses, somehow or other, got into a truck on part of the Great Western Railway, and somehow or other got out of the truck at the terminus at Manchester, therefore there might have been a contract by the Great Western Railway Company to take them to Manchester in a reasonable time. I am clearly of opinion that there was a contract, according to the usual course of the railway company, of which the Judges may almost take judicial notice; and, further, there is direct evidence in this particular case that the railway company took the animals on a written contract; and the plaintiff, in my opinion, cannot, by throwing before the jury the chance facts that, somehow or other, the horses got into the truck at one place, and, somehow or other, got out at another, ask the jury to infer a contract by the Great Western Railway Company to carry them. It is quite clear there was a written contract, and the plaintiff kept it from the jury, for the best possible reason, because it would disprove the thing which he asked the jury to infer. I think there was no evidence to go to the jury that the defendants were liable as to the six horses; and therefore, as to that part of the rule, it must be made absolute to enter a verdict for the defendants.

WILLES, J. and KEATING, J. concurred.

*Rule, as to the first count, discharged; and as to the second, made absolute to enter a verdict for the defendants, and reduce the damages by 30*l*.*

[IN THE COMMON PLEAS.]

Jan. 20, 1866.

PHILLIPS AND OTHERS v. POLAND.

35 L. J. C.P. 128; L. R. 1 C.P. 204.

Bankrupt Act, 12 & 13 Vict. c. 106. s. 112—Protection from Arrest.

BANKRUPTCY.—*An order for protection, granted under the 12 & 13 Vict. c. 106. s. 112, does not protect a bankrupt from arrest at the suit of a subsequent creditor, even though he has not passed his final examination.*

This was a rule calling on the plaintiffs and the sheriff of Middlesex to shew cause why the defendant should not be discharged out of custody, on the ground that he was privileged both at common law and by the protection granted by one of the Commissioners in Bankruptcy, under the 12 & 13 Vict. c. 106. s. 112. from arrest, till he had passed his final examination.

On the 1st of March, 1864, the defendant filed a petition in bankruptcy, and on the 22nd of March, 1864, he was duly adjudged bankrupt and surrendered, and protection was thereupon granted to him till the 28th of April, 1864. the time appointed for his last examination. This protection was renewed from time to time till the 29th of January, 1866, in order that he might pass his final examination on that day. In August and September, 1865, he purchased of the plaintiffs the goods which were the subject-matter of the action, and, on the 9th of December, 1865, judgment was signed.

On the 16th of December, 1865, a sheriff's officer came to the defendant's lodgings and produced a writ of *fi. fa.* on the judgment; and on being informed by the defendant that the goods there were not his and that he was a protected bankrupt who had not passed his final examination, and being shewn the order of protection, such officer produced a writ of *ca. sa.* and arrested the defendant.

An application had been made on the 19th of December, 1865, to Byles, J. at chambers, to discharge the defendant from custody, and he had referred the application to the Court.

Bullar shewed cause.—The question turns on the 12 & 13 Vict. c. 106. s. 112, which enacts, that if a bankrupt "be not in prison or in custody at the date of the adjudication, he shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender during the time by this act limited for such surrender, and for such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination, until his certificate be allowed as the Court shall from time to time by indorsement upon the summons of such bankrupt think fit to appoint." Now, first, there are three acts partially in force relating to this matter, viz., 12 & 13 Vict. c. 106, 17 & 18 Vict. c. 119. and 24 & 25 Vict. c. 134. By the 24 & 25 Vict. c. 134, the interpretation clause of the 12 & 13 Vict. c. 106. is repealed (see section 230), a new interpretation clause is enacted (see section 229), and the three acts are to be read as one act (see section 232). This being so, "creditor" in the first act must receive the same interpretation as in the third; and on looking through this last act it will be found that wherever the word "creditor" is used, it is used in reference to creditors who can prove under the bankruptcy. And a different interpretation of the same word cannot be given in different portions of the same act, unless there be something clearly to indicate that this was intended.—*The King v. the Guardians of the Holborn Union* (6 Ad. & E. 68). But, secondly, the case of *Grave v. Bishop* (25 Law J. Rep. (N.S.) Exch. 58; s. c. reported as *Grace v. Bishop*, 11 Exch. Rep. 424) is conclusive on the point; that case was decided on this very section, and is on all-fours with the present case, the only difference being that there the bankrupt had passed his last examination. But that was quite immaterial, and the Court decided that

the section only gave protection against creditors under the bankruptcy. And the *Freston Cases* (30 Law J. Rep. (n.s.) Chanc. 460; s. c. 30 Law J. Rep. (n.s.) Q.B. Rep. 133; 30 Law J. Rep. (n.s.) Exch. 89) are inapplicable, for there the creditor was one who had proved.

Quinn, for the sheriff, admitted the only distinction between the present case and *Grave v. Bishop* (25 Law J. Rep. (n.s.) Exch. 58; s. c. reported as *Grace v. Bishop*, 11 Exch. Rep. 424) was the one pointed out.

Nasmyth, in support of the rule.—The word “creditor,” in the 12 & 13 Vict. c. 106. s. 112, extends to all creditors of every description. The case of *Grave v. Bishop* (25 Law J. Rep. (n.s.) Exch. 58; s. c. reported as *Grace v. Bishop*, 11 Exch. Rep. 424) is distinguishable on the ground that there the bankrupt had passed his final examination. This distinction is material, because the object of the section is, that the bankrupt should be at full liberty, in order to assist the Court in every way in disclosing every matter in respect of his property, and in collecting it for the benefit of the creditors; and this object would be equally interfered with, whether the arrest was by an antecedent or subsequent creditor; and therefore as long as the Court requires his assistance, and he has a duty to perform in respect of his property, *i. e.* down to the final examination, he should be protected against every one. And if it be said that this would entail inconvenience and injustice to third parties, it must be recollected that the time during which the protection would last is practically short, and during that time it is known that the debtor is a bankrupt; and therefore this inconvenience is much less than that which would be entailed by the contrary construction. Again, *Davis v. Trotter* (8 Term. Rep. 475), *Ex parte Dalton* (1 Ball & B. 130), *Darby v. Baugham* (5 Term. Rep. 209), and *Ex parte Leigh* (1 Glyn & J. 264), are authorities in favour of the present argument; and in *Chitty's Practice* (9th edit. p. 725) it is said, “It would seem from the cases decided under repealed acts on this subject, that these provisions (*i. e.* 12 & 13 Vict. c. 106. ss. 112, 113.) extend to all arrests by creditors, whether for debts provable under the fiat or not.”

WILLES, J.—This is a rule calling on the plaintiffs and the sheriff to shew cause why the defendant should not be discharged out of custody. The judgment in this action was in respect of a debt incurred in September, 1865; the action was for goods sold and delivered; the judgment was regularly entered up, and a *ca. sa.* issued thereon, under which the defendant was arrested. He now claims to be discharged, because he is entitled to protection under section 112. of the Bankrupt Law Consolidation Act, 1849, and he claims this protection under these circumstances. The petition was presented in March, 1864; on the 22nd of that month the defendant was adjudicated bankrupt, and he obtained an order for protection, which was renewed from time to time, and will not expire till the 29th of this present month. And there is no doubt that he was arrested whilst the time was running to which the protection extended. When he was arrested he was not at, going to, or returning from the Court of Bankruptcy, nor was he engaged in business relating to the proceedings in Bankruptcy, although he had not yet passed his last examination. On these facts, it is for us to decide whether he was rightly arrested on the 16th of December last. This question depends, not on any common law privilege, as he was not going to, attending or returning from the Court of Bankruptcy, but on the construction to be put on the word “creditor” in section 112, a section whereby the period during which the bankrupt is protected from arrest may be extended and the protection enforced, not only where the common law privilege exists, but also during the period between the time of his surrender and that of finishing his examination, and “for such time after finishing his examination, until his certificate be allowed, as the Court shall from time to time, by indorsement upon the summons of such bankrupt, think fit to appoint.”

The question for our consideration is, what is the meaning of the word “creditor”; whether it means any creditor for any debt whenever accruing, or one who can come in and prove under the bankruptcy? I am of opinion

that the latter is the true construction. The rule is clear, that general words are to be construed generally, and so as to give full effect to them, unless there be something in the statute to shew that a contrary construction is to be put upon them. But it is also equally clear that general words are to be restrained to matters with which the statute is dealing; and if it be dealing with a certain subject-matter, they are to be restrained to it, unless it appears that the legislature was dealing with something larger. General words are to be restricted according to the persons or things in contemplation of the legislature; and it seems, therefore, on reading section 112, and looking to the use of the word "creditor" in other portions of the statute, that the intention of the legislature was to confine the word "creditor" to one who would come in and prove under the bankruptcy. The force of the argument to the contrary consists in respect of the necessity of protecting the bankrupt against, not only creditors who can prove, but also those whose debts have accrued since the bankruptcy. Now, as to this: a Court is appointed, before which the bankrupt is to appear, to which he is to surrender, which he is to assist by information, as to his affairs, and which is to receive, on the final examination, a complete account of his proceedings, by which it is to be guided in considering the question of his order of discharge. It is suggested that it is necessary that the bankrupt should be in a position always to appear before the Court in discharge of the duties imposed on him by the legislature, and that it is not unreasonable to protect him against creditors whose debts have accrued since the bankruptcy, just as a witness is protected when called on by a subpoena to give evidence. The contention, to a certain extent, is true; but in order to make it a valid reason in support of the proposition contended for, it is necessary to go further, and to shew that the bankrupt has no such protection unless the statute be so construed. Now, no such proposition as this is laid down anywhere, or supported by any authority; and a bankrupt in attending before the Court has the same protection as a witness. That alone is sufficient to dispose of the argument. But in addition another answer is afforded by the terms of section 112. itself, because it expressly gives a right to have the bankrupt brought up, when in prison or custody, by order of the Court, whenever it is necessary for the purposes of the bankruptcy proceedings,—a power which extends, not merely to cases where the process is in respect of debts, but also where it is in respect of criminal liabilities; for the words are, "whenever any bankrupt is in prison or in custody under any process, attachment, execution, *commitment or sentence*." Therefore, not only is there the common law protection, but an express power given by statute.

So much, therefore, as to the argument: now as to authority. I pass over the cases of *Davis v. Trotter* (8 Term. Rep. 475), *Ex parte Dalton* (1 Ball & B. 130), and *Ex parte Leigh* (1 Glyn & J. 264), because in the reports of them it does not appear when the debts accrued; and *Ex parte Freston* (30 Law J. Rep. (n.s.) Chanc. 460; s. c. 30 Law J. Rep. (n.s.) Q.B. Rep. 133; 30 Law J. Rep. (n.s.) Exch. 89), because there the original execution creditor had proved under the bankruptcy; and it is therefore not necessary to make any remark on them. The only cases it is necessary to refer to are *Darby v. Baugham* (5 Term Rep. 209) and *Grave v. Bishop* (25 Law J. Rep. (n.s.) Exch. 58; s. c. reported as *Grace v. Bishop*, 11 Exch. Rep. 424). As to *Darby v. Baugham* (5 Term Rep. 209), that is an authoritative decision of Lord Kenyon; and it is relied on as supporting the proposition that the analogous section (section 5.) of the statute 5 Geo. 2. c. 30. (which protected the bankrupt from a liability to arrest for debt up to the finishing of his examination) applied, whether the debt of the arresting creditor accrued before or after the bankruptcy. It is necessary to look to the circumstances of that case, and to compare it with *Grace v. Bishop* (25 Law J. Rep. (n.s.) Exch. 58; s. c. reported as *Grace v. Bishop*, 11 Exch. Rep. 424). The circumstances of the former case were peculiar. It seems that the execution creditor was an accommodation acceptor; and, as I infer from the report of the case, the bill was drawn before,

but became due and was paid after the bankruptcy. The case was peculiar, because it was a case where the original liability was incurred by the bankrupt before his bankruptcy, and where, although the payment was made by the execution creditor, who stood in the position of surety for the bankrupt, after the bankruptcy, proof of such payment could be given under the bankruptcy. It is true that when Lord Kenyon decided the case there was no statutory provision in force—as I supposed during the argument, and Mr. Baron Platt seems to have supposed in *Grave v. Bishop* (25 Law J. Rep. (N.S.) Exch. 58; s. c. reported as *Grace v. Bishop*, 11 Exch. Rep. 424)—similar to the 49 Geo. 3. c. 12. s. 8; but in turning to 2 *Christian's Bankrupt Laws*, 2nd edit. 354, which is the touchstone in these matters, whilst I find that this statute was the first statute containing a provision which allowed sureties who paid after the examination to prove under it, I also find a series of authorities (the first decided in 1791, which was two years, and the second in 1792, one year before Lord Kenyon's decision) which decided that the Lord Chancellor in Bankruptcy would give relief to the surety by making the creditor prove as trustee for him. Mr. Christian doubts the soundness of this; but it is clear that in Bankruptcy the difficulty as to proof by a surety paying after bankruptcy, was got over. This being so, the case of *Darby v. Baugham* (5 Term Rep. 209) does not seem so much opposed to *Grave v. Bishop* (25 Law J. Rep. (N.S.) Exch. 58; s. c. reported as *Grace v. Bishop*, 11 Exch. Rep. 424) as would at first appear. Now, unless *Darby v. Baugham* (5 Term Rep. 209) is to be explained in the way I have pointed out, *Grave v. Bishop* (25 Law J. Rep. (N.S.) Exch. 58; s. c. reported as *Grace v. Bishop*, 11 Exch. Rep. 424) is a decision on the very point decided by it, because, although there is a difference between the two statutes, 5 Geo. 2. c. 30, and the Bankrupt Law Consolidation Act, 1849, yet that difference does not touch the point which we are at present discussing; for the only difference between the two statutes is, that the latter extends the time during which protection can be afforded to the bankrupt, but the latter statute does not either enlarge or restrict the class against whom the bankrupt is to be protected. And the present case can only be distinguished from *Grave v. Bishop* (25 Law J. Rep. (N.S.) Exch. 58; s. c. reported as *Grace v. Bishop*, 11 Exch. Rep. 424), which was decided on section 112. of the Bankrupt Law Consolidation Act, 1849, on the ground that there the protection was claimed after the bankrupt had passed his last examination. But the language of the statute as respects the persons to be bound is the same, and we cannot give the word "creditor" two meanings according as the arrest is before or after the last examination; the case of *Grave v. Bishop* (25 Law J. Rep. (N.S.) Exch. 58; s. c. reported as *Grace v. Bishop*, 11 Exch. Rep. 424) is, therefore, in point. And on the question of authority the matter stands thus: that if *Darby v. Baugham* (5 Term Rep. 209) be not explainable in the way I have pointed out, then we have a case decided in the year 1793 one way, and another case decided in 1855, after full discussion, the other way. And we must adopt the latter, and act on it if it be irreconcilable with the former.

MONTAGUE SMITH, J.—I am of the same opinion. No question arises here as to the defendant's right at common law to be discharged from custody, for he was not going to, attending, or returning from the Commissioners, or engaged in any business relating to the bankruptcy. He was in his lodgings, and was there arrested. The question must depend on the proper construction to be put on the Bankrupt Law Consolidation Act, 1849. I think on the question of construction we are bound by the case of *Grave v. Bishop* (25 Law J. Rep. (N.S.) Exch. 58; s. c. reported as *Grace v. Bishop*, 11 Exch. Rep. 424), which does not seem distinguishable, and in which the Court, after taking time to consider, discharged the rule. Mr. Nasmyth, who has argued ably for the defendant, confessed he had no authority in his favour on the construction of the statute, and the only decision he has relied on is one of Lord Kenyon's, in the case of *Darby v. Baugham* (5 Term Rep. 209). I think that case is to be supported on the reasons given by my Brother Willes, and that the decision

turned on the fact that in a sense the plaintiff there was a creditor for a debt which accrued before the bankruptcy, and this conclusion is fortified by the case of *Grave v. Bishop* (25 Law J. Rep. (N.S.) Exch. 58; s. c. reported as *Grace v. Bishop*, 11 Exch. Rep. 424), in the Court of Exchequer. The proper construction of the statute seems that put on it by my Brother Willes. The word "creditor" is used in various places throughout this statute, which is one which gives a certain jurisdiction over previous creditors and a bankrupt. Is there any reason why we should read this word in section 112. in a more extended way than in other parts of the statute? I can see no reason. Mr. Nasmyth endeavoured to draw a distinction between an arrest previous and one subsequent to the last examination. But he must admit that the right of the Commissioners to grant protection is extended beyond the examination; and, therefore, all his reasoning as to the legislature meaning to protect the bankrupt in the way he contends during the proceedings preparatory to such examination fails. The legislature meant to give protection after the examination, and therefore extended it to such time after as the Commissioner shall allow. And why should he have a right to deal with subsequent creditors? In granting the bankrupt protection against previous creditors he would be governed by the statements of the creditors over whom he had jurisdiction, and the bankrupt whose estate he was administering. But with respect to subsequent creditors he has no power or means of inquiring, and great mischief would arise if he were to grant protection as against subsequent creditors without knowing the circumstances. I therefore think that the protection given by section 112. is confined to those who are creditors of the bankrupt at the time of the fiat, and who might come in under the bankruptcy. The authorities do not conflict with this view. The case of *Ex parte Freston* (30 Law J. Rep. (N.S.) Chanc. 460; s. c. 30 Law J. Rep. (N.S.) Q.B. Rep. 133; 30 Law J. Rep. (N.S.) Exch. 89) has no application to the present case, as there the execution creditor had proved, and I think that there was no privilege of arrest here, and therefore that this rule should be discharged.

Rule discharged.

[IN THE COMMON PLEAS.]

Jan. 27, 1866.

CRAFTER v. THE METROPOLITAN RAILWAY COMPANY.

35 L. J. C.P. 182; L. R. 1 C.P. 300; 14 W. R. 334; 12 Jur. N.S. 272.

Approved, *Rigg v. Manchester, Sheffield & Lincolnshire Railway*, 1866, 14 W. R. 834; 12 Jur. N.S. 525 (C.P.). Referred to, *Great Western Railway v. Davis*, 1878, 39 L. T. 475 (Ex. D.).

Railway—Negligence—Staircase.

CARRIERS.—*The defendants had a staircase at one of their stations for the use of passengers; it led from the arrival platform to the street, was about six feet wide, had walls on each side, and had wooden steps nosed with brass, which had become smooth from use. The plaintiff, who together with large numbers of others had used these stairs without accident for months, slipped and hurt himself; and in an action for negligence against the defendants, he relied on the evidence of a builder who said that he thought brass dangerous, that lead would be proper and less slippery, and that there should be a hand-rail:—Held, there was no evidence of negligence to go to the jury.*

The first count of the declaration stated that the defendants were possessed

of a staircase leading to a station of their railway, on which the public using the railway were invited to walk, and that it was their duty so to keep it that the public using the railway on their invitation might safely pass up and down the staircase; and that they neglected their duty, and so negligently kept the staircase that it was dangerous to persons passing along and so using the railway; and that the plaintiff, who was passing down the staircase for the purpose of using the railway by their invitation, fell and was thrown down the staircase and received certain specified injuries. The second count stated that the defendants were carrying passengers for hire on their railway and used a certain station for the reception and accommodation of the passengers; that the station was in their possession and under their management, and that they negligently managed the station, and kept the station staircase and approaches in a dangerous and slippery state, and did not provide hand-rails or sufficient accommodation for safe access to the carriages, and that the plaintiff having been received by them as a passenger, fell and was thrown down the staircase, and received certain specified injuries.

The defendants pleaded not guilty.

At the trial, it appeared that the staircase was about six feet wide, with a wall on each side, and that its steps were of wood, with brass nosings about 2½ inches wide, which were said to have become additionally slippery by wear. The staircase led from the arrival platform of one of the stations to the street, and the plaintiff in ascending slipped on the brass nosing of one of the steps, fell and was injured. This staircase had been used by the plaintiff every day for some months (ever since the opening of the railway) without complaint or injury, and between 40,000 and 50,000 passengers per month had also without accident passed up the staircase. The plaintiff relied on the evidence of a builder, who was called to state that brass nosings were improper on such a staircase, that lead would be the proper material, as being less slippery, and that there should be hand-rails.

A verdict was found for the plaintiff, with leave to the defendants to move to enter a nonsuit, on the ground that there was no evidence of negligence to go to the jury.

A rule having been obtained pursuant to such leave, and also for a new trial, *Huddleston* and *H. James* shewed cause.—There was evidence here of negligence. It was proved at the trial that brass was an improper and unsafe material for nosing such steps as these, and the decision of this matter was especially within the province of the jury. This case cannot be distinguished from *Longmore v. the Great Western Railway Company*,¹ where it was held that the question of the proper construction of a bridge could not be withdrawn from the jury, although the bridge had been used for years by thousands of persons without accident, and the way in which the injured person slipped through a space in the railing was the most unforeseen accident that could well be imagined.

Hawkins and *Horace Lloyd*, in support of the rule.—There was no evidence to go to the jury. There was no pretence for saying the staircase was out of order, and the only evidence relied on by the plaintiff was the expression of opinion, by a builder in a small way of business, that it would have been safer to have nosed with lead and erected a hand-rail; and this although thousands of persons and the plaintiff himself had used it for months without accident. This case falls within *Tooney v. the London, Brighton and South Coast Railway Company*² and *Cornman v. the Eastern Counties Railway Company* (29 Law J. Rep. (N.S.) Exch. 94; s. c. 4 Hurl. & N. 781). In the former case the plaintiff, having been directed by a stranger, went to the lamp-room instead of the urinal, and fell down some steps, and it was held that there was no evidence of negligence to go to the jury, Willes, J. saying, "It ought to have been shewn the steps were more than ordinarily dangerous. . . . It is impossible for any one so

(1) See this case, 35 L. J. C.P. 135.

(2) 27 Law J. Rep. (N.S.) C.P. 39; s. c. reported as *Toomey v. the London, Brighton and South Coast Railway Company*, 3 Com. B. Rep. N.S. 146.

to dispose his property that a man may not, by accident or negligence, injure himself upon it." In the latter case there was the same ruling respecting an accidental fall over a weighing machine on a railway platform; all the Judges laying stress on the fact that the machine had been there for five years, could be plainly seen, and might be fairly considered to be safely situated, and that a mere scintilla of evidence would not do, but there must be reasonable evidence from which a jury might infer negligence. To use the expression of Martin, B., "If this accident had occurred in a timber-yard no jury would have found negligence against the owner of it; but many persons think that if an accident happens within the gates of the premises of a railway company, there should always be a verdict against them."

ERLE, C.J.—I am of opinion that this rule should be made absolute, because I think there was no evidence to go to the jury of actionable negligence, and I draw a distinction between the present case and those referred to in argument both from the nature of the structure and the ground of complaint as to that which was not supplied, namely, the hand-rail. With regard to the nature of the structure, these were common wooden stairs, some 6 or 8 feet wide, with the ordinary rise to go up, and some $2\frac{1}{2}$ inches of a strip of brass, or what they call a nosing to the steps. In my judgment, according to common experience, this was an ordinary structure; there was nothing of a peculiar nature about it, nothing like a trap-door, or a way of falling through the railing. There was a wall on both sides, and the passenger had only to lift his foot from step to step. The brass, having become smooth, was said to be slippery at times, and there was evidence that lead would be less slippery than brass. In my opinion, the persons who admit passengers to walk up such stairs as these, whether of wood or of wood with brass upon it, are not liable to an action because certain witnesses come and say they think that lead would have been safer. With regard to the question of the hand-rail, I am of opinion that from the nature of the structure the passengers going up this staircase had no right to claim that there should be a hand-rail, which, in truth, could only be used by those passengers who went up nearest to the wall, as of necessity several would go up abreast, and only one could use the hand-rail. It was not a thing that ordinary people would demand, and there is no law that requires of a railway company to gratify such a demand. This was an ordinary structure, and in an ordinary state and condition; there was nothing at all of a peculiar nature about it, and those using it could see what it was that had to be guarded against. Perhaps there may be a distinction where a man has to descend from a height with an open balustrade and there is a possibility of falling down from a considerable height; but this was an ordinary staircase. I am further of opinion that even if there be a scintilla of evidence that there was a cause of complaint, still the plaintiff had perfect notice and knowledge of the nature of the structure; he had full knowledge of the place, was using it with full knowledge of what it was, and he has no reason to complain. The plaintiff had used this staircase every day from the time of the opening of the line of railway, a period of some eighteen months; and we are told that some 40,000 passengers a month have used the staircase ever since it was opened. I think he has no right to maintain an action because he would have found more convenience if there had been a hand-rail, and less slipperiness if there had been lead instead of brass in the front of the steps.

WILLES, J.—I am of the same opinion. It was incumbent on the plaintiff to give reasonable evidence, evidence from which the jury should come to the conclusion that the defendants had supplied an improper structure. The question comes to this, whether it was improper for the reasons which have been stated to face these steps with brass. The only evidence that was given was the evidence of a builder, who said, in effect, that lead was better than brass, and that in his opinion brass was dangerous. There is hardly any structure that one meets with in one's passage through life as to which you may not be able to call some one who will say it is dangerous. We must read the evidence

by the light of that common experience which everybody has. We must take into account that the plaintiff must be considered to have known that which everyone knows, that brass is used for nosing such stairs as these, because he had used these stairs over and over again without objection. He does not deny that he knew brass was used. Taking all the circumstances together, this is nothing more than an attempt to make persons use a particular sort of material in constructing their stairs at the place where they carry on their business, instead of the material which they have used, and which they use in common with a great number of mankind in hotels, and steamboats, and other places where everyone has seen brass used. I think, therefore, there was no evidence that could properly have been left to the jury. I think this case is to be amply distinguished from the case of *Longmore v. the Great Western Railway Company*.¹ The charge there consisted of there being an apparent rail for the protection of persons who might slip on a wooden bridge, whereas, in fact, the rail, instead of being any protection, offered none at all, and there was a hole through which the husband of the plaintiff fell and received the injury as to which damages were sought to be recovered. In that case there was a trap, whilst here the usual mode of constructing stairs had been adopted. I think the rule ought to be made absolute to enter a nonsuit; but for the purpose of meeting any future steps which may be taken, the remainder of the rule with respect to a new trial must stand over and be reserved.

KEATING, J.—I have felt some difficulty, I confess, in this case in distinguishing it from the case of *Longmore v. the Great Western Railway Company*,¹ I cannot say that that difficulty is wholly removed; but these cases present questions of mere degree, and as my Lord and my two learned Brothers are of opinion that there is a distinction between the two cases, I therefore am not disposed to dissent from the judgment of the Court.

MONTAGUE SMITH, J.—I am of opinion that a nonsuit should be entered in this case. I think that a line must be drawn between suggestions of possible precautions that may be taken and evidence of negligence which is reasonable and proper to go to the jury. It may be very difficult to know where to place that line; but I think in this case that the facts lie on the side of mere suggestion of possible precautions, or possible alterations, which might have been made, and which would have rendered the staircase more absolutely safe, and that there was no evidence at all of anything which amounted to negligence to go to the jury. There was nothing unusual in the staircase, and as the staircase, such as it was, with the brass nosing and want of a hand-rail, was obvious to everyone, and must have been perfectly well known to the plaintiff, it seems to me, therefore, that the evidence of negligence failed, and that the plaintiff in using this structure, such as it was, cannot complain of this accident, which was not of an unusual or peculiar kind, but an accident of a description which happens on all staircases, however they may be constructed, that is, that a man slips upon them. I think the case of *Longmore v. the Great Western Railway Company*¹ may be distinguished from the present. In that case there was an aperture in the rails of the staircase, which was undoubtedly dangerous; a hole, so that a man might fall through. It was not obvious to anyone using it, that by slipping on the staircase he might fall through; and the consequences of falling through an aperture of that sort would, of course, be very serious, as they were in that case. With regard to the expression one of the witnesses used, that the stairs were dangerous by reason of the brass nosing, that is really merely an expression of opinion, and it is not strictly admissible for a witness to give evidence as to his opinion, although, no doubt, it is an expression very commonly used by witnesses. Although we are not here to assume that which is the undoubted province of the jury, yet the Court are bound to see in every case that there was sufficient and proper evidence to go to the jury, and to ask their opinion upon. In this case, I think, there was not such proper evidence, and therefore that the verdict must be entered as is sought for by the rule.

Rule absolute to enter a nonsuit.

[IN THE COMMON PLEAS.]

May 31, 1865.

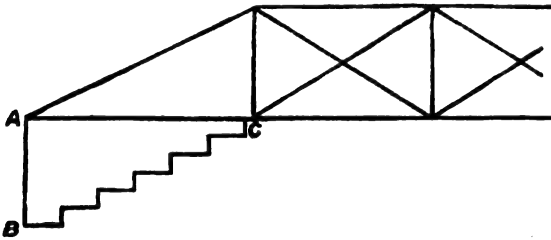
LONGMORE v. THE GREAT WESTERN RAILWAY COMPANY.

35 L. J. C.P. 135; 19 C.B. N.S. 183.

See *Crafter v. Metropolitan Railway*, [1866] E. R. A. 1541; 35 L. J. C.P. 132; L. R. 1 C.P. 300; 14 W. R. 334 (C.P.). Referred to, *Lay v. Midland Railway Co.*, 34 L. T. 30 (Ex. D.).

CARRIERS.—This was an action, brought by the plaintiff as administratrix, to recover compensation for the death of her husband, who was killed by falling from a bridge belonging to the defendants.

The bridge in question was a wooden one, constructed over the defendants' railway for the use of passengers in crossing the line from one platform to the other. The bridge may be thus described, with the help of a diagram.



The top consisted of a level boarding reaching across the line at a considerable height above it. A person standing on the top of the bridge and desiring to descend on either side would first have to descend a flight of six or eight steps, B C, in line with the top of the bridge; he would then find himself on a square landing, and would then have to turn at right angles and descend a long flight of steps to the platform. The railing of the bridge was on the cross-girder principle, except where the short flights of steps were, and there only one girder was placed, as A C; A B was about 4 feet, and A C between 7 or 8 feet long. The only other way of crossing from one platform to the other was either by crossing the metalled way, or by going out of the station some little distance to a public bridge over the line, crossing this bridge and coming back on the other side of the line and entering the opposite side of the station. This bridge had been used by thousands of persons, and the deceased frequently, without any accident. One night, however, the deceased unfortunately slipped in descending one of the short flights of steps, fell through the aperture A B C, and was killed.

The jury found a verdict for the plaintiff, on the ground that the bridge was not a safe or proper one.

A rule was granted, pursuant to leave reserved to enter a nonsuit, on the ground that there was no evidence of negligence; or for a new trial because the Judge (Keating, J.) did not rule that as there was another bridge, the deceased used the wooden one at his own risk.

Huddleston and Macnamara shewed cause.

W. H. Cooke and H. James appeared in support of the rule.

ERLE, C.J.—I am of opinion that this rule should be discharged. It was a question peculiarly for the jury whether reasonable care and skill had been used in the construction of this bridge for the use of passengers. I am of opinion that there was evidence to go to the jury, and that the Judge would

not have been justified in taking the matter out of the hands of the jury, in whose province it was.

WILLES, J.—I am of the same opinion.

BYLES, J.—I am of the same opinion. The defect was not obvious, and the danger not apparent; it was the nearest way, and the deceased was invited to use it, and it was a question for the jury whether it was an improper structure.

KEATING, J.—I am of the same opinion. The jury might have found no negligence, and I do not say that I should have found the same way as they have done; it was, however, a question for them.

[IN THE COMMON PLEAS.]

BOLTON, *assignee of* PARSONS, *a bankrupt, v.* LANCASHIRE AND YORKSHIRE RAILWAY CO.

Jan. 19, 1866.

35 L. J. C.P. 137; L. R. 1 C.P. 431; 14 W. R. 430; 13 L. T. 764.

See *In re M'Laren; Ex parte Cooper*, [1879] E. R. A.; 48 L. J. Bk. 49; 40 L. T. 105; 27 W. R. 518 (C. A.).

Trover—Stoppage in Transitu.

SALE OF GOODS.—*A. sold to B. goods which were lying at X, one of the defendants' railway stations; a portion were by B.'s order sent to Y, another of the defendants' stations, were there taken by him and were paid for; B. refused to take any more, but A. sent the remainder to Y. to be delivered to him; B. refused to take them and they were sent back to X; A. also refused to take them, and they were again sent to Y, where they remained till B. became bankrupt; A. then directed the defendants to keep them for him, and they did so. In an action of trover by the assignee of B. against the defendants,—Held, that A. had a right of stoppage in transitu, and that the defendants were therefore justified in detaining the goods for him.*

This was an action to recover damages for the conversion, by the defendants, of the goods of the plaintiff, the assignee of the estate and effects of Thomas Parsons, a bankrupt. The defendants pleaded not guilty, and that the goods were not the plaintiff's.

The cause came on for trial, before Shee, J., at the last Spring Assizes, held at Liverpool, for the southern division of the county of Lancaster, when a verdict was found for the plaintiff, for 30*l.* 12*s.* 6*d.* damages, and 40*s.* costs of suit, subject to the opinion of the Court upon the following

CASE.

On the 12th of July, 1864, the said Thomas Parsons bought from Joseph Wolstencroft eleven skips of 32 cop twist, at 2*s.* 9½*d.* per lb. The goods were then lying at the defendants' railway station in Salford, and it was agreed that they should be delivered by Wolstencroft to Parsons in such parcels and at such times as the latter should request. On the 19th of July Wolstencroft sent an invoice to Parsons of the whole of the goods, with the numbers and weights of each skip. On the 22nd of July part of the goods, viz. three skips, were delivered by Wolstencroft at the Brierfield railway station, on the defendants' line of railway, to the order and at the request of Parsons. For some reason which did not appear, Parsons, on the 2nd of August, returned the above invoice to Wolstencroft, and, on the 4th of August, he wrote to Wolstencroft the following letter:

"We decline taking any more of the 32 twist, whatever the consequence may be. It is so bad we cannot get out winders and warpers to work it. If you have sent the four skips off, we shall return them."

On the same day, Wolstencroft wrote to the defendants the following letter:

"Order to Messrs. the L. & Y. Railway Company, Salford station, by Joseph Wolstencroft.—Gentlemen, Please send to Thomas Parsons, Brierfield station, four skips out of the eleven lots marked, &c. Please send them off to-day and oblige," &c.

On the 16th of August Parsons paid Wolstencroft 95*l.* for the three skips delivered on the 22nd of July, and took from him a receipt. It is admitted that, as to the three skips, there was no objection made by Parsons, except as to the weight, and this was allowed for in the 95*l.* It is also admitted that, at the time the three skips were ordered to be delivered to Parsons, the whole eleven skips were lying at the defendants' railway station in Salford. On the 17th of August Wolstencroft sent to Parsons an invoice of the remaining eight skips, which particularized them, and contained the following statement: "Four skips of these skips have been sent to Brierfield station according to your wish; the other four are lying at Salford station, waiting your instructions; whatever is wrong in the weights shall be made right." And on the same day that Parsons received the above he returned it to Wolstencroft, with the following letter:

"We wrote you on August 4, by train, we should not take any more of the twist. Therefore, we shall not have any more of it, as we cannot get it worked. We return you the invoice." Parsons allowed the four skips therein mentioned to remain at Brierfield station, and instructed his carter not to remove them. On the 27th of August Parsons received a letter from Wolstencroft's attorney, demanding payment of 301*l.* 12*s.* 1*d.* and threatening an action. On the 1st of September Wolstencroft delivered the following order to the defendants: "Order to Messrs. the L. & Y. Railway Co., Salford station, by J. Wolstencroft. Gentlemen,—Please deliver to Mr. Thomas Parsons, Brierfield station, the remaining four skips, lying in 20 Arch . . . to-day. Yours, &c." On the 2nd of September Parsons's carter, without his knowledge, took away from the Brierfield railway station the four skips last sent by Wolstencroft, but these were at once returned by Parsons. On the same day he consigned the whole eight skips from the Brierfield station to Wolstencroft, and got from the station-master a memorandum of receipt of the goods. On the same day the whole eight skips were sent by the defendants from the Brierfield station to Salford, to the order of Wolstencroft; but he refused to receive them, and they were sent back to Brierfield, and on the 6th of September the defendants sent a letter to their station-master at Brierfield, telling him of the refusal and directing inquiry to be made of the sender, and on the 7th of September sent the following letter to Parsons:

"You consigned eight skips to J. Wolstencroft, Manchester, on the 2nd instant; he refuses to take them, stating they are returned goods. Please say how they must be disposed of." And on the same day Parsons wrote to the defendants in answer to the above:

"The eight skips you write about; we cannot give you any information about them; the skips are not ours; we shall have nothing to do with them; they belong to J. Wolstencroft." The eight skips were sent back to the Salford station the same night. Nothing further took place between any of the parties in relation to the eight skips until the 30th of September, on which day particulars of demand for 319*l.* 8*s.* 11*d.*, and a notice requiring payment under the Bankruptcy Act, was served on Parsons by Wolstencroft. It is admitted that 301*l.* 12*s.* 1*d.* only was due on the remaining eight skips.

On the 3rd of October, a trader debtor summons for 319*l.* 8*s.* 11*d.* was served on Parsons, which was made returnable on the 12th of October. On the 4th of October Wolstencroft's attorney wrote to the defendants the following letter:

"Be good enough to retain possession of the under-mentioned skips on behalf of Mr. Joseph Wolstencroft until further instructed. Eight skips marked," &c. The eight skips mentioned in this letter were the skips now in question. It is admitted that Parsons filed an affidavit of his having a good defence on the merits, and on the return of the trader-debtor summons, viz., on the 12th of October, 1864, appeared before the Bankruptcy Court and resisted the application on the said ground, and stated he would stop payment if the summons was proceeded with, and thereupon an order was made for him to give security for the debt and costs of any action which might be brought. On the 19th of October Parsons petitioned the Bankruptcy Court, and on the same day was duly adjudicated a bankrupt. On the same day Wolstencroft wrote to the defendants the following letter:

"The eight skips lying in the cellar at your station, please let them continue there to my order." On the 21st of October the officer of the Court of Bankruptcy demanded the goods from the defendants, and gave them notice not to part with them, as they were claimed by the assignee under Parsons's bankruptcy, and the defendants' clerk thereupon shewed to the said officer an entry in the defendants' books stating that the same goods were claimed by Wolstencroft. On the 21st of October Wolstencroft sent to the defendants an order for the delivery of the goods to him. On the 29th of October the goods were delivered by the defendants to Wolstencroft. The first meeting of Parsons's creditors in bankruptcy for proof debts, was held on the 1st of November, 1864, when Wolstencroft's attorney tendered a proof for 319*l.* 8*s.* 11*d.*, which, being objected to on account of the discrepancy in the amount claimed by the letter of the 26th of August, 1864, and that claimed by the proof, it stood over till the next meeting, and has never since been presented, nor has Wolstencroft proved his debt. On the 5th of December the attorneys for the plaintiff wrote to the defendants a letter demanding compensation for the eight skips. The defendants' attorneys replied that they were instructed to defend any proceedings which might be commenced.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover, and if the Court is of opinion that the plaintiff is entitled to recover, then the verdict which has been entered for the plaintiff is to stand; but if the Court be of a contrary opinion, the verdict which has been entered for the plaintiff is to be vacated, and instead thereof a verdict entered for the defendants.

Holker (*C. Crompton* with him), for the plaintiff.—In the first place, the sale was a sale of specific goods, and the property in them passed to Parsons the bankrupt by the sale. The next and main point is, whether the vendor had a right to stop them on the ground of the transitus not being at an end. It is submitted that he had not, as the transitus had previously come to an end. They had been delivered at the railway station indicated by the purchaser, and their journey had ended notwithstanding the purchaser might have refused to keep them. This is not a case merely of constructive possession in the buyer, but a case in which the transit was actually at an end, and the vendor's right to stop the goods was therefore gone, according to *Lickbarrow v. Mason* (1 Smith's Lead. Cas. 681, 5th ed). The case of *Cusack v. Robinson* (30 Law J. Rep. (N.S.) Q.B. 261) is an authority in favour of the plaintiff. There the goods having been delivered at Fenning's wharf, according to the directions of the purchaser, by carriers whom he named, it was held that they were so under the purchaser's control as to put an end to any right of stoppage by an unpaid vendor, and that there was an actual receipt by the purchaser within the 17th section of the Statute of Frauds, although the purchaser had telegraphed to the vendor that he should send them back as not according to sample, and they were re-delivered by Fenning to the carriers under the purchaser's order. The cases of *Wentworth v. Outhwaite* (10 Mee. & W. 436; s. c. 12 Law J. Rep. (N.S.) Exch. 172) and *Smith v. Hudson* (34 Law J. Rep. (N.S.) Q.B. 145) also shew that the goods being here in the custody of the defendants as warehousemen, and not as carriers, the unpaid vendors had no right to stop them.

Thirdly, it will be contended on the other side, that the vendor had assented to the purchaser's request, and had agreed to take the goods back, and that therefore, with their mutual consent, the contract of sale had been rescinded. It is clear from the evidence that this was not so, and that the vendor never intended to give up his rights as vendor or to put an end to the contract, but only to hold the goods until he had been paid for them.

Brett (J. A. Russell with him), for the defendants.—The plaintiff, who is assignee, cannot be in a better position than Parsons the bankrupt. The first question is, whether the property passed at all, and it would seem that this was not a sale of specific goods, and that any goods might have been delivered by the vendor. But, secondly, if the property did pass, yet, not only had the vendor the right to stop the goods *in transitu*, but the vendee agreed that he might stop them.

Holker, in reply.—It is impossible to say that the transitus continued during the month the goods were at the station; the railway company must therefore have been warehousemen, and they must be considered the warehousemen of the vendee, as the station was the place of receipt designed by him—*Smith v. Hudson* (34 Law J. Rep. (N.S.) Q.B. 145), *Wentworth v. Outhwaite* (10 Mee. & W. 436; s. c. 12 Law J. Rep. (N.S.) Exch. 172) and *Dodson v. Wentworth* (5 Scott, N.R. 832).

ERLE, C.J.—I am of opinion that our judgment should be for the defendants. The action is brought by the assignee of a bankrupt named Parsons, who claims the property in certain skips of twist. As far as the contract is concerned, Parsons before his bankruptcy was entitled to the property in them, but when he became bankrupt they were not in his possession, but in that of the defendants the railway company. The point to be decided is, whether the vendor was entitled to claim as unpaid vendor the right of stoppage *in transitu*. I assume that it is probable that the goods were to be delivered to Parsons at the Brierfield station; three skips arrived there, and were taken by his consent to his warehouse, and no question arises as to these. The others afterwards arrived at Brierfield, but had not ceased to be *in transitu*; before they arrived notice had been given by the vendee that he intended to dispute his liability to take them, and after they arrived orders were given to the defendants to take them back. The vendor refused to receive them, and, being refused both by vendor and vendee, they remained in the defendants' the railway company's hands. I am of opinion that they never ceased to be *in transitu*. *James v. Griffin* (2 Mee. & W. 623; s. c. 6 Law J. Rep. (N.S.) Exch. 241) shews that the intention of the vendee is material. Again, in *Whitehead v. Anderson* (9 Ibid. 529; s. c. 11 Law J. Rep. (N.S.) Exch. 157), Parke, B. says, "The question is *quo animo* the act is done. My notion has always been that the question is, whether the consignee has *taken* possession, not whether the captain has *intended* to deliver it." Now it is clear that in this case, when the goods were at Brierfield, the vendee never intended to take possession. Some of the goods, it is true, were taken to his premises; but that was clearly contrary to his intention, and by a mistake of his carter, and therefore it is just the same as if they had been taken by a wrongdoer. He never intended to take possession of them. Mr. Holker relied on the ground that the railway company were warehousemen for the real owners. Carriers, no doubt, may become warehousemen for the consignee, and in many cases do; but there must be a change from their position as carriers to the position of warehousemen, and the parties concerned must make this change; but there was no contract here to make the railway company warehousemen, and therefore, under the circumstances, I am of opinion that there should be judgment for the defendants.

WILLES, J.—I am of the same opinion. One fact is peculiarly in favour of the defendants. All the skips were at one time warehoused with them for the seller, a fact which distinguishes this case from *Cusack v. Robinson* (30 Law J. Rep. (N.S.) Q.B. 261). The persons with whom the goods were warehoused

for the seller were also the persons who were to transfer them to the buyer. We have, therefore, first to consider the question of whether this agency for the seller had ceased, and if it had ceased, how it did cease. It is said that it ceased by the seller saying to the railway company, "Hold no longer for me; I put an end to your holding for me, and you must hold for the buyer"; and that therefore the railway company must be considered to hold for the buyer. But what is the just construction of what took place? If the goods were of a kind that the seller could think fit to get rid of altogether, and of which he could think fit to lose the security, it might possibly be considered that he meant, "I will abandon the goods, and will not have them, even if the buyer will not take them." But inasmuch as they were valuable goods, and it would seem the last thing he could intend that he should throw them away, I think such a direction must be considered to mean, "I insist that the buyer shall take, but if he absolutely will not, do not throw them away, but continue to hold for me as before." It is especially a question for a jury whether this was not the true intention of the seller. No doubt the property passed; indeed, a difficulty could never arise unless it did. The effect of that is, that the buyer is at the risk of the goods, and the expense of insurance would fall on him; but it does not follow that, in such a case as this, the possession is to be delivered unless the price be paid; and the lien attaches as long as the goods are in the hands of an agent for the seller. But if the carrier be the agent for the buyer, the bare lien is gone by a delivery to him, even if there were a sale for cash. But a right to stop *in transitu* upon bankruptcy, even where credit has not expired, remains till the goods are delivered to the buyer or his agent for custody, or for sending the goods upon a new journey or destination, or for a purpose other than carriage upon the original transit. Until one or the other happens the seller has a right of stoppage *in transitu*; the right exists unless it be lost by acceptance of the goods by the purchaser or his agent for custody or a new purpose other than that of carriage. But it is besides to be observed, that the arrival, in order to do away with the right of stoppage *in transitu*, must be such a one that the buyer has actual or constructive possession, and this cannot be whilst the buyer repudiates the goods. These are the elements of the law of stoppage *in transitu*. Apply these doctrines to the facts of the present case, and it is clear the transitus was not at an end. There is also a by-point, viz., the part delivery of the goods. Different opinions have been held on the question of whether a part delivery is a constructive delivery of the entire goods comprised in the contract, so as to put an end to the right to stop *in transitu* as to the whole of the goods. At one time it was held that there was a constructive delivery of the whole. This, however, has since been questioned and dissented from; and it has been said only to be a constructive delivery of the whole if the vendor gives and the vendee takes possession of part, meaning thereby respectively to give and take possession of the whole. I think this is a plain case when the facts are understood.

KEATING, J.—I am of the same opinion, for the reasons already given.

MONTAGUE SMITH, J.—I am of the same opinion. The question is one of fact. It is not disputed that if the goods were in the possession of the defendants as carriers the right of stoppage existed. The only question is, whether, on the facts, though in one sense at an end, the transitus was completely ended. The point strongly urged was, that the railway company were warehousemen for Parsons; but they could not be so without his consent, and it is clear that he never intended to take, and would have resisted to the end but for his bankruptcy.

Judgment for the defendants.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Common Pleas.)

Feb. 6, 1866.

LOCK v. FURZE.

35 L. J. C.P. 141; 1 H. & R. 379; L. R. 1 C.P. 441; 15 L. T. 161; 14 W. R. 403: affirming, 34 L. J. C.P. 201; 19 C.B. N.S. 96; 12 L. T. 731; 13 W. R. 971; 11 Jur. N.S. 726 (C.P.).

Referred to, *Wigsell v. School for Indigent Blind*, [1882] E. R. A.; 51 L. J. Q.B. 330; 8 Q.B. D. 357; 46 L. T. 422; 30 W. R. 474 (Q.B. D.). Distinguished, *Wallis v. Hands*, [1893] E. R. A.; 62 L. J. Ch. 586; [1893] 2 Ch. 75; 68 L. T. 428; 41 W. R. 471 (Ch. D.). See *In re Gray*, [1901] E. R. A.; 70 L. J. Ch. 133; 84 L. T. 24; 49 W. R. 298 (Ch. D.).

Lease—Action for Breach of Covenant for Quiet Enjoyment—Interesse Termini—Measure of Damages.

LANDLORD AND TENANT. VENDOR AND PURCHASER.—*The plaintiff being in occupation of premises under a lease from J. F., which would expire on the 4th of December, 1864, obtained from J. F. a reversionary lease for twenty-one years and twenty-one days, to commence from the said 4th of December, 1864, on payment of a premium. In November, 1863, J. F. died. It then turned out that he had no power to grant this reversionary lease, and thereupon F. V., who was entitled to the premises on the death of J. F., refused to ratify it, and the plaintiff was obliged to accept a lease from F. V., to commence on the 25th of December, 1864, for seven years only, at a greater rent. The plaintiff brought an action against the executor of J. F. on a covenant for quiet enjoyment contained in the void lease:—Held, that the plaintiff was entitled to be indemnified for what he had lost by the breach of covenant, and that under the circumstances the difference between the value of the two leases might be used as a test of the amount of the damages he was entitled to.*

This was an appeal by the defendant against the judgment of the Court of Common Pleas discharging the greater part of a rule of that Court, obtained by the defendant.

The facts will be found fully stated in the report of the case below (34 Law J. Rep. (N.S.) C.P. 201), and the following statement will be found sufficient for the present report.—

The action was brought against the defendant, as the executor of John Furze, for breach of a covenant for quiet enjoyment, in a lease dated the 14th of February, 1860, whereby John Furze, in consideration of 400*l.*, demised to the plaintiff certain premises from the 4th of December, 1864 (when a then existing lease to the plaintiff would expire) for twenty-one years, at a rent of 175*l.*

The first count of the declaration was founded on this covenant, and alleged that Frances Vickers, who claimed through John Furze, had threatened to evict the plaintiff, who had been obliged to accept from her a lease for only seven years, at a rent of 300*l.*, had been put to expense, and lost the 400*l.* There was a second count for money had and received.

The defendant pleaded to the first count, secondly, that the plaintiff had never entered into possession of the premises under the lease; fourthly, that Frances Vickers did not demand them from the plaintiff or oust him; and to the second count payment into court of 417*l.*, and never indebted to the residue.

On these pleas issue was joined, and there was a demurrer to the second plea. At the trial, the first count of the declaration was substantially proved,

and also the second plea. The money paid into court was the 400*l.* premium and 17*l.* for the expenses of the void lease; the plaintiff, however, claimed between 1,500*l.* and 1,600*l.* for damages for the difference in value between the two leases, and 65*l.*, the expense of the new lease.

The learned Judge, in summing up, told the jury, in substance, that the covenant having been broken, the plaintiff under the circumstances was entitled to be indemnified for what he had lost under that breach of covenant, and to recover the difference in value between the old and new leases.

The jury found a verdict on the first count for the plaintiff for 1,522*l.* (which included the 65*l.*) and for the defendant on the second; and leave was reserved to the defendant to move to set aside the verdict on the second and fourth pleas, and to reduce the verdict by 65*l.*

A rule was (in the terms set forth in the report below) afterwards obtained pursuant to such leave, and also for a new trial on the ground of misdirection; and it was agreed that the demurrer should be argued with the rule. The Court of Common Pleas decided the demurrer in favour of the plaintiff, and made the rule absolute to enter a verdict for the defendant on the second plea and to reduce the damages by 25*l.*, but discharged the residue of the rule, with leave to the defendant to appeal on the main point as to the principle of damages; and the question submitted to the Court of Appeal was, whether the damages should be reduced, and if so, whether to nominal damages or 25*l.*

Garth, for the appellant (the defendant below).—The question is, how the damages are to be assessed; and it is contended that as this was the sale of an *interesse termini*, and the plaintiff was never in possession under the deed of conveyance, the same rule applies as that which holds good where a sale of lands goes off; and that, therefore, only the money paid (*viz.* 400*l.*) and the expenses are recoverable. There is no direct authority to be found in the English books, but there is a large number of American authorities on this point. The state of the law on this question is elaborately discussed in 4 *Kent's Commentaries*, 10th edit., part 6, lec. 67, and the author says, "The ultimate extent of the vendor's responsibility, under all or any of the usual covenants in his deed, is the purchase-money, with interest; and this I presume to be the prevalent rule throughout the United States."

[BLACKBURN, J.—But in the note, after stating that it had been held in Massachusetts that the true measure of damages was the consideration-money and interest, he says that this was formerly the rule also in South Carolina, but that now the rule is there settled according to the English common law doctrine. So that he evidently considers that the English law is contrary to the prevalent doctrine in America.]

In *Staats v. Ten Eyck's Executors* (3 Caines, 111) Kent, C.J., said, "Upon the sale of lands the purchaser usually examines the title for himself, and in case of good faith between the parties (and of such cases only I now speak) the seller discloses his proof and knowledge of the title. The want of title is therefore usually a case of mutual error, and it would be ruinous and oppressive to make the seller refund for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be, if that rise was owing to the taste, fortune or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser without the hazard of absolute ruin." And in *Mayne on Damages*, pp. 98, 99, we find that the author, after citing these words of Chief Justice Kent, goes on to say, "I conceive that the doctrine laid down by Chief Justice Kent is clearly the equitable rule, where the improvements arise from causes of an entirely collateral nature, such as the growth of a town, the formation of a railway, or the like." The reason is, that such events are not in the contemplation of the parties.

[MARTIN, B.—The case of *Robinson v. Harman* (1 Exch. Rep. 855; s. c. 18 Law J. Rep. (N.S.) Exch. 202) is against you.]

There fraud existed, which makes all the difference.

[BLACKBURN, J.—You must shew that you are within the exception laid

down in *Flureau v. Thornhill* (2 W. Black. 1078). CHANNELL, B.—The distinction pointed out in *Sugden's Vendors and Purchasers*, 14th edit., p. 236, seems not to have been sufficiently attended to; there it is said, "Where the purchaser has paid any part of the purchase-money, and the seller does not complete his engagement, so that the contract is totally unexecuted, the purchaser may affirm the agreement by bringing an action for the non-performance of it, or he may disaffirm it and bring an action for money had and received to his use. In this latter action the plaintiff cannot recover more than the money paid, although the estate has risen in value, while it would seem that if the estate has experienced a diminution in value, he can only recover the damages he sustained by the estate not having been conveyed, that being the only money retained by the defendant against conscience. But where, for example, the purchasers have had possession of the property, so that the parties cannot be placed in *statu quo*, the count for money had and received cannot be maintained."]

In *Sedgwick on Damages* (2nd edit), chap. 6, the matter is fully discussed. As to the English law, the author points out that there is hardly any learning on the subject, and that in *Pomeroy v. Partington* (3 Term Rep. 678, note), though the Court did not actually decide the point, they intimated that only the money paid, interest and expenses could be recovered; and as to the American law, he agrees with the account given in *Kent's Commentaries*, and shews that the prevalent American rule arose from the analogy to the ancient real warranty, and the assumed impropriety of applying different rules to covenants for quiet enjoyment and seisin.

[MARTIN, B.—As late as the year 1826, in *Hopkins v. Glazebrook* (6 B. & C. 31), Lord Tenterden said, "I will only say, that if it is advanced as a general proposition that where a vendor cannot make a good title, the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it."]

There is only one English case, viz. *Williams v. Burrell* (1 Com. B. Rep. 402; s. c. 14 Law J. Rep. (N.S.) C.P. 98), which comes at all near the present, and that is distinguishable, because there the lessee had entered and enjoyed the premises under the lease, whereas here there was only an *interesse termini*.

Mellish (*Archibald* with him), for the respondent (the plaintiff below).—A covenant for title is broken the moment the deed is sealed if the vendor really has no title; but a covenant for quiet enjoyment is not broken till the vendee is disturbed; and it would be odd if the damages recoverable were not the loss at the time of disturbance. With respect to the amount in the present case, the difference between the value of the two leases was the proper thing to give. The vendee did the best he could do for himself and all parties in getting the second lease, and it is fair to take the difference as a test of the damages. The true principle was laid down to the jury; and this difference was only used as a fair method of arriving at the amount under the circumstances.

MARTIN, B.—I have a strong opinion that the Court of Common Pleas were right, and so has the Lord Chief Baron, who has left the court. The matter is, in my judgment, clear. The correct rule is laid down, by Parke, B., in *Robinson v. Harman* (1 Exch. Rep. 855; s. c. 18 Law J. Rep. (N.S.) Exch. 202): "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." The deceased, by this contract, bound himself for the existence of a certain state of things; and if this be altered, why should he not pay the difference? It is said that the case of *Flureau v. Thornhill* (2 W. Black. 1078) qualified the rule of the common law; but Parke, B., in *Robinson v. Harman* (1 Exch. Rep. 855; s. c. 18 Law J. Rep. (N.S.) Exch. 202) treats it as an exception. The case of *Sikes v. Wild* (4 Best & S. 421; s. c. 32 Law J. Rep. (N.S.) Q.B. 375) upholds *Flureau v. Thornhill* (2 W. Black. 1078), although Lord Tenterden, then Chief

Justice Abbott, said in *Hopkins v. Grazebrook* (6 B. & C. 31), "If it is advanced as a general proposition that when a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it; if it were necessary to decide that point, I should desire to have time for consideration." Still it is an exception, and why should we extend it? Lord Tenterden is against it; the rule of the common law is against it; why should it be further extended? *Prima facie*, the plaintiff would be entitled to be placed in the same situation as if the contract had been performed; and I am of opinion that the Court of Common Pleas were right.

CHANNELL, B.—I am of opinion that the judgment of the Court below should be upheld. The action is brought for breach of a covenant for quiet enjoyment (as to which it may be parenthetically remarked that there may be a distinction between the consequences of a breach of a covenant for title and one for quiet enjoyment, as the one breach may be said to occur at the time of the contract, the other at the time of eviction); and the question reserved for our opinion is as to the principle on which the damages were assessed. The principle laid down by the learned Judge at the trial, as disclosed by the case, was, that the plaintiff under the circumstances was entitled to be indemnified for what he had lost under the breach of covenant, and to recover the difference in value between the old and new leases. There is a general rule of law, that if a man enters into a contract and fails to perform it, he is to make compensation to the extent of the injury. Where the contract is one *in fieri*, or rescinded, or there is an attempt to enforce it, different considerations may arise which it is unnecessary to discuss. Here the contract was executed as far as possible. The deceased executed the conveyance, which contained a covenant for quiet enjoyment. The plaintiff being in possession under an old unexpired lease, what was actually conveyed was an *interesse termini* no doubt, and no actual eviction was necessary; but still the contract was actually executed, containing a covenant for a given benefit which the testator could not give, and therefore the damages ought not to be limited to what the plaintiff paid. It is true that the difference in value between the old and new leases is not necessarily the amount; but what was done at the trial, as to this, was only a method of working out the principle, and really was in ease of the defendant; as taking the shorter lease was no doubt the best thing to be done under the circumstances.

BLACKBURN, J.—I am of opinion that the decision of the Court of Common Pleas should be affirmed. The general rule is, as laid down by Baron Parke in *Robinson v. Harman* (1 Exch. Rep. 855; s. c. 18 Law J. Rep. (n.s.) Exch. 202), that where a contract is broken the injured person is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. This is the amount of damages where the contract would give the actual enjoyment of a thing, and it is immaterial whether the contract is as to real or personal property. To this rule, however, there is an exception: the origin of which, I take it, was, that in the present complicated state of things no man can be sure that he has a good title to his real property, and therefore it is prudent for him when he is about to sell it, to make it part of the bargain that he shall not be liable to full damages, but that the bargain may be off on repayment of money paid and expenses. That is reasonable; and *Flureau v. Thornhill* (2 W. Black. 1078), and other cases, establish that by custom such a stipulation *tacite inest*. As Mr. Justice Parke said in *Walker v. Moore* (10 B. & C. 422), "A jury ought not, in the case of a vendor in possession, to give any other damages in consequence of a defect being found in the title than those which were allowed in *Flureau v. Thornhill* (2 W. Black. 1078), which was recognized in *Johnson v. Johnson* (3 B. & P. 167), *Bratt v. Ellis* (Sugd. Vend. & Pur. App. 7), and *Jones v. Dyke* (Ibid. 8). In the absence of any express stipulation about it, the parties must be considered as content that the damages, in the event of the title proving defective, shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed

goodness of the bargain." This is the true and only principle on which to support *Flureau v. Thornhill* (2 W. Black. 1078), and the other cases depending on it. There is a tacit agreement in such a case, and it merely saves writing at length. But in the present case there is an executed conveyance, a conveyance of the subject-matter out and out, containing a covenant for quiet enjoyment. Why should this case be out of the ordinary rule? and why should the plaintiff not be compensated for what he has lost, viz. a valuable lease? No English case decides otherwise, or even suggests (unless it be in the note in 3 *Term. Rep.* 678) any such difference as has been here contended for. In America there appears to be considerable difference in the law on this point in the different States; as to which I will only say that it may be in New York and the States where the law is the same that there is a tacit understanding even in such a case as the present, somewhat similar to that which here exists in cases like *Flureau v. Thornhill* (2 W. Black. 1078). The only English decision on the point is in the case of *Williams v. Burrell* (1 Com. B. Rep. 402; s. c. 14 Law J. Rep. (N.S.) C.P. 98), and there Lord Truro gave up the point. I am of opinion that the same rule applies here as in ordinary cases, and that in such a case there is no difference between a contract as to real and a contract as to personal property.

MELLOR, J.—I am of the same opinion. Here there was an actual executed demise with a covenant for quiet enjoyment. The plaintiff was entitled to enjoy the premises for the whole term, but it turned out that the deceased had no title to make such a lease, and on his death his successor avoided it, and the plaintiff was obliged to make a new bargain for a shorter lease at a larger rent. I hesitated, because I doubted whether the true rule had been laid down to the jury. But I think that it may be taken for granted that the obtaining the shorter lease was really in ease of the defendant, and the best thing to be done; and it was not laid down by the learned Judge as a rule that the difference between the value of the leases was the measure of damages, but that this was used merely as a way of working out the true rule laid down to them, that the plaintiff was to be indemnified for what he had really lost. I think, therefore, there was nothing objectionable in the way in which the matter was left to the jury: the true principle was laid down to them, and the taking the difference of value between the leases was only a mode of guiding them as to the proper amount; and I am of opinion therefore that the direction was not erroneous.

PICOTT, B.—I am of the same opinion. I hesitated, however, for some time, because I doubted whether the proper rule had been laid down to the jury. The learned Judge told the jury "that the plaintiff was entitled to be indemnified for what he had lost." That was correct; but he went on to say, "and to recover the difference in value between the old and new leases," and it struck me there was a fallacy in arriving at the damages in that way. I thought that the case differed from the case of an ordinary commercial contract,—as for instance, a contract for cotton, where, if it be broken by non-delivery, a man may go into the market and get more—because I thought the plaintiff ought to shew what he had lost in money, and that this could not be done in such a case as this, as he could not have obtained a similar lease to the void one of this property, and that to take an imaginary lease as a basis would be erroneous. In the result, however, I think this cannot be distinguished from the ordinary case, though it seems to me hard measure.

Decision affirmed.

[IN THE COMMON PLEAS.]

Jan. 19, 1866.

ANGLO-AFRICAN COMPANY (LIMITED) v. LAMZED AND OTHERS.

35 L. J. C.P. 145; 1 H. & R. 216; L. R. 1 C.P. 226; 13 L. T. 796;
14 W. R. 477.*Shipping—Charter-party—Loading of Cargo.*

SHIPPING.—*The provision "charterer's stevedore to be employed by ship" means, that if the charterer appoints one, he is to be employed; but if the charterer does not appoint one, the master must load the ship properly, according to the charter-party.*

These were cross-demurrers to a plea and replication.

The declaration was founded on a charter-party, by which the defendants agreed that their ship should take out a cargo for the plaintiffs to certain places in Africa, deliver it, and there reload such merchandise as should be sent alongside, not exceeding what she could reasonably stow, &c., and carry it to England at a lump freight; and the breach alleged was, that although not prevented by any of the excepted perils, the defendants made default in reloading such lawful merchandise as was sent alongside the ship at the said ports, not exceeding what the said ship could reasonably stow, &c., by reason whereof a great part of the cargo provided for the said ship by the plaintiffs, and which the said ship could and ought to have loaded agreeably to the terms of the said charter-party, was left behind.

The plea set out the charter-party, the only material provision of which was, "charterer's stevedore to be employed by ship," and then alleged that according to the form and effect of the said charter-party, a stevedore was to be provided by the plaintiffs to reload and stow the said ship, which stevedore was to be employed by the defendants for that purpose; and such stevedore being so employed by the defendants as aforesaid, the defendants, according to the usage of merchants, would not be responsible or liable to the plaintiffs for or in respect of any default in such reloading and stowing; and the defendants were ready and willing to perform the said charter-party on their part, and to employ the charterer's stevedore as therein agreed, whereof the plaintiffs had notice; but the plaintiffs did not nor would provide any stevedore for the purpose of reloading and stowing the said homeward cargo according to the said charter-party; and by reason of the default of the plaintiffs in that behalf the master of the said ship was forced and obliged to and did reload and stow the same to the best of his skill and ability, and that the plaintiffs' alleged cause of action is for and in respect of the said ship not having reloaded so much merchandise for the said homeward cargo as she might have reloaded if a competent stevedore had been provided and employed in and about the reloading and stowing of the said cargo; and the defendants say that the alleged breach of the said charter-party was caused by such default of the plaintiffs as aforesaid, and not otherwise.

To this plea the plaintiffs demurred; and also replied that before and at the time of making the said charter-party, and thence until and at the time of loading the homeward cargo there was not any stevedore at the loading-places in Africa, as the plaintiffs and the defendants respectively well knew at the time of making the said charter-party, but there was at the loading-place in England before and at the time of making the said charter-party, and at the time of loading the outward cargo, a number of stevedores, as the plaintiffs and the defendants well knew at the time of making the said charter-party.

To this replication the defendants demurred.

Sir G. Honyman, for the plaintiffs.—The meaning of the stipulation as to the stevedore is merely, that if the charterer chooses to appoint one, he must

be employed by the ship; but if one be not appointed, then it is the duty of the ship-owner to load the ship properly—*Sack v. Ford* (13 Com. B. Rep. N.S. 90; s. c. 32 Law J. Rep. (N.S.) C.P. 12).

Quain, for the defendants.—It is not necessary to contend that it was compulsory upon the charterer to appoint a stevedore; for the plea narrows the breach alleged in the declaration to this, that the only cause of complaint is, that so large a cargo was not loaded as an experienced stevedore might have put on board.

[WILLES, J.—But your plea does not allege that the master loaded a reasonable and proper cargo.]

It is submitted that such an allegation is sufficiently involved in the plea for the purposes of the present contention. The defence is, an experienced stevedore might have put in more; your complaint is merely that we did not put in as much as he could; but as you did not appoint one, it does not lie in your mouth to complain.

ERLE, C.J.—The contract was to load all that the ship could reasonably carry; the ordinary liability. I take it that this was not loaded, according to the allegation contained in the breach. The plea says, the plaintiffs' stevedore was to be employed, and a larger cargo would have been shipped if he had been appointed. It is clear this is no defence. If the plea meant that all was loaded which the ship could reasonably carry, it would amount merely to a denial of the breach. If it only means that more could have been put on board by a stevedore, it assumes that one must be appointed by the charterers; but the stipulation only gives an option to them to appoint one, who is to be employed and paid for by the ship; and if they do not, then the ship-owners are to load in the usual way, with the usual liabilities.

WILLES, J., KEATING, J. and MONTAGUE SMITH, J. concurred.

Judgment for the plaintiffs.

[IN THE COMMON PLEAS.]

Jan. 17, 1866.

SHORT v. SIMPSON AND OTHERS.

35 L. J. C.P. 147; 1 H. & P. 181; 13 L. T. 674; 14 W. R. 307;
12 Jur. N.S. 258.

Applied, *The Nepoter*, [1869] E. R. A.; 38 L. J. Adm. 63; L. R. 2 A. & E. 375; 22 L. T. 177; 18 W. R. 49 (Adm.). Discussed, *Sewell v. Burdick*, [1885] E. R. A.; 54 L. J. Q.B. 156; 10 App. Cas. 74; 52 L. T. 445; 33 W. R. 461 (H.L.). Applied, *Bristol and West of England Bank v. Midland Railway Co.*, [1892] E. R. A.; 61 L. J. Q.B. 115; [1891] 2 Q.B. 653; 65 L. T. 234; 40 W. R. 148 (C. A.).

Shipping—Bill of Lading—Transfer of Right of Action by Indorsement—Bills of Lading Act, 18 & 19 Vict. c. 111. s. 1.

SHIPPING.—The plaintiff having shipped goods on board the defendants' vessel in the port of London, upon the terms of a bill of lading given by the defendants, by which the goods were made deliverable at Bombay to the plaintiff or his assigns, indorsed the bill of lading to A. B. before the arrival of the ship at Bombay, as a pledge for monies advanced to the plaintiff. Such monies having been afterwards repaid, A. B. re-indorsed the bill of lading to the plaintiff, but not until after the goods had arrived at Bombay and had

been delivered there to a wrong person:—Held, that the plaintiff was entitled to sue for such wrong delivery, although the same took place whilst A. B. was the holder of the bill of lading, as by such re-indorsement the plaintiff was remitted to his rights under the original contract with the defendants.

Semble—that by the Bills of Lading Act (18 & 19 Vict. c. 111. s. 1.) the plaintiff, as such indorsee, even if he had not been a party to the original contract, would have been entitled to sue for its breach.

The first count of the declaration stated, that whereas theretofore the plaintiff, at the request of the defendants, caused to be delivered to the defendants, and they received from the plaintiff, certain goods and merchandise of the plaintiff of great value, to be by them, on board a ship of the defendants, safely and securely carried and conveyed by the defendants therein on a voyage, to wit, from the river Thames to Bombay, and there, to wit, at Bombay aforesaid, to be safely and securely delivered for the plaintiff, certain perils and casualties only excepted, for certain freight and reward to the defendants in that behalf, and the defendants were not prevented from so carrying and conveying or delivering the said goods and merchandise by any or either of the perils and casualties aforesaid, and all conditions were fulfilled, and all things happened and all times elapsed necessary to entitle the plaintiff to have the said goods and merchandise safely and securely carried and conveyed and delivered by the defendants as aforesaid, yet the defendants did not safely and securely carry, convey and deliver the said goods and merchandise as aforesaid, but the same by and through the carelessness, negligence and improper conduct of the defendants in that behalf became and were and are wholly lost to the plaintiff, and the plaintiff lost an advantageous market for the same.

The second count stated that by a bill of lading made on the 3rd day of September, 1863, by the defendants and delivered to the plaintiff, the defendants promised the plaintiff that certain goods of the plaintiff in the said bill of lading mentioned, and then shipped on board the ship *Dorothy*, in the port of London, should be delivered at Bombay, in India (certain perils and casualties only excepted), to the plaintiff or his assigns, he or they paying freight for the same, with prime and average accustomed, and the plaintiff indorsed the said bill to the Central Bank of Western India, to whom the property in the said goods thereby passed, and they afterwards re-indorsed the said bill of lading to the plaintiff, to whom the property in the said goods passed; and although the delivering of the said goods as aforesaid was not prevented by any of the perils or casualties aforesaid, and all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiff to maintain this action for the breach thereafter mentioned, yet the said goods were delivered by the defendants to persons not entitled to receive or have the same, and the same have been and are wholly lost.

The third plea to the first count stated that the said goods and merchandise were so delivered by the plaintiff to the defendants and received by them after the 14th day of August, 1855, and that the same were so delivered and received under and subject to the terms of a certain bill of lading then signed for the same by the master of the ship in the first count mentioned, and that the agreement for the carriage, conveyance and delivery of the same was contained wholly in the said bill of lading, and not otherwise, and the defendants say that the said bill of lading was and is in the words and figures following, that is to say:

H M P B B 1/30 30r	}	Shipped in good order and well conditioned by Thomas Short junior in and upon the good ship or vessel called the <i>Dorothy</i> , whereof is master for this present voyage Bruce, and now riding in the river Thames, and bound for Bombay, 31 cases merchandise, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Bombay (the act of God, the Queen's enemies, fire, and all and every other dangers and
-----------------------------	---	--

accidents of the seas, rivers and navigation of whatever nature and kind soever, save risks of boats, so far as ships are liable thereto, excepted), unto order; freight to be paid in London, ship lost or not lost, or to assigns: freight for the said goods with primage and average accustomed. In witness whereof the master of the said ship hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished, the others to stand void.

" Dated 3rd September, 1863.

" Weight and contents unknown. Not accountable for leakage, breakage or rust.

" Benj. Bruce.

" Indorsed per pro. Tho. Short, jun.

" Geo. Short."

That after the shipment of the said goods and merchandise, and before the arrival of the said ship at Bombay, the plaintiff indorsed the said bill of lading to certain persons to the defendants unknown, in order to pass the property in the said goods and merchandise to such persons; and that thereupon, and by reason of such indorsement, the property in the said goods and merchandise mentioned in the first count passed to the said persons, and that the said persons were the holders of the said bill of lading at the time of the committing of the said grievances in the first count mentioned, and the persons entitled to receive the said goods and merchandise were and are the parties entitled to sue the defendants in respect of the grievances mentioned in the said first count.

Replication to the said third plea, that whilst the said persons to whom the plaintiff indorsed the said bill of lading as therein mentioned were the holders of the said bill of lading, the defendants did not at any time deliver to the said persons, nor did the said persons at any time during such period, or at all, have delivery of the said goods and merchandise from the defendants, who have altogether made default in performing their duty and the terms of the bailment in the declaration mentioned, to wit, by delivering the said goods and merchandise to persons not entitled to receive the same, to wit, to persons other than the said persons in the said third plea mentioned, and other than the plaintiff. And, further, that the said bill of lading was indorsed by the plaintiff as in the said third plea mentioned in blank, and not otherwise, and delivered to the said indorsees thereof by the said plaintiff so indorsed in blank, which is the indorsement in the said third plea mentioned, and that after such indorsement and before suit, and whilst the said indorsees thereof in the said plea mentioned were the lawful holders thereof, they, with the intent to pass and revest the property in the said goods and merchandise to and in the plaintiff, thereby redelivered the said bill of lading so indorsed in blank to the plaintiff, with such intent as aforesaid, and so as to pass and revest, and they did thereby pass and revest the said property, and all rights of action in respect of the said goods to and in the plaintiff. And, further, that the said indorsement of the said bill of lading to the said persons in the said plea mentioned was not made with intent to pass, and did not, as between the plaintiff and the said indorsees, pass the absolute property in and an indefeasible right to the said goods and merchandise to the said persons, but with intent to give them, and in pursuance of an agreement between them and the plaintiff to give them a right in the nature of a pledge upon and in respect of the said goods and merchandise by way of further assurance to secure monies advanced and paid by them to the plaintiff. And, further, that before and at the time of the said redelivery of the said bill of lading to the plaintiff the said monies had been repaid to the said persons, and all claims of theirs upon or in respect of the said goods had been and were satisfied.

Rejoinder to such replication, that the said indorsees in such replication mentioned first redelivered the said bill of lading so indorsed in blank as therein mentioned to the plaintiff after the said alleged default of the defendants in the said replication mentioned, and not otherwise, and that at the time of the said alleged default the said indorsees were the holders of the said bill of lading and

the parties entitled to receive the said goods and merchandise and to sue for the non-delivery thereof.

The defendants also demurred to the said third count and to the said replication to the third plea, and the plaintiff demurred to the said rejoinder.

The defendants pleaded also a tenth plea to the third count, which stated that the said bill of lading was made after the 14th of August, 1855, and that the reindorsement thereof by the Central Bank of Western India to the plaintiff was first made after the alleged default of the defendants, and not otherwise, and that at the time of the alleged default the said Central Bank of Western India were the holders of the said bill of lading, and the persons entitled to receive the said goods, and to sue the defendants in respect of such alleged default.

The plaintiff demurred to this tenth plea.

Joinders in the several demurrers.

Dowdeswell, for the plaintiff.—One question is, whether the indorsee of a bill of lading has transferred to him a right of action which had previously accrued. That depends on the construction of section 1. of the 18 & 19 Vict. c. 111, which enacts that every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such indorsement shall have transferred to and vested in him all rights of suit in respect of such goods, as if the contract contained in the bill of lading had been made with himself. But another question arises in the present case, and that is, whether, if the consignor who has indorsed the bill of lading afterwards becomes again the holder of the bill, he is not remitted to his original rights under his contract with the shipowner. The cases of *Thompson v. Dominy* (14 Mee & W. 403; s. c. 14 Law J. Rep. (N.S.) Exch. 320) and *Howard v. Shepherd* (9 Com. B. Rep. 297; s. c. 19 Law J. Rep. (N.S.) C.P. 249) shew, that before the statute 18 & 19 Vict. c. 111, the effect of an indorsement of a bill of lading was only to transfer the property in the goods, but not the contract, and that therefore before this statute the only person who could sue the shipowner for breach of his contract to deliver the goods was the consignor, between whom and the shipowner the contract to carry and deliver had been made. The act of 18 & 19 Vict. c. 111. has, it is submitted, put a bill of lading on the same footing as a bill of exchange, so far as the rights of the parties are concerned, and a vested right of action would therefore pass to the indorsee as well as a future right of action. If it were not so, the inconveniences would be immense; the goods on their arrival might be found in a bad condition from some injury they sustained during the voyage; but the bill of lading perhaps passed through the hands of many indorsees, and if nobody could sue but the person who was the holder at the time when the injury took place (which might be almost impossible to fix), it would often lead to a denial of justice.

The Court then called on

Sir G. Honyman, for the defendants.—It is plain from the pleadings in this case that the goods had been landed at Bombay and had been delivered there to some one before the bill of lading was re-indorsed to the plaintiff. It is therefore submitted that the property in the goods did not pass to the plaintiff by such re-indorsement, and consequently no right of action in respect of them was transferred to the plaintiff by such re-indorsement. Section 1. of the Bills of Lading Act does not say that the consignee is to have every right in respect of the contract contained in the bill of lading, which the original shipper had, but only that every consignee or indorsee to whom the property in the goods mentioned in the bill of lading shall pass by such consignment or indorsement, is to have transferred to him rights of suit in respect of such goods. It is therefore essential for the plaintiffs case that he should make out that the property in the goods passed to him by the re-indorsement. It is submitted that the bill of lading ceased to be a symbol of the goods after the goods had been landed, and that the bill of lading could only be indorsed so as to transfer the property in the goods whilst the goods were *in itinere*—*Lickbarrow v. Mason* (1 Smith's Lead. Cas. 5th edit. p. 710), where it is stated

" that the jury found that by the custom of merchants, bills of lading for the delivery of the goods to the order of the shipper or his assigns are, after the shipment, and *before the voyage performed*, negotiable and transferable by the shipper's indorsement and delivery, or transmitting of the same to any other person; and that by such indorsement and delivery or transmission, the property in such goods is transferred to such other person." So Lord Mansfield, in *Wright v. Campbell* (4 Burr. 2046), says, " If the goods are *bona fide* sold by the factor at sea (as they may be where no other delivery can be given), it will be good." There is nothing in any of the authorities to contradict this; indeed, it seems to be treated as law that the property in the goods would pass only by a transfer made whilst they were *in transitu*, and that it was not competent to do so by any indorsement of the bill of lading after the goods had been landed and delivered. If that be so, then this statute did not transfer to the plaintiff the right of action by the re-indorsement of the bill of lading to the plaintiff under the circumstances which appear in this case. Supposing the goods had gone to the bottom of the sea before the bill of lading was indorsed; the goods having then ceased to exist, no property in them could be transferred, and the statute does not transfer a right of action except where the property in the goods is transferred.

Dowdeswell, in reply.—It is not necessary for the plaintiff to deny the proposition that a bill of lading is at an end after the goods have been landed and delivered according to the terms of the bill of lading. It is alleged in the third count that, by the re-indorsement to the plaintiff, the property in the goods passed, and therefore the right of action passed to him by the re-indorsement.

[*Sir G. Honyman* asked for and obtained leave to amend the pleadings by inserting an averment of delivery of the goods at Bombay to a wrong person before the re-indorsement to the plaintiff.]

A wrongful delivery at Bombay to a person who had no right to have them, would not excuse the defendants or alter the plaintiff's right to the goods—*Jones v. Dowle* (9 Mee. & W. 19; s. c. 11 Law J. Rep. (N.S.) Exch. 52).

ERLE, C.J.—I am of opinion that our judgment should be for the plaintiff. There was here a bill of lading indorsed in blank by the plaintiff as security for money which he had raised on it, so that there was a good indorsee of the bill of lading whilst it was outstanding. Now in that state of things, the bill of lading was re-indorsed to the plaintiff, the money advanced on it having been paid off. I think that without having recourse to the Bills of Lading Act, the plaintiff had again all his rights at common law under the original contract with the defendants. But independently of that, if the party to whom the plaintiff had indorsed the bill of lading in blank had handed it over to a third person, I should have said that such person would have had in him all the rights which could be had under the bill of lading itself, and that the defendants by making a wrongful delivery of the goods, could not have put an end to their liability under the bill of lading.

WILLES, J.—I am of the same opinion. I think that the true construction of the act is, that the rights under the contract may be transferred by indorsement of the bill of lading, and are enforceable so long as the transfer to such indorsee remains in force. When, however, the indorsees of the bill of lading in this case were paid off and the bill of lading was handed back to the consignor, the latter was remitted to the rights he had independently of the statute. I agree too that the defendants cannot mend their position by shewing by their pleadings that they had wrongfully delivered the goods to other persons than those to whom they should have delivered them.

KEATING, J.—I agree that the plaintiff was remitted to his original rights, and that the wrongful delivery of the goods by the defendants can make no difference.

MONTAGUE SMITH, J.—I am of the same opinion. I think that under the

Bills of Lading Act, the rights under the contract pass from one assignee to another. The plaintiff was, however, in this case remitted to his rights under the contract, and he has not been deprived of them by a wrongful delivery of the goods.

Judgment for the plaintiff.

[IN THE COMMON PLEAS.]

Feb. 10, 1866.

CORNER AND ANOTHER v. SWEET.

35 L. J. C.P. 151; L. R. 1 C.P. 456.

Followed, *Bailey v. Brown*, [1876] E. R. A.; 35 L. J. C.P. 151; L. R. 3 Q.B. 133; 14 W. R. 584 (C.P.).

Debtor and Creditor—Bankruptcy Act, 1861—24 & 25 Vict. c. 134.—Deed of Inspectorship—Release—Pleading.

BANKRUPTCY.—*To a declaration on the common money counts, the defendant pleaded that a deed was made between himself and certain inspectors, and the persons who were creditors entitled to prove in bankruptcy; that such deed was an inspectorship-deed within the true intent, &c. of the Bankruptcy Act, 1861; that it provided that when a certain composition was paid, or the inspectors should certify that the estate was fully administered, or that a certain conveyance had been made, the debtor, his estate and effects should be absolutely released and the deed be pleadable as a release, and that, as it was essential to prevent the defendant being harassed, if any creditor should whilst the deed was in force prosecute any action, &c., the deed should have the effect of an order of discharge and be pleadable in bar; that the proper number of creditors had assented; that the inspectors and the defendant had properly executed it; that it had been properly registered and everything happened to make it binding on all creditors; that the plaintiff was a creditor and his debt a debt within the meaning of the deed; and that the deed was in force:—Held, first, that as the deed was sufficiently described to shew it was a deed within the Bankruptcy Act, 1861, and it was averred to be in all respects an inspectorship-deed within its true intent and meaning, it must be taken to be a good deed; and, secondly, that the clause as to pleading the deed in bar was good, and the plea an answer to the action.*

This was a demurrer to a plea.

The declaration was on the common money counts.

Plea—That, before the commencement of this action, and after the 11th of October, 1861, the defendant then being a debtor within the true intent and meaning of the Bankruptcy Act, 1861, and indebted to divers persons, a deed bearing date the 6th of October, 1864, was made and entered into between the defendant of the first part, Elias De Pass Gustavus Sichel and George Hutchinson, thereafter called the inspectors, of the second part, and the several persons, companies and copartnership firms, who at the date of the said deed were respectively creditors of the said defendants, or who would be entitled to prove under an adjudication in bankruptcy against the said defendant on a petition filed on the day of the date of the said deed thereafter called the creditors, of the third part; and that the said deed related to the debts and liabilities of the defendant and his release therefrom, and the distribution, inspection, management and winding-up of his estate, and was in all respects an inspectorship-deed within the true intent, meaning the provisions of the

Bankruptcy Act, 1861; and that by the said deed it was provided and declared that, if and when the composition or sum of 10s. in the pound upon their respective debts should have been paid to the said creditors respectively, or if and when (though the said sum might not have been paid) the said inspectors or inspector should certify by writing under their or his hands, to be indorsed upon or refer to the said deed, that the estate of the said debtor had been fully administered according to the provisions thereof to the satisfaction of the said inspectors or inspector, or if and when the said inspectors or inspector should in like manner certify that the said debtor had made such conveyance, assurance or assignment as in the 21st clause of the said deed mentioned. which said certificate the said inspectors or inspector should be bound to give immediately upon such conveyance, assurance or assignment as aforesaid being made, then and immediately upon such composition being paid or (as the case might be) upon either of the said certificates as aforesaid being given, the said debtor, his heirs, executors and administrators, estate and effects, should be absolutely released and discharged from the said respective claims and demands of the said creditors respectively, and the said deed should and might accordingly thereupon operate and be pleadable as a release and discharge to the said debtor, his heirs, executors and administrators, as fully and effectually and in like manner as an order of discharge under an adjudication in bankruptcy; and that it was further provided and declared that the said deed, and the provisions thereby made, should be taken and accepted by the said creditors as aforesaid, in lieu of and in substitution for their said several and respective debts, claims and demands, in respect whereof dividends would become payable under the said deed, or in respect whereof a proof could be made under an adjudication of bankruptcy against the said debtor, founded on a petition for adjudication filed on the day of the date of such deed; and that, whereas it was essential to the interests of the said creditors, and for the better realization of the said estate, that the said debtor should not be harassed by any proceedings thereafter to be commenced or prosecuted by any of the said creditors in respect of any such debt, claim or demand as aforesaid, it was by the said deed declared and agreed that if any of the said creditors should at any time thereafter, whilst the said deed was in force, commence or prosecute any action, suit or other proceeding in respect of any such debt, claim or demand as aforesaid, the said deed and provisions therein contained should operate and have the same force and effect as an order of discharge which had taken effect under the Bankruptcy Act, 1861, and the said declaration and agreement might be pleaded and used in bar of or as a defence or answer to every such action, suit or other proceeding in like manner, and with the same effect as an order of discharge under the Bankruptcy Act, 1861, might be pleaded and used in case the debtor had been adjudicated a bankrupt in respect of any of the said debts, claims or demands of the said creditors, or any or either of them, and had obtained his order of discharge; and that a majority in number representing three-fourths in value of the creditors of the said defendant, whose debts respectively amounted to 10l. and upwards, did in writing assent to or approve of the said deed, and the defendant and the said inspectors executed the same; and the execution of the said deed by the defendant was attested by an attorney, and within twenty-eight days from the day of the execution of the said deed by the defendant, the same was produced and left (having been first duly stamped) at the office of the chief registrar of the Court of Bankruptcy for the purpose of being registered, and was accordingly duly registered, and together with such deed was delivered to the chief registrar such an affidavit as by the statute required; and that all conditions have happened, and all things have been done, and all times have elapsed necessary in that behalf to make the said deed as valid and binding on all the creditors of the defendant as if they had been parties to and duly executed the same; and that the plaintiffs were creditors of the defendant within the true intent and meaning of the said deed; and that the claim in the declaration mentioned was a debt, claim and demand

within the said deed, and in respect of which a dividend would become payable under the same, and that the said deed from the making thereof hitherto has been and still was in force; and that by reason of the premises the defendant was entitled to plead the said deed in bar of, and as a defence to this action.

To this plea there was a demurrer.

Woollett, in support of the demurrer.—There is no absolute release; it is only to take effect after the certificates are given, and cannot be given till after payment, which may never take place, as no time is specified. In order that a deed may be good its provision must be reasonable—*Hidson v. Barclay* (3 Hurl. & C. 9; s. c. 33 Law J. Rep. (N.S.) Exch. 273), and such a provision as this is unreasonable.

[*WILLES, J.*—*Gibbons v. Vouillon* (8 Com. B. Rep. N.S. 483; s. c. 19 Law J. Rep. (N.S.) C.P. 74) decides that such a release is good; but further, you have not set out the deed, which may be very reasonable; and the plea avers that the deed was in accordance with the statute, and contained a provision as to release. In *Tabor v. Edwards* (27 Law J. Rep. (N.S.) C.P. 183), where there was a general averment, but no release, I distinguished *Bloomer v. Darke* (2 Com. B. Rep. N.S. 165; s. c. 26 Law J. Rep. (N.S.) C.P. 214), on the ground that, though a general averment that a thing is contrary to a statute is bad, one that is in accordance is good; and the Court were inclined to think the latter general averment is good, though there was no decision on the point, because it was unnecessary, as the deed was held to be no bar as there was no release.]

But the release here is on a contingency, and is therefore bad; and if this be so, the additional clause becomes clearly unreasonable and bad; and notwithstanding the general averment, sufficient matter is disclosed on the plea to shew that the deed is unreasonable; there is no provision for a tender of the deed to the creditors, not for the time of payment of the composition.

[*WILLES, J.*—It would have to be within a reasonable time, and in *Clapham v. Atkinson* (4 Best & S. 722; s. c. 34 Law J. Rep. (N.S.) Q.B. 49) it was held, that a provision that a composition should not be paid for a year did not vitiate the deed.]

Walker v. Nevill (34 Law J. Rep. (N.S.) Exch. 73) will, no doubt, be relied on by the other side, but that case is distinguishable.

J. Brown and Lanyon, in support of the plea, were not called on.

WILLES, J.—I am of opinion that our judgment should be for the defendant. The only doubt I had was as to the mode of pleading the deed,—whether it was necessary to set out the deed at length, or whether it was sufficient to describe the deed, so as to shew it to be within the statute, and to aver that it was in accordance with the statute. In the old days of special demurrers there was a distinction between an averment that an act was *contra formam statuti*, and one that it was *secundum statutum*. The former was held not to be enough without stating the fact which made the act contrary to the statute; but the latter was held to be an averment of fact under which you might prove that the requirements of the statute were complied with, and which was not open to special demurrer. One case which used frequently to occur was as to the assignment of a sheriff's bond. Now that special demurrers are abolished, I think you may aver in that general way in all cases. It is enough in such a case as this to give a general description of the deed sufficient to shew it is within the statute, and to add a general averment that the deed is according to it. The only way in which an objection could be taken would be by an application at chambers, on the ground that the plea was embarrassing; but that would not apply here, because the plaintiff, if dissatisfied with the statement of it, may set out the deed in his replication, and it is much more convenient to plead in this way. There being, therefore, authority that this is an averment of fact, and it being more convenient to hold that such an averment is valid than to hold that the deed should be set out *in extenso*, it must be taken on this plea that the deed is a good one within the statute.

Now, then, passing over the first clause as to the release, is the second clause as to pleading this deed in bar a good provision? It states,—“And whereas it is essential to the interests of the said creditors, and for the better realization of the said estate that the said debtor should not be harassed by any proceedings hereafter to be commenced or prosecuted by any of the said creditors in respect of any such debt, claim or demand as aforesaid, it is by the said deed declared and agreed that if any of the said creditors shall at any time hereafter, whilst the said deed is in force, commence or prosecute any action, suit or other proceeding in respect of any such debt, claim or demand as aforesaid, the said deed and provisions therein contained shall operate and have the same force and effect as an order of discharge which had taken effect under the Bankruptcy Act, 1861, and the said declaration and agreement may be pleaded and used in bar of or a defence or answer to every such action, suit or other proceeding, in like manner and with the same effect as an order of discharge under the Bankruptcy Act, 1861, might be pleaded and used in case the debtor had been adjudicated a bankrupt in respect of any of the said debts, claims or demands of the said creditors, or any or either of them, and had obtained his order of discharge.” No doubt, before the case of *Gibbons v. Vouillon* (8 Com. B. Rep. N.S. 483; s. c. 19 Law J. Rep. (N.S.) C.P. 74), there was a difficulty; but that case is an express decision that if a deed contains a provision giving a licence to a debtor to carry on his business for five years without molestation, and providing that if an action be brought it might be pleaded as a release, the deed may be pleaded in bar to an action by a creditor who was a party to the deed. That case, therefore, shews that this clause of the present deed may be pleaded in bar; for the effect of the statute is, that the deed is just as binding on a non-signing creditor as if he had actually signed. In the case of *Tabor v. Edwards* (27 Law J. Rep. (N.S.) C.P. 183), to which I referred during the argument, I thought that if there had been a release, as there is here, the plea would have been good like the present one.

KEATING, J.—I am of the same opinion for the same reasons.

[IN THE COMMON PLEAS.]

Jan. 26, 1866.

SKILLETT AND OTHERS v. FLETCHER AND ANOTHER.

35 L. J. C.P. 154; 1 H. & P. 197; L. R. 1 C.P. 217; 14 L. T. 61; 14 W. R. 435; 12 Jur. N.S. 295: affirmed, [1867] E. R. A.; 36 L. J. C.P. 206; L. R. 2 C.P. 469; 16 L. T. 426; 15 W. R. 876 (Ex. Ch.).

See *Croydon Commercial Gas and Coke Co. v. Dickinson*, [1876] E. R. A.; 45 L. J. C.P. 869; 1 C.P. D. 707; 35 L. T. 943; 29 W. R. 825 (C.P. D.): on appeal, [1877] E. R. A.; 46 L. J. C.P. 157; 2 C.P. D. 46; 36 L. T. 135; 25 W. R. 157 (C. A.).

Principal and Surety—Bond for Collection of Poor, and Sewers and General Rates—Bond severable.

PRINCIPAL AND SURETY.—The condition of a bond given to the churchwardens of a parish by the defendants as sureties for one S., after reciting that in March, 1852, S. had been appointed collector of the poor-rates of the said parish, and that, in March, 1856, he had been also appointed collector of the sewers and general rates under the Metropolis Local Management Act, 1855, was stated to be, that S. should pay to the said churchwardens all sums that should be collected by him in execution of his said office of collector of all or some

or one of the said rates. In an action on such bond, to a declaration which alleged that S. did not pay to the churchwardens sums which it was stated he had collected in execution of his said office of collector of the said rates, the defendants pleaded in effect that the duties of S. in his said office of collector were increased by certain statutes passed after giving the said bond, for imposing a main-drainage rate, and also that S. was appointed by the said churchwardens collector of such main-drainage rate, of which the defendants had had no notice, and by which their risk as sureties had been increased:—Held, on demurrer, a bad plea, because the collection of the poor-rates was treated by the parties to the bond as a distinct employment, and the plea did not shew any alteration of the condition of S. as collector of the poor-rates, and was therefore no answer to so much of the cause of action as related to the defendants' responsibility for the collection of the poor-rates.

The declaration stated that theretofore, &c., the defendants, by their bond in writing, sealed with their respective seals, acknowledged themselves to be held and firmly bound to the plaintiffs and one George Bilton (since deceased) in the sum of 1,000*l.*, to be paid to the plaintiffs and the said George Bilton, which said bond was and is subject to a condition whereby,—after reciting that in and by act of parliament passed in the 49th year of the reign of His late Majesty King George the Third, intituled 'An Act for the more equally and effectually assessing and collecting the Poor-rates within the Parish of St. Anne, commonly called St. Anne, Limehouse, in the county of Middlesex,' it was and is enacted, that it should and might be lawful for the churchwardens, overseers of the poor and vestrymen of the said parish, in vestry assembled, or the major part of them, in case they should deem it necessary, from time to time to appoint a treasurer or treasurers, and a clerk or clerks, and a collector or collectors, of the poor-rates of the said parish, and such other officers as they might judge necessary, and to take such security as they the said churchwardens, overseers of the poor and vestrymen of the said parish should think proper from such treasurer, clerk or collector, and from time to time to remove such treasurer, clerk, collector and other officers, and appoint in like manner by ballot others in the room and stead of such of them as should be so removed, or as should die or discontinue or resign his or their office or offices, and that Edward Day Skillett was, on the 25th of March, 1852, duly appointed collector of the poor-rates of the said parish, and was, on the 26th of March, 1856, duly appointed collector of the sewer rates and general rates to be levied under the provisions of the Metropolis Local Management Act, 1855, and that it might happen that the said E. D. Skillett might be appointed from year to year such collector as aforesaid, or be re-appointed collector of all or some or one of the said rates for the said parish, or otherwise be continued in the said office or offices without re-appointment; and it was a condition of the appointment of the said E. D. Skillett as such collector of the said rates respectively as aforesaid that he should find and provide two sureties to become bound with himself in the penal sum of 1,000*l.* (limited as thereafter mentioned) for the due fulfilment of the said office for the whole period of time during which he should continue in the said office of collector of all, or some, or one of the said rates, and that the said E. D. Skillett had applied unto the defendants to become sureties for him, which they had consented and agreed to do,—(and the condition of the said bond was declared to be such that), if the said E. D. Skillett, his executors or administrators, had from time to time since such respective appointments as aforesaid, well and truly and effectually performed, and did and should from time to time and at all times thereafter, for and during the whole period of time that he should continue in the said office of collector of all or some or one of the said rates aforesaid, whether by virtue of the appointments aforesaid, or either of them, or any future appointment or appointments, well and truly and effectually perform the duties of the said office of collector of the said rates respectively, and he the said E. D. Skillett, his executors, administrators and assigns, did and should from time to time duly

and faithfully account for, and upon the request of the churchwardens and overseers for the time being of the said parish of St. Anne, or any three or more of them, well and truly pay or cause to be paid all and every the sums of money that should or might from time to time be collected or received by him the said E. D. Skillett by virtue of the said acts respectively, or otherwise in execution of his said office of collector, of all, or some, or one of the said rates, to the churchwardens and overseers of the poor of the said parish of St. Anne for the time being, or to some or one of them, or to the treasurer of the said parish, or such other person or persons as the said churchwardens, overseers of the poor and vestrymen of the said parish for the time being, or the major part of them in vestry assembled, should duly authorize and empower to receive the same; and also that if the said E. D. Skillett, his executors or administrators, should and did from time to time, and at all times thereafter as aforesaid, upon such request as aforesaid, give and deliver a particular, true and perfect account in writing, under his or their hand or respective hands, to the said churchwardens, overseers of the poor and vestrymen of the said parish for the time being, or to some one of them (to be verified by his or their solemn statutory declaration if required), of all monies which he the said E. D. Skillett should from time to time have received and collected, or levied by virtue of the said acts respectively, or either of them, or by reason or otherwise in the execution of his said office, then that the said bond or obligation should be void and of no effect, but otherwise the same should be and remain in full force and virtue; and it was thereby provided that nothing in the said bond contained should extend to render either of the defendants, their heirs, executors or administrators, liable to pay more than the sum of 500*l.* apiece.

Averment, that, although the said E. D. Skillett continued in the said office of collector of the said rates for a long time after making the said bond, and during his continuance in the said office, and for and during the time mentioned in the said condition in that behalf, collected and received divers sums of money by virtue of the said acts, and otherwise, in execution of his said office of collector of the said rates, yet he did not during the period of time that he continued in the said office of collector well, truly or effectually perform the duties of the said office of collector of the rates respectively, in this, to wit, that he did not account for or pay over the said monies, but failed and made default, although all things necessary, &c., and all times, &c. elapsed, and applied the monies to his own use, contrary to his duty as such collector; nor did the said E. D. Skillett duly or faithfully account for, or upon the request of the churchwardens, &c., well or truly pay the said sums of money which had been so collected and received by him by virtue of the said acts, and otherwise, in execution of his said office of collector of the said rates, to the churchwardens, &c., nor did the said E. D. Skillett, although duly requested so to do, give or deliver a particular or true account in writing under his hand to the said churchwardens, &c., of all monies which he, the said E. D. Skillett, had received and collected and levied by virtue of the said acts, and by reason or otherwise in execution of his said office. Breach, non-payment of the said sum of 1,000*l.*

Eighth plea—To the whole declaration, that the said bond was made and executed before the making and passing and coming into force of certain acts of parliament, that is to say, of 21 & 22 Vict. c. 104, and 25 & 26 Vict. c. 102; and that the said two acts of parliament in this plea mentioned had been respectively made and passed after the making and execution of the said bond, and were respectively in force before and at the time when the alleged breaches of the condition of the said bond in the declaration mentioned, or any of them, were first committed by the said E. D. Skillett, or had first happened and accrued, and so remained and continued in force thenceforth until the commencement of this suit. Further, that the duties of the said E. D. Skillett in his office of collector of the said rates were much increased, varied, altered, and enlarged by virtue and in pursuance of the said acts of parliament, and the respective provisions thereof; and that the said office was altered, varied and

enlarged by the said acts, and the respective provisions thereof; and that the said office of collector, and the duties, liabilities and responsibilities thereof, were by the said acts altered and varied, and made another and different office, with further, other and larger duties, liabilities and responsibilities from the respective times of the coming of the said acts into effect, to the said office, and its duties, liabilities and responsibilities at the time of the making and execution of the said bond. Further, that the said E. D. Skillett, so being such collector as aforesaid, was, by the churchwardens and overseers of the poor, and the vestrymen acting for the said parish of St. Anne, Limehouse, after the passing and coming into effect of the said statute of the 21 & 22 Vict. c. 104, appointed to be collector, under and by virtue of the said act, of the main-drainage rate to be assessed and levied under and in pursuance of the provisions of the last-mentioned act, in the same manner, and subject to the like provisions, as the said sewers rate in the condition of the said bond mentioned; and that the defendants had no previous notice or knowledge of such last-mentioned appointment, nor did they assent thereto, nor did the said E. D. Skillett give any further security whatsoever for the due discharge and faithful performance of the duties of the last-mentioned office. Further, that as such collector of the said main-drainage rate, and by virtue of the said office of collector, and in the proper discharge of the duties thereof, the said E. D. Skillett received divers large sums of money, being other and greater sums than those he was entitled and appointed to receive under his said office in the said bond mentioned, and had other duties to discharge, and by means of the premises the responsibilities of the said E. D. Skillett were greatly increased and altered, and the risk of the defendants of his sureties varied and increased. Further, that under and by virtue of the said 25 & 26 Vict. c. 102, the said E. D. Skillett did by virtue of the said last-mentioned act, in addition to the rates and sums of money mentioned in the bond, become, by virtue of his being such collector as is mentioned in the said bond, and otherwise by virtue of the said last-mentioned statute, collector of certain sums of money included by the said last-mentioned statute in the said sewers rate for the purpose of defraying the expenses of the Metropolitan Board of Works, the said monies being sums other than and additional to those which, as such collector as in the said bond is mentioned, and by virtue of his said office, he was entitled and bound to collect before the coming into effect of the last-mentioned statute. Further, that after the passing and coming into force of the said last-mentioned statute the said E. D. Skillett, by virtue and under the provisions of the same, became collector of a separate rate for the metropolis main drainage, levied in the same manner, for the same period, upon the same persons, and subject to the like provisions as the said sewers rate in the said bond mentioned, whereby the said E. D. Skillett became entitled and bound to collect further, other and additional monies to those which, as such collector, as mentioned in the said bond, he was appointed, entitled and bound to collect, and had numerous further and other additional duties to discharge, and whereby the risk of the defendants as his sureties under the said bond was greatly altered and increased. Further, that all the breaches of the condition of the said bond in the declaration mentioned happened and accrued after the making, passing and coming into effect of the said acts, and after the happening of the several other facts, matters and things in this plea above alleged.

Demurrer thereto, and joinder in demurrer.

Gibbons (*M'Mahon* and *Hannen* with him), in support of the demurrer.—One of the questions which is raised on this demurrer is, whether the 21 & 22 Vict. c. 104. has so increased the duties of the collector, and therefore the responsibility of the surety, as to discharge the latter.—[The argument as to this is omitted, as the decision entirely turned on the other point.]—Next, the bond is for the due accounting by E. D. Skillett for the poor-rates received by him, as well as for the accounting for the sewers and general rates; and the plea is bad, inasmuch as it gives no answer as to not paying over the poor-rates which

E. D. Skillett had collected. None of the subsequent statutes have altered or affected the collector's duties as to the poor-rates, and it was within the contemplation of the bond that E. D. Skillett would be appointed to collect rates analogous to that of the main-drainage rate—*The Guardians of the Portsea Island Union v. Whillier* (29 Law J. Rep. (N.S.) Q.B. 150).

Philbrick (*Mellish* with him), contra.—Though the recital in the condition to the bond alludes to two appointments as if they were to separate offices, the condition itself treats the office to which Skillett had been appointed as one office, and it is for his due performance of his duties of such office so long as he should continue “in the said office of collector of all or some or one of the said rates aforesaid, whether by virtue of the appointments aforesaid or either of them.” The case comes, therefore, within the principle of *Bonar v. Macdonald* (3 H.L. Cas. 226), where it was held that a variance in the agreement to which a surety had subscribed, and which variance had been made without the surety's consent, and may prejudice him, will discharge the surety, though the original agreement, notwithstanding such variance, may be that on which the liability is substantially incurred. The surety guarantees the solvency of the principal debtor; therefore, if by the change of or addition to the duties of such principal debtor the risk of the surety is increased, the surety is discharged, and it matters not by what means the risk is increased, whether it be by enlarging the duties of the office for the performance of which the bond is given, or whether it be by adding to it another office. *Pybus v. Gibb* (6 El. & B. 902; s. c. 26 Law J. Rep. (N.S.) Q.B. 41) is an authority to shew that in such a case the suretyship cannot be severed. It appears here that Skillett was appointed by the plaintiffs to a fresh office, namely, that of collector of the main-drainage rate, which alone would discharge the sureties.

[MONTAGUE SMITH, J.—The sureties are not sureties for the new office. How, then, are they affected by the appointment?]

Their risk as sureties for the old office is altered by the imposition of the duties of the new office. The principal debtor receives by virtue of the new office larger sums than he would otherwise have done, and the sureties incur therefore a greater risk as to his properly discharging his duties under the old office. The case of *Oswald v. the Mayor, &c. of Berwick* (5 H.L. Cas. 856; s. c. 3 El. & B. 653; 23 Law J. Rep. (N.S.) Q.B. 321) also affirms the principle that if the risk of the surety be increased by any change in the duties and liabilities of the office, for the performance of which the bond is given, the surety is discharged; and here it is alleged in the plea as a matter of fact that the risk of the defendants as sureties was increased by Skillett being made collector of the main-drainage rate.

Gibbons replied.

ERLE, C.J.—I am of opinion that our judgment should be for the plaintiffs. The action is brought on a bond given by sureties for a collector of poor-rates, and also of sewers rates and general rates under the Metropolitan Local Management Act, 1855. There were two separate appointments of the collector, one as the collector of the poor-rates, and the other as the collector of the sewers rates and general rates. That being so, the bond recites that he was bound to find sureties for the fulfilment of the said office of collector, that is to say, collector of those two different rates. It was, therefore, contemplated that the rates were divisible in their nature, and the condition to the bond then is for the collector to pay over what he should collect. The averment in the declaration is, that he collected sums of money by virtue of the statutes referred to, and otherwise in his office of collector, and that he had not paid them over. The plea is, in effect, that after he was so appointed collector statutes were passed whereby the main-drainage rates were to be collected, and that those statutes, imposing the duty of collecting those rates, threw upon him a duty to collect them, in addition to the rates mentioned in the bond. Now, I am

of opinion that this is a bad plea, and for the purpose of this judgment I do not propose to give any opinion upon the question, whether the main-drainage rates are the same as the sewers rates and general rates under the statute of 1855, or are rates levied under the statutes restricting the power of that act; but I think the plea is bad, because the plea ought to answer all the causes of action in the declaration, and I think that there is in this declaration a cause of action in respect of the breach of duty of the collector in not paying over the poor-rates, and also in not paying over the sewers and general rates; and then the increase of duties which is alleged in the plea in respect of the sewers rate and general rates is, in my judgment, totally different from the duties in respect of the poor-rates. In respect of each of these duties the surety is responsible. Had there been two distinct bonds, one in respect of the poor-rates and another in respect of the sewers and general rates, there would be no doubt that an increase of duty discharging the surety as to the sewers and general rates would be no answer to the breach of duty in respect of the poor-rates, and I think the bond in the present case is made equally severable. It seems to me that the cases which have been referred to are where there has been a change in the nature of the employment, and by reason of that an increased duty for which the surety was sought to be made answerable. That was the case of *Bonar v. Macdonald* (3 H.L. Cas. 226), where the principal debtor was a clerk in a bank, and he was afterwards appointed as manager to a district branch of that bank, with power to discount bills. There there was a change altogether in the nature of his employment, and, therefore, the surety for him as clerk was no longer surety for him as manager. The same reasoning applies to the case of the bailiff of a county court—*Pybus v. Gibb* (6 El. & B. 902; s. c. 26 Law J. Rep. (N.S.) Q.B. 41), where the statute altered afterwards the jurisdiction of the Court, so that the risk of the surety for such bailiff was increased. That is my view of the cases, and for the reasons I have mentioned I think the plea is bad.

WILLES, J.—I am of the same opinion. The declaration alleges in effect that the principal debtor was appointed in 1852 collector of poor-rates, and in 1856 collector of sewers and general rates, and the bond was given by the defendants, as sureties, to secure the proper conduct of the principal as collector of poor-rates and sewers rates under his existing appointments, and also to secure his good conduct in respect of his being re-appointed to collect all, or some, or one of the rates. The declaration afterwards goes on to allege that he misconducted himself by not accounting and paying over money he had received for rates. That declaration might be proved by shewing either that he was collector of poor-rates and that he misconducted himself in that capacity, or that he was appointed to both offices and misconducted himself in both. The defendants plead the establishment, under statute, of main-drainage rates, and states, first, a distinct appointment of the principal debtor as collector of the main-drainage rates, and next, that the principal debtor, as collector of the sewers rates, would be bound to collect the main-drainage rates; and it states further, that new duties were imposed in respect of the main-drainage rates which, if he discharged them, would impose new responsibilities on the sureties. That is the scope of the plea, and to that there is a demurrer, and it is a familiar law that the plea, to be good, must answer all the causes of action stated in the declaration; and if there be one cause of action therein stated to which it is no answer, there must be judgment for the plaintiffs. The question of law appears to be, whether the entire liability of the sureties for the principal debtor as collector of the poor-rates is discharged by the matter stated in the plea. I am of opinion that it is not. There is, I apprehend, a distinction between the new circumstances which affect the position of the sureties only, as, for instance, giving time, and cases where the condition of the principal debtor is altered. To the latter class belong the cases to which my Lord referred, of *Bonar v. Macdonald* (3 H.L. Cas. 226) and *Pybus v. Gibb* (6 El. & B. 902; s. c. 26 Law J. Rep. (N.S.) Q.B. 41). To this class of cases we must direct our attention, for unless this plea establishes an alteration in the condition of the principal

debtor as collector of the poor-rates, it sets up no answer whatever. With respect to *Bonar v. Macdonald* (3 H.L. Cas. 226), it is a mistake to suppose that the House of Lords laid down any such rule that additional labour to be done by the principal debtor and stipulated for by a distinct contract, would discharge the surety. In that case the clerk for whom the surety was responsible had not only an additional salary and additional labour, but also additional liability, and it will be found, on referring to the judgment of Lord Brougham, in which the judgment of Lord Cottenham is set forth, that it was because of that essential change in the obligation by altering the liability of the principal debtor that it was held that there was a discharge of the surety. Therefore the judgment of Lord Campbell in *Pybus v. Gibb* (6 El. & B. 902; s. c. 26 Law J. Rep. (N.S.) Q.B. 41), when he speaks of the duties of the principal debtor being enlarged, must be understood in the sense of liabilities. The case of *Pybus v. Gibb* (6 El. & B. 902; s. c. 26 Law J. Rep. (N.S.) Q.B. 41) was a case in which the principal debtor held an office which was enlarged with new duties and new liabilities.

I have observed on these cases because they were the strongest which Mr. Philbrick could produce, and I now turn to the present case. It is not necessary to consider whether the appointment of collector of poor-rates was an office; that would depend on whether it was to be held during a period, or whether the collector could be discharged as an ordinary servant. But whether a distinct office or not in point of law, the parties to the bond treat it as a distinct employment, as to which a liability may subsist wholly apart from the collection of sewers or general rates. That being so, the question arises just as if there had been a distinct bond given for the conduct of the collector of the poor-rates, and as if the plea had set up in answer to a proceeding on the bond that the principal debtor was subsequently appointed collector of sewers rates. To such a case the authorities referred to are wholly inapplicable. With respect to the other question, probably what Mr. Gibbons stated in the outset may be right; but I cannot give an opinion until further facts appear before us, and I content myself with saying that the bond is not entirely discharged, and therefore that our judgment should be for the plaintiffs.

KEATING, J. concurred.

MONTAGUE SMITH, J.—I am of the same opinion. The bond recites distinct appointments, and I think the liability of the sureties is to be taken distributively. Then, it is said that there was a change in one of the offices for the due performance of the duties of which the sureties are liable, which increased the risk of the sureties, and so the sureties were discharged. It is not necessary to give any opinion as to whether the duties have been so changed as to discharge the sureties; but, assuming that they would be discharged as to the main-drainage rates, they are not discharged as to the other independent office. It appears to me that it is the same as if the obligation of the sureties had been contained in two bonds; and supposing that were so, and that after one bond was executed by the sureties, Skillett was appointed collector of the main-drainage rates, that independent appointment would not interfere with the former contract which related to Skillett being the collector of the poor-rates, and would not discharge the sureties as to such former contract. There is nothing in the plea to shew that his appointment of collector of main-drainage rates rendered him incompetent for the discharge of the duties of collector of the poor-rates. I think we are bound to regard these as two distinct appointments, and the bond applicable to each as if there had been separate bonds. I am disposed to think that the cases in which the surety has been discharged, turn very much on the point of the contract itself being altered so as to prejudice the surety. That appears to be the principle of the decision in *Bonar v. Macdonald* (3 H.L. Cas. 226), and that is the principle laid down in *Bell's Principles of the Laws of Scotland*, 5th ed., p. 95, in the passage cited in Lord Cottenham's judgment, where he says, "The rule is laid down in *Bell's Principles*, that the cautioner is freed by any essential change consented to by the creditor on the principal obligation or transaction without the knowledge

or assent of the cautioner." Therefore, treating the collection of poor-rates as a distinct appointment, the sureties were not discharged as to Skillett's liability for that; and therefore I think our judgment should be for the plaintiffs.

Judgment for plaintiffs.

[IN THE COMMON PLEAS.]

Nov. 22, 1865; Jan. 12, 1866.

CATTERALL v. HINDLE.

35 L. J. C.P. 161; L. R. 2 C.P. 368; 1 H. & R. 267; 14 L. T. 102; 14 W. R. 371;
12 Jur. N.S. 488.

Principal and Agent—Agent for Sale of Goods—Payment to Agent—Settlement of Accounts between Agent and Purchaser.

PRINCIPAL AND AGENT.—*The defendant advanced a sum of money to a factor on a general account, as against goods which were to be subsequently delivered to and purchased by the defendant. Goods were accordingly delivered, the property of different makers, part of them being the goods of the plaintiff, who had employed the factor to sell them for him on a del credere commission. The defendant knew which were the plaintiff's goods, and that the factor sold them only as agent for the plaintiff. On a settlement between the factor and the defendant the accounts between them were balanced, by the latter paying the factor the difference between the price of the goods and the sum advanced:—Held, that the defendant could not treat any part of such advance as a pre-payment for the plaintiff's goods, and that the settlement between the defendant and the factor did not make any portion of the advance which was applied to the payment of the plaintiff's goods a good payment as against the plaintiff.*

This was an action brought to recover the sum of 274*l.* 7*s.*, for goods sold and delivered. The pleas were, never indebted, and payment.

The cause was tried, before Montague Smith, J., at the last Summer Lancashire Assizes, when the facts appeared to be that the plaintiff, who traded under the name of "Paul Caterall, Son & Co.," was a cotton-spinner at Preston, and employed one Joshua Armitage, a commission agent at Blackburn, to sell yarns on his account, upon a *del credere* commission, as broker. The defendant, a manufacturer at Blackburn, trading under the name of "Edward Briggs & Co.," dealt with Armitage, in purchasing from him, as agent for the plaintiff and others, yarns marked with the initials of the parties spinning them. Previous to the 14th of October, 1864, he had purchased from Armitage yarns of the plaintiff's, and paid for them in cash, and there was no evidence of any other mode of payment as between him and Armitage before that date. On that day the accounts between them being then balanced, Armitage applied to the defendant for a loan of 1,000*l.*, which the defendant refused, but agreed to advance that amount for the purchase, at an agreed price, of yarns to be subsequently delivered. The defendant accordingly paid Armitage on that day 1,000*l.*, and on the 19th and 21st of October deliveries of yarns of one Kershaw, to the amount of 725*l.* 13*s.*, were made by Armitage on account of the advance. On the 24th of December and the 5th of January following he delivered yarns of the plaintiff's to the value of 527*l.* 3*s.*, and on the 11th of January a settlement took place by the defendant paying to Armitage the excess beyond the 1,000*l.* in cash, and so balancing the account between them to that date. The plaintiff, however, was not paid for those yarns by Armitage, who soon after became

bankrupt. In taking the account the defendant debited Armitage not only with the 1,000*l.*, but also with interest for delay in the deliveries, as well as discount, short weights, &c. He put to his credit the yarns as delivered, without specifying the makers, but he knew which were the yarns of the plaintiff, and that Armitage sold them as agent. The jury found that the 1,000*l.* was advanced to Armitage upon a general account, and not for Kershaw's yarns specifically, that being the only question the parties desired to be so left. The verdict was entered for the defendant upon the plea of payment, leave being reserved to the plaintiff to move to enter a verdict for him for the amount he claimed, namely, 274*l.* 7*s.*, or for such other sum as the Court might think fit, if the transaction between the defendant and Armitage did not prove payment to the plaintiff.

A rule nisi to that effect having been afterwards obtained by *E. James*, on behalf of the plaintiff,

Temple and *J. Edwards* shewed cause.—It was contended by the plaintiff at the trial that the 1,000*l.* was not paid as against the plaintiff's goods but as against Kershaw's. The jury having found that the payment was made by the defendant on his general account, it is submitted that the defendant became entitled to the verdict. It was a payment of 1,000*l.* in advance, which, according to Chief Justice Wilde, in *Fish v. Kempton* (7 Com. B. Rep. 687; s. c. 18 Law J. Rep. (N.S.) C.P. 206), would bind the principal. In that case Chief Justice Wilde says, "Where a factor sells with notice to the vendee that he sells as factor, payment to him is good, even though made prematurely." Moreover, when the settlement of accounts took place between Armitage and the defendant in January, 1865, there was such an appropriation of this 1,000*l.* to the plaintiff's account, as according to *Favenc v. Bennett* (11 East, 36) would amount to a payment which would bind him.

Kemplay, in support of the rule.—However the 1,000*l.* was paid, whether specifically as against Kershaw's goods or generally on the account between Armitage and the defendant, it does not affect the plaintiff's rights. When the settlement took place between Armitage and the defendant there was nothing which amounted to a payment which was binding on the plaintiff. Suppose the plaintiff had refused to deliver goods, the defendant could not have sued the plaintiff for money had and received in respect of the 274*l.* 7*s.*, the amount of the balance of the 1,000*l.*, after paying what was due for Kershaw's goods. This shews that no part of the 1,000*l.* could be considered a payment on account of the plaintiff's goods. Then it is clear Armitage had only authority from the plaintiff to receive payments in money, and therefore the writing off on the settlement of accounts so much of the 1,000*l.* as remained due to the defendant after Kershaw's goods had been paid for was without authority from the plaintiff, and cannot be taken as payment to that extent of the plaintiff's debt—*Todd v. Reid* (4 B. & Ald. 210), *Bartlett v. Pentland* (10 B. & C. 760), and *Sweeting v. Pearce* (7 Com. B. Rep. N.S. 449; s. c. 29 Law J. Rep. (N.S.) C.P. 265). The exception to this is where there is a custom to make settlements in accounts by taking credits as payments, and such custom is known to and binding on the principal—*Stewart v. Aberdeen* (4 Mee. & W. 224; s. c. 7 Law J. Rep. (N.S.) Exch. 292); but that does not apply to the present case. The payment here, as regards any part of the 1,000*l.*, was before anything was due to the plaintiff, and was only a debt from Armitage to the defendant.

Cur. adv. vult.

The judgment of the Court (Erle, C.J., Willes, J., and Keating, J.) was now (Jan. 12) delivered by—

KEATING, J.—[After stating the facts as above, the learned Judge proceeded as follows:—] A rule having been granted, cause was shewn last term, and, after hearing the arguments and considering the case, we think the rule should be made absolute to enter the verdict for 274*l.* 7*s.* That a broker or agent

employed to sell has *prima facie* no authority to receive payment otherwise than in money, according to the usual course of business, has been well established, and it seems equally clear that if, instead of paying money the debtor writes off a debt due to him from the agent, such a transaction is not payment as against the principal who is no party to the agreement, though it may have been agreed to by the agent—see the judgment of Abbott, C.J. in *Russell v. Bungle* (4 B. & Ald. 398) and *Todd v. Reid* (4 B. & Ald. 210), the authority of which upon this point is not affected by the correction as to a fact by Baron Parke in *Stewart v. Aberdeen* (4 Mee. & W. 224; s. c. 7 Law J. Rep. (N.S.) Exch. 292). It has also been held by this Court, in the case of *Underwood v. Nichols* (17 Com. B. Rep. 239; s. c. 25 Law J. Rep. (N.S.) C.P. 79), that the return to the agent of his cheque cashed for him by the debtor a few days before, was not part payment as against the principal; “It amounts to no more,” said Chief Justice Jervis, “than the debtor seeking to discharge his debt to the principal by writing off a debt due to him from the agent, which he has no right to do.” We think the present case the same in principle with *Underwood v. Nichols* (17 Com. B. Rep. 239; s. c. 25 Law J. Rep. (N.S.) C.P. 79).

When the plaintiff supplied his goods on the 24th of December and the 5th of January, Armitage had from the 21st of the preceding October been in debt to the defendant to the amount of 274*l.* 7*s.*, being the difference between the amount for Kershaw’s yarns and the 1,000*l.* advanced, and the defendant so treated it in his own account. Now, the only way in which the goods so supplied were ever paid for was by writing off that amount from the 1,000*l.* and paying the balance in money, which is precisely what was decided in *Underwood v. Nichols* (17 Com. B. Rep. 239; s. c. 25 Law J. Rep. (N.S.) C.P. 79) not to be a good payment as against the plaintiff. And it is to be observed it did not appear there was any usage or course of business that would at all make it so; on the contrary, the evidence shewed that all the payments for goods delivered before and after the transaction in question were payments in money in the ordinary way, and that the advance of the 1,000*l.* was an isolated and exceptional transaction; neither was there any proof whatever of any ratification by the plaintiff, who at once repudiated any authority to Armitage to receive payments for his yarns except in money.

It was argued by the counsel for the defendant that the advance of 1,000*l.* might operate as a pre-payment, and that such would be good, and for this he cited the dictum of Chief Justice Wilde in the case of *Fish v. Kempton* (7 Com. B. Rep. 687; s. c. 18 Law J. Rep. (N.S.) C.P. 206). The case itself only decided that a set-off by the debtor of a debt due to him by a known factor, would not be good as against the principal; but the dictum of Chief Justice Wilde was referred to as distinguishing between set-off and pre-payment, and suggesting that the latter would have been good. It is unnecessary, however, to say more in the present case than that the dictum of the Chief Justice applied to the case of a payment to the factor as part of the particular transaction, and which the principal could treat at the time as being made to his agent for him, whereas in the present case the payment was not made on account of the plaintiff’s yarns, so as that the plaintiff could have called upon Armitage to account for the 1,000*l.*, or any part of it as money received to his use. Had he done so the answer of Armitage would have been that, although a pre-payment in which the plaintiff had a possible interest, yet, inasmuch as the whole might have been exhausted in payment of Kershaw’s or other yarns of the agreed quality, the plaintiff would have no right to treat it as a payment to or for him until a subsequent act of appropriation, which in substance is nothing more than writing off a debt, should take place. It is unnecessary therefore to express any opinion upon that dictum as to the law or usage as applied to factors, as we do not think it applies to the present case.

It is right to notice, though it was not pressed in argument as creating a distinction, that Armitage acted under a *del credere* commission from the plaintiff. We think this makes no material difference as to the question raised in the case. The agent selling upon a *del credere* commission receives an

additional consideration for extra risk incurred, but is not thereby relieved from any of the obligations of an ordinary agent as to receiving payments on account of his principal.

The rule therefore to enter a verdict for the plaintiff for 274*l.* 7*s.* will be absolute.

Rule absolute.

[IN THE COMMON PLEAS.]

Jan. 17, 1866.

BECKETT v. THE MIDLAND RAILWAY COMPANY.

35 L. J. C.P. 163; 1 H. & R. 189; L. R. 1 C.P. 241; 13 L. T. 672; 14 W. R. 398; 12 Jur. N.S. 231: for subsequent proceedings see [1868] E. R. A.; 37 L. J. C.P. 11; L. R. 3 C.P. 82; 17 L. T. 499; 16 W. R. 221 (C.P.).

See *Falkingham v. Victorian Railway Commissioners*, [1900] E. R. A.; 69 L. J. P.C. 89; [1900] A. C. 452; 82 L. T. 506 (P.C.); *Long Eaton Recreation Grounds Co. v. Midland Railway*, [1902] E. R. A.; 71 L. J. K. B. 837; 86 L. T. 873; 50 W. R. 693 (C. A.).

Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), s. 68.—*Action on Award*—*Plea traversing injurious Affection.*

COMPULSORY PURCHASE.—*By an award made under the Lands Clauses Consolidation Act* (8 & 9 Vict. c. 18), *the arbitrator awarded one entire sum as the amount of damage sustained by a person by reason of his messuage being injuriously affected by the execution of the works of a railway company, to wit, by the erection of an embankment, and by the narrowing of the road in front of the said messuage. To a declaration in an action on this award for not paying the sum awarded, the company pleaded, that the said messuage was not injuriously affected by the narrowing of the road:—Held, on demurrer, a good plea.*

Declaration, after reciting that the plaintiff was seised in fee of a messuage, situate in and known as No. 30, Ampthill Street, in the borough of Bedford, and that the defendants were a railway company incorporated by a certain act of parliament therein mentioned, and by a certain other act, entitled the Midland Railway Additional Powers Act, 1862, were empowered to execute certain works, and that the plaintiff, being a party entitled to compensation in respect of his interest in the messuage above mentioned, which was injuriously affected within the meaning of the Lands Clauses Consolidation Act, 1845, by the execution of the said works by the said last-mentioned act authorized to be executed, and after also reciting an agreement between the plaintiff and the defendants to refer the amount of such compensation to the award of an arbitrator, alleged that such arbitrator duly made and published his award in writing concerning the matter so referred to him, and thereby awarded and adjudged that the plaintiff had sustained damage by reason of his said messuage No. 30, Ampthill Street, being injuriously affected by the execution of the said works mentioned in and authorized by the 14th section of the Midland Railway Additional Powers Act, 1862, to wit, by the erection of an embankment and by the narrowing of the road in front of the said messuage, to the amount of 80*l.*, which said sum he, the said arbitrator, thereby awarded and directed the defendants to pay to the said plaintiff.

The breach assigned was the non-payment of the sum awarded.

Plea, after setting out in *hæc verba* the said award (which did not differ

from what was so alleged in the declaration), and also the agreement of reference, stated that the plaintiff's said message was not, nor was his interest therein, injuriously affected by the narrowing of the said road in front of the said message, and that the said sum of 80*l.* included money, the amount of which is unknown to the defendants, which money the said arbitrator awarded for compensation for damage sustained by the plaintiff by reason of his said message being, as the arbitrator erroneously supposed, injuriously affected by the narrowing of the said road, by reason whereof the said supposed award was and is void.

Demurrer, and joinder in demurrer.

A. K. Stephenson, in support of the demurrer.—The plea is bad. It is submitted that if by any means the plaintiff's message could be injuriously affected by narrowing the road, the award would be good and the plaintiff entitled to the amount awarded. *Rickets v. the Metropolitan Railway Company* (34 Law J. Rep. (N.S.) Q.B. 257) shews that if the value of the house be so affected by the access to it being interfered with, the occupier would be entitled to compensation under the 68th section of the Lands Clauses Act. The award is therefore good on the face of it.

[ERLE, C.J.—That is not disputed: the question is if the plea is not also good.]

The defendants might traverse the injurious affection; but it is submitted they have no right to sever the amount awarded and to confine the plea, as they have done here, to a traverse of the affection by the narrowing the road. There might be an affection within the act by the embankment, and if there was, that would be sufficient to support the award. In *In re Newbold v. the Metropolitan Railway Company* (14 Com. B. Rep. N.S. 405) Erle, C.J., says, "The award is good enough for the purpose of assessing the amount, provided the claimant on the trial of an action shews that his right has been injuriously affected by the works of the company. All the law about awards, and the mode of enforcing them, has nothing to do with the question." The case of *Hodkinson v. Fernie* (27 Law J. Rep. (N.S.) C.P. 66) shews that the parties are bound by the award, both as to fact and law, provided it be good on the face of it.

[ERLE, C.J.—In the case of an award under the Lands Clauses Consolidation Act, if the company will not pay the amount awarded, the claimant must bring an action on it; and in answer to such action the company are entitled to shew that the land was not injuriously affected at all. Then the question comes to this, that where there are two claims, one tenable and the other not, and the arbitrator awards one entire sum in respect of both, whether the company may not sever the claims and traverse the injurious affection in respect of one of them.]

There has been no case in which such a plea as this has ever been pleaded before. In *Read v. the Victoria Station and Pimlico Railway Company* (1 H. & C. 826; s. c. 32 Law J. Rep. (N.S.) Exch. 167) the plea denied that the plaintiff's interest was at all damaged or injuriously affected; and so in *Barber v. the Nottingham Railway Company* (15 Com. B. Rep. N.S. 726; s. c. 33 Law J. Rep. (N.S.) C.P. 193), the plea which was held good was a plea traversing that any damage had been sustained by the works of the company.

[KEATING, J.—Suppose the plaintiff's house has been injuriously affected by raising the embankment, but not by narrowing the road, and the amount of compensation awarded being given in respect of both, what are the company to do? WILLES, J.—I am strongly inclined to think that this would be a good plea to an ordinary award. You could always plead in an action on an award that there was a matter in difference submitted under a reference of all matters in difference upon which the arbitrator has not awarded, or that it was made of matters not submitted to the arbitrator, however good the award might appear on the face of it. *Mitchell v. Staveley* (16 East, 58) and *Fisher v. Pimbley* (11 Ibid. 188) are sufficient authorities for that. Then the arbitrator in the present case had only power to award compensation in respect of such matters as the claimant had a legal right to compensation for.]

Both parties by the submission agreed to refer the amount of compensation to which the plaintiff was entitled in respect of his interest in his house being injuriously affected by the execution of the company's works. It is submitted that that gave the arbitrator authority to find what he did in this case.

Field (Macnamara with him) appeared in support of the plea, but was not heard.

ERLE, C.J.—I am of opinion that our judgment should be for the defendants. This is a reference, under the Lands Clauses Consolidation Act, of a claim for compensation by reason of the plaintiff's messuage being injuriously affected by the execution of the works of a railway company. The company were bound to summon a jury to assess the amount of compensation, if the claimant did not desire to refer the amount to an arbitrator. Here the company and the claimant agreed to refer such amount to an arbitrator; but still the award of such arbitrator stands *in pari jure* with the assessment of a compensation jury. Now, the assessment of damages by such jury is only in case the claimant can establish by action his right to compensation, and the company would be entitled in such action to traverse the claimant's right to compensation. The present claimant claimed damage by the narrowing of the road; and if the claim had been confined to that and the plea had traversed it, that would have been tried by a jury; but the claimant claimed also damage in respect of the erection of an embankment, and the award of the arbitrator gives him compensation for both. The railway company contend that the award is bad in respect of having given compensation for the narrowing of the road, because the plaintiff's messuage was not damaged, they say, by the narrowing of the road. Had the arbitrator awarded 40*l.* for one matter, that is to say, for the erection of the embankment, and 40*l.* for the other matter, that is to say, for the narrowing of the road, it would have been bad as to the 40*l.* in respect of narrowing the road, if the claimant admitted that his messuage was not injuriously affected by such works. I think, therefore, the company had a right to traverse the injurious affection in respect of narrowing the road, notwithstanding a lump sum has been awarded as a compensation in respect of both matters.

WILLES, J.—I am of the same opinion. In the case of an ordinary award, where there has been a reference of damages, provided the party can enforce his claim to damages in an action at law, the condition must be exhausted before the party can be entitled to the damages so awarded. So with respect to a reference of damages as to several claims, if the award of the arbitrator included the amount of a claim which was not enforceable, the whole sum so awarded would not be recoverable, because it would be impossible to tell how much had been awarded in respect of the claim which was bad. The construction which has been put by the Courts upon the Lands Clauses Consolidation Act, beginning with the case of *The Queen v. the London and North-Western Railway Company* (3 El. & B. 443; s. c. 23 Law J. Rep. (n.s.) Q.B. 185), imposes on a claimant seeking compensation that which is precisely what I have imagined a party to be subject to who seeks compensation under a condition on an ordinary award.

KEATING, J.—I am of the same opinion. If it were not as we hold, a railway company would be obliged to pay in respect of what it is admitted they are not liable for, because the arbitrator has also given a sum in respect of what they are liable for.

MONTAGUE SMITH, J. concurred.

Judgment for the defendants.

[IN THE COMMON PLEAS.]

Jan. 12, 1866.

MALPAS v. THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

35 L. J. C.P. 166; 1 H. & R. 227; L. R. 1 C.P. 336; 13 L. T. 710; 14 W. R. 391; 12 Jur. N.S. 271.

Carriers by Railway—Evidence—Parol Agreement to carry beyond the Place mentioned in Consignment Note.

CARRIERS. EVIDENCE.—*The plaintiff went to the defendants' station at Guildford and (as he said) asked if he could send some cattle to King's Cross station (which was beyond the defendants' line), when they would arrive, and what was the charge, and was told (as he said) that he could, that they would arrive at a particular time, and that the charge was 14s., which should be paid at the end of the journey; according to the defendants' evidence, he was told he could only send to the Nine Elms station, belonging to the defendants, and must take the risk about the animals going on. The plaintiff signed a consignment note containing the words, "to be sent to the Nine Elms station," but not the sum to be paid. The cattle were sent to the Nine Elms station and there detained. The fare to the Nine Elms station was 8s.:—Held, that the above oral testimony was admissible for the purpose of shewing on oral contract to carry to King's Cross, in addition to the written contract to carry to Nine Elms.*

The declaration in this case alleged that the plaintiff had delivered certain calves and a heifer to the defendants, to be carried from Guildford to the cattle station, York Road, King's Cross, within a reasonable time, and that the defendants had failed to do so.

The pleas were, not guilty; a denial of the contract; a denial of the breach; and an allegation that the animals were carried under certain conditions, in the plea set out, which exonerated the defendants.

At the trial, it appeared that the plaintiff having bought nine calves and a heifer at Guildford, was desirous of sending them by the defendants' railway and then along the North London Railway to the cattle station at King's Cross, in order that he might sell them at the Islington Cattle Market. With this object he went to the station at Guildford, and there was conflicting evidence as to what took place there. According to the evidence of the plaintiff, he asked the clerk whether he could send his animals by train to go by the North London Railway to the cattle station, what the charge was, and when they would arrive, and that the clerk told him that he could, that they would arrive about four o'clock next morning, and that the charge was 14s., but that he (the clerk) would rather it was paid at the end of the journey. According to the evidence for the defendants, the plaintiff was told there was no such train, that the company would not undertake the consignment beyond Nine Elms, a London station belonging to them, and that beyond there he must take his chance. One thing, however, was clear, that the defendant signed (though he said he did not read) a paper containing certain special conditions of carriage, and the words, "Received of Malpas, of New Cattle Market, the under-mentioned animals. . . . to be sent to Nine Elms Station," the number of the truck, the words "Malpas, New Cattle Market," under the word "consignee" in the form, the description of the animals, no charge of any sum of money, and the words "charges to be paid."

The animals were sent; they arrived at the Nine Elms station; and no one being there to receive them, they remained there a considerable time, till, eventually, after inquiries being made, they were sent on to King's Cross, and there received by the plaintiff from the North London Railway Company, on payment of the fare of 14s. The fare to Nine Elms would be 8s. There

was no doubt that, if the defendants were bound to carry to the Nine Elms station only, there was no unreasonable delay, but, if to King's Cross, there was.

The learned Judge having ruled that the particular condition relied on by the defendants in their pleas was unreasonable, left it to the jury to say whether or not they believed the plaintiff's evidence, and whether or not there was a contract to carry to King's Cross. The jury found a verdict for the plaintiff.

A rule was obtained by the defendants calling on the plaintiff to shew cause why there should not be a new trial, on the ground that the consignment note signed by the plaintiff was conclusive evidence of the contract.

Bayliss now shewed cause.—It is true that parol evidence is not receivable to contradict or vary a written contract; but a signed document is not necessarily the contract, and parol evidence is receivable to shew that it was never intended to be so, and that the real contract was not in writing—*Rogers v. Hadley* (2 H. & C. 227; s. c. 32 Law J. Rep. (N.S.) Exch. 241), *Lindley v. Lacey* (34 Law J. Rep. (N.S.) C.P. 7). Here the question was, whether or not the written document was intended to be the contract; the parol evidence was receivable for that purpose, and the jury have found it was not so intended.

Giffard and Wood, in support of the rule.—If it was said that the plaintiff was induced to sign the document by fraud or mistake it would, no doubt, be no contract; but there is no pretence for that. The plaintiff, who knows the usages of railway companies to have written contracts only, says he did not read it. Where a note is made, say of the time and the price, you may still shew additional terms—*Jeffery v. Walton* (1 Stark. 267); you may add to but you may not contradict the written document—*Hoadly v. M'Laine* (10 Bing. 482; s. c. 3 Law J. Rep. (N.S.) C.P. 162). The evidence here was directly to contradict the consignment note. If a man may wittingly sign a document and then evade it merely by saying he neglected to read it, the finality of written documents is at an end, and that very conflict of testimony is allowed which it is their object to prevent.

[*Gilmore Evans*, at the request of the Court, stated the facts and decision in *Robinson v. the Great Western Railway Company*, now reported, 35 L. J. C.P. 128.]

ERLE, C.J.—I am of opinion that this rule should be discharged. This was an action brought on a contract to carry some animals from Guildford to King's Cross; and the question is, whether there was any evidence of a contract to carry to that place. The plaintiff gave oral evidence of a contract to carry to King's Cross for 14s., and the defendants relied on a paper signed by the plaintiff at the time of the oral contract on which the action was founded, containing a statement that the terminus was the Nine Elms station. It certainly was agreed orally that the animals were to be carried to King's Cross: that has been found by the jury; but the defendants contend that the paper is conclusive as to there being a contract to carry to Nine Elms. I am of opinion that this contention fails, because I am of opinion that on the evidence it is clear that the written contract to carry to Nine Elms is not inconsistent with an additional oral one to carry on to King's Cross; for on the evidence, although perhaps it is not clearly and definitely shewn that in order to be carried to King's Cross the animals necessarily or usually would be carried to Nine Elms first, I take it that the transaction was capable of being carried out on the assumption that the animals should be carried to Nine Elms and that there should be an additional *transitus* from Nine Elms to King's Cross. There is one important fact in corroboration of this view: no fare is mentioned in the paper; to ascertain it oral evidence was necessary, and that oral evidence shewed that the charge was to be 14s., a portion of which, it clearly appears, was for carriage on to King's Cross. I think the

rule should be discharged, because the oral evidence does not vary or contradict the written contract, but shews an additional contract to carry on to King's Cross. I am careful to make this clear, because I agree that it is most important that railway companies, with their numerous transactions and consequent liabilities, should be able to limit their liabilities by writing. An agreement made in writing at the time of contracting is, no doubt, conclusive. In *Robinson v. the Great Western Railway Company* (35 L. J. C.P. 123) there was a nonsuit because there was a written contract, and it was not shewn; and in *Van Toll v. the South-Eastern Railway Company* (12 Com. B. Rep. N.S. 75; s. c. 31 Law J. Rep. (N.S.) C.P. 241), where the plaintiff delivered a bag containing jewelry at the cloak-room of a railway station, and received a ticket on which there was a notice that the defendants would not be liable for any package above 10*l.* in value, this Court held that the plaintiff must be taken to have assented to this, and that as her bag and its contents were above this value the defendants were not liable. But here, as I have already pointed out, oral evidence was absolutely necessary to shew the agreed price of the carriage, and that distinctly shewed that it was a sum beyond the carriage to Nine Elms and for carriage to King's Cross. On the ground, therefore, that the oral evidence was to shew an additional contract, and not to impeach the written document, I am of opinion that it was admissible, and that this rule should therefore be discharged.

WILLES, J.—I am of the same opinion on the same grounds. Suppose the company insist that the document is conclusive, still the amount of the payment is left out; oral evidence was necessary to shew this, and this oral evidence shewed that the agreed payment was 14*s.*, and also proved clearly that for carriage to Nine Elms only the company would not charge 14*s.*, but something less. The bargain to carry to Nine Elms was complete by the payment of that lesser sum. What then was the additional charge for? It was for something, and must be for carriage beyond Nine Elms; and it is not inconsistent with the written document that this additional sum was charged in respect of an additional oral contract to carry on to King's Cross. And I consequently cannot see anything in this oral testimony to set aside or alter the written contract. There is, no doubt, a rule that you cannot alter a written contract by a contemporaneous parol one, but this is not the case here; the oral evidence does not alter the written contract, but shews an additional contract to carry further. With respect to the case of *Jeffrey v. Walton* (1 Stark. 267), I would remark that the reporter must have misrepresented what Lord Ellenborough said. For there the agreement having been made, afterwards a memorandum was made on a card, which did not purport to be an agreement, and did not even mention the subject-matter, yet Lord Ellenborough is made to say, "I shall not allow any evidence to be given by the plaintiff in contradiction of these terms, but I am of opinion that it is competent to the plaintiff to give in evidence supplementary matter as part of the agreement." He could never have meant that this memorandum was a written agreement. The case, however, is supportable on another ground, that the parties consented to this memorandum being part of the contract and acted on it; and it is therefore a sound decision, because where a document has been recognized and acted on, no objection taken, but another allowed to act on it, then there is an estoppel.

KEATING, J.—I am of the same opinion. It is important that it should be understood that our judgment is not on the ground that we hold it competent for a consignee to vary the written note by parol evidence, but on the ground that here such evidence was to prove an additional contract, which does not alter, contradict or vary the written document.

SMITH, J.—I am of the same opinion. No question is here raised as to the verdict being against evidence; the only question is, whether I ought to have left it to the jury to say whether there was a contract to carry to King's Cross. It is not competent to a man to sign a document and then contradict

it by parol evidence; but here evidence was necessary to shew the agreed price, which was not inserted; if no price had been mentioned, then it would have been inferred that the proper general charge for the mentioned transit was to be paid; here, however, according to the plaintiff's evidence, the price was mentioned, and the parties agreed for 14s., a sum which included the expense of carrying on to King's Cross, and in respect of which the company, no doubt, therefore would have to carry to King's Cross; and it was a question for the jury whether they believed this evidence, and whether or not there was a contract to carry further than Nine Elms.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Common Pleas.)

Feb. 5, 6, 1866.

COLES v. TURNER.*

35 L. J. C.P. 169; 1 H & R. 386; L. R. 1 C.P. 373; 14 W. R. 402;
12 Jur. N.S. 688.

Applied, *Greenberg v. Ward*, [1866] E. R. A. 1741; 35 L. J. C.P. 316; L. R. 1 C.P. 585; 14 L. T. 760; 14 W. R. 795 (C.P.): see *Hickmott v. Simmonds*, [1866] E. R. A. 636; 35 L. J. Ch. 580; L. R. 2 Eq. 462 (M.R.); *Giddings v. Penning*, [1866] E. R. A.; 35 L. J. Ex. 191; L. R. 1 Ex. 325; 14 W. R. 940 (Ex.).

Debtor and Creditor—Bankruptcy Act, 1861, s. 192.—Deed of Assignment—Clause verifying Debts—Reasonable Provisions.

BANKRUPTCY.—A clause in a deed of assignment under the Bankruptcy Act, 1861, by which the trustee is empowered to require any creditor of the debtor to verify the nature and amount of his debt, with full particulars, by statutory declaration, "or otherwise as the trustee may think fit," has not the effect of depriving the creditor who fails to produce proof to the satisfaction of the trustee of all benefit under the deed, and such clause is therefore reasonable.

The statutable majority of creditors have power to bind the minority in giving a discretion to the trustees under the deed as to the mode in which they shall manage the debtor's estate, and as to the time when and the manner in which they shall sell it.

Appeal from the decision of the Court of Common Pleas, reported 34 *Law J. Rep.* (N.S.) C.P. 198.

The question was as to the validity of a deed of assignment under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), as against a non-assenting creditor. The deed, which was an assignment by the debtor Richard Turner to a trustee upon trust for sale, &c., and to apply the monies to be received to the payment of the debts of the debtor, contained, amongst others, the following clause: "And it is hereby agreed and declared that it shall be lawful for the said trustee or trustees to require any person or persons claiming to be a creditor or creditors of the said Richard Turner, notwithstanding that he or they may have executed these presents, and that the amount or alleged amount of his or their debt or debts may have been inserted in the schedule

* *Coram* Pollock, C.B., Martin, B., Channell, B., Blackburn, J., Mellor, J. and Pigott, B.

hereto, to verify the nature and amount of such debt or claim, with full particulars shewing the consideration thereof by statutory declaration, proved before the Commissioners of Bankruptcy, or otherwise as the trustee or trustees may think fit." The Court of Common Pleas held this clause to be unreasonable, and to vitiate the deed. The rest of the deed is more fully set out in the report of the case in the Court below.

Mellish (*Hannay* with him), for the appellant, the defendant below.—The objection which has been made to the clause in question is, that it is supposed to give an arbitrary power to the trustee to reject any debt he pleases if the creditor cannot comply with the terms of proving his debt in the way the trustee may choose to require, although such creditor may be able and willing to give very good legal evidence of such debt. It is submitted that that is not the fair meaning of this clause. In the first place it is to be remarked that the deed creates no inequality amongst the creditors; the clause relates as well to those who have signed as to those who have not signed, and there is nothing unreasonable in enabling the trustee to require proof of the debt by the person claiming to be creditor. If the trustee had no means of ascertaining whether the person claiming to be creditor was what he claimed to be, the whole object of the deed, which is to divide the assets amongst all the creditors, would be defeated. The Court below decided against the deed on the authority of the case of *Leigh v. Pendlebury* (15 Com. B. Rep. N.S. 815; s. c. 33 Law J. Rep. (N.S.) C.P. 172); but the deed in that case expressly deprived the creditor of all benefit under it, if he failed to comply with what the trustee should require as to proving his debt. That is very different from the clause in the present case, which merely gives the trustee the power of ascertaining who are creditors. If such power be unreasonably exercised, it can be controlled by the Bankruptcy Court, with appeal to the Lord Chancellor, and it is only similar to the power which the 12 & 13 Vict. c. 106. s. 164. gives to the Bankruptcy Court. It is absolutely necessary that there should be some such power vested in some one. The 197th section of the 24 & 25 Vict. c. 134. subjects the creditors and trustees to the jurisdiction of the Court of Bankruptcy, and if the trustee therefore improperly refused to admit a creditor's claim, there is power to go before the Bankruptcy Court on the subject, for there are no negative words in the deed to deprive the creditor of that or of any other right if he fail to comply with the requisition of the trustee as to proof. In *Strick v. De Mattos* (3 H. & C. 22; s. c. 33 Law J. Rep. (N.S.) Exch. 276), a clause requiring a creditor to verify his debt by statutory declaration was held not unreasonable. And *Ex parte Spyer* (32 Law J. Rep. (N.S.) Bankr. 62) shews that the Court of Chancery will not allow the object of the deed to be defeated by a wrong exercise of a discretionary power. The Court of Common Pleas seemed to consider in the present case that there were other clauses in the deed open to objection besides the clause in question; but as they held that clause bad, it became unnecessary to give a decided opinion on the other clauses.

[*Biron*, for the respondent, said he should object to the power which the deed gave "to the trustee or trustees, in his or their discretion, to postpone the sale of" the trust property so assigned, "and to lease such unsold portion either from year to year or for a term of years for such rents as he or they may think fit," "and to give credit for the whole or any part of the purchase-money either with or without taking security for the same."]

If the statutable majority of the creditors thought it more to the advantage of the estate that the trustee should have such powers, there is no reason why they should not be given to him.

[*MELLOR, J.*—The objections seem to assume that the trustee will act in an unreasonable manner.]

Yes; that is the effect of them.

Biron (*Prentice* with him), contra.—With regard to the clause requiring the creditors to prove their debts to the satisfaction of the trustee, it is not to

be distinguished from the clause which was held unreasonable in *Leigh v. Pendlebury* (15 Com. B. Rep. N.S. 815; s. c. 33 Law J. Rep. (N.S.) C.P. 172). The clause makes the proof a condition precedent to the creditor getting any dividend or benefit under the deed. There is no limit to the kind of proof the trustee may insist on having; and if he should choose to impose on the creditor anything unreasonable before he will allow his debt, there is no means by which the creditor can get any dividend from the estate. No doubt, section 197. of the 24 & 25 Vict. c. 134. gives the Court of Bankruptcy a general jurisdiction over these deeds; but it is not a remedy to which a creditor should be bound to resort; and, moreover, that Court cannot go beyond the deed; and if there is anything unreasonable in any of the clauses of such deed, that Court cannot rectify them; but the deed must be bad. With respect to the other clauses in this deed. The clause by which the trustee may postpone the sale, and lease the property for such rents as he may think fit, is surely unreasonable; but supposing this Court should think otherwise, it cannot be right that in case of sale the trustee may give credit for the purchase-money without even taking any security for it.

[BLACKBURN, J.—Has not the legislature cast on the majority of the creditors the power of determining what shall be best for all the creditors?]

But this would enable a trustee to put the whole property in jeopardy; he might lease it or sell to the debtor himself without any assets being derivable thereunder for the creditors.

[MELLOR, J.—There are some things which a Court of law cannot determine so well as the creditors, whether they are unreasonable or not; as, for instance, what powers should be given for selling or disposing of an estate of a debtor.]

It is submitted that a non-assenting creditor should not be subject to the caprice of a trustee. In the case of bankruptcy assignees sell only for cash.

Mellish, in reply.—The 136th section of the Bankruptcy Act, 1861, expressly gives power to the Court of Bankruptcy to determine all differences between parties claiming under these deeds of arrangement; and on the authority of that enactment, the Lord Chancellor held, in *Ex parte Lawrence* (32 Law J. Rep. (N.S.) Bankr. 61), that the Court of Bankruptcy has jurisdiction to summon a trustee, under a deed of assignment for the benefit of creditors, to be examined touching his dealings with the trust estate.

Cur. adv. vult.

On the following day (Feb. 6) the judgment of the Court was delivered by—

BLACKBURN, J.—In this case, which was argued yesterday, we have come to the conclusion that the judgment of the Court of Common Pleas is erroneous and must be reversed. The Court below based their judgment on the case of *Leigh v. Pendlebury* (15 Com. B. Rep. N.S. 815; s. c. 33 Law J. Rep. (N.S.) C.P. 172), holding that the provision in the deed in question in the present case was, in effect, that in case of failure to comply with the terms of the provision, the creditor would lose his right of having the benefit of the dividends under the deed; and that such a provision was unreasonable and therefore vitiated the deed. We do not wish, on such a subject as this, to do more than is necessary to decide the question actually before us; and we therefore refrain from expressing any opinion as to whether the provision in *Leigh v. Pendlebury* (15 Com. B. Rep. N.S. 815; s. c. 33 Law J. Rep. (N.S.) C.P. 172) was or was not in itself unreasonable. Neither do we decide anything on the question whether a Court of law can declare a provision which applies equally to all classes of creditors, and which the statutable majority of the creditors thought fit to adopt, void on the ground that in the opinion of the Court it is unreasonable. On these points we leave former decisions neither confirmed nor impugned. We base our decision on this, that we think

the clause now in question has not the effect of depriving the creditor, who fails to produce proof to the satisfaction of the trustee, of all benefit under the deed, and that we think the clause as we construe it, quite reasonable. In every case where a trust is to distribute a fund among a particular class, whether creditors or any other class, the trustee must, in the absence of any express provision on the subject in the deed, determine in some way whether he will act on the supposition that the person claiming benefit under the deed is or is not of that class. The trustee cannot be bound to give the dividends to every one who claims, though others assert that his claim is fictitious, nor can he be bound to reject every claim which is objected to, though it is said that the objection is unfounded. His duty, as trustee, requires him in some way or other to ascertain what he thinks to be the fact, and to act on his opinion, which will cast the onus upon the party dissatisfied with his decision, of appealing to a Court of equity, or, in the case of a deed within their jurisdiction, to the Court of Bankruptcy, to set aside that decision. Bearing this in mind, it will be found that the provision in this deed, perhaps, requires no more from the creditor than would be required if the deed were silent. At all events, it requires nothing unreasonably beyond what would be thus required. It does not make the trustee arbitrator, finally to decide whether there is any debt, or what is the amount of that debt; nor does it impose any penalty on those creditors who fail to produce what the trustee thinks sufficient proof of the debt; it simply requires that the creditor shall prove his debt "by statutory declaration or otherwise as the trustee may think fit." If he does so, those who think his claim bad must appeal to the Court of Bankruptcy. If he does not do so, the person claiming to be a creditor must appeal. We see nothing unreasonable in this.

Some other objections, on which the Court below did not adjudicate, were urged before us. We think they all failed. Those who intrust to others the task of realizing an estate, ought to select their trustees carefully; but, having done so, it is prudent to give those trustees a discretion as to the mode in which they shall manage that estate, the time when and the manner how they shall sell it, so as to make the best of it. The statutable majority of the creditors are by the Bankruptcy Act empowered to bind the minority in such matters, and we see no objection to the manner in which they have in this case exercised their authority. Judgment must therefore be reversed.

Judgment reversed.

[IN THE COMMON PLEAS.]

Feb. 9, 26, 1866.

SEAGRAVE v. THE UNION MARINE INSURANCE COMPANY.

35 L. J. C.P. 172; 1 H. & R. 302; 14 L. T. 479; 14 W. R. 690.

See *Anderson v. Morice*, [1875] E. R. A.; 44 L. J. C.P. 341; L. R. 10 C.P. 609; 33 L. T. 355; 24 W. R. 30 (Ex. Ch.): affirmed, [1877] E. R. A.; 46 L. J. C.P. 11; 1 App. Cas. 713; 35 L. T. 566; 25 W. R. 14 (H.L.).

Marine Insurance—Insurable Interest—Shipper and Consignee named in Bill of Lading.

MARINE INSURANCE. SHIPPING.—*The mere fact of a person's name appearing in a bill of lading as the shipper and consignee of the goods is only prima facie and not conclusive evidence that such person has an insurable interest in such goods.*

The plaintiff, who was a broker, sold for his principals on commission a

certain cargo of goods, shipped under a bill of lading which made the goods deliverable to the order of the plaintiff or his assigns, and he retained the possession of such bill of lading until the purchaser had accepted a bill for the amount of the goods. The plaintiff was not a factor, but a mere agent, who had not possession of the goods, or any lien on them for advances, commission or otherwise. The goods were lost on the voyage; and in an action upon a policy of insurance which the plaintiff had effected upon the cargo, the jury found that there was no sale of the goods until after their loss; and the learned Judge at the trial ruled that the plaintiff had an insurable interest, as the bill of lading made the goods deliverable to him or his assigns:—Held, that such ruling was wrong as a matter of law, and that the plaintiff, having, in fact, nothing to suffer and incurring no liability by the loss, had no insurable interest.

Declaration upon a policy of insurance, by which the defendants promised to pay and make good all such losses as might happen by perils of the sea, on a voyage from Liverpool to Londonderry, to certain guano, valued at the sum of 1,150*l.*, in the ship *Ann and Isabella*, with an averment of the plaintiff having been interested in the goods to the amount of the monies insured, and of the ship with the goods having been wholly lost by the perils insured against.

Pleas, traversing first the promise, and secondly that the plaintiff was interested in the said goods.

The facts are fully stated in the judgment of the Court.

A rule *nisi* having been obtained to set aside the verdict, which was found for the plaintiff at the last Liverpool Winter Assizes, and for a new trial on the grounds, *inter alia*, first, that the Judge misdirected the jury in telling them that the facts proved established a sufficient insurable interest in the plaintiff to entitle him to recover; and, secondly, that there was no sufficient evidence of an insurable interest in the plaintiff to entitle him to recover.

Brett, Mellish and Potter shewed cause against the rule; and

Temple and Charles Russell argued in support of it.

In addition to the authorities referred to in the judgment, the following were cited: 1 *Arnould on Insurance*, 66 (3rd edit.), 1 *Phillips on Insurance*, 177, s. 311, 2 *Duer on Insurance*, 104, 105, *Carruthers v. Sheddon* (6 Taunt. 14), *Morgan v. Price* (4 Exch. Rep. 615; s. c. 19 Law J. Rep. (N.S.) Exch. 201), and *Sparkes v. Marshall* (2 Bing. N.C. 761; s. c. 5 Law J. Rep. (N.S.) C.P. 286).

Cur. adv. vult.

The judgment of the Court was delivered on the 26th of February by—

WILLES, J.—This was an action upon an insurance of guano, valued at 1,150*l.*, on board the *Ann and Isabella*, from Liverpool to Londonderry.

The declaration averred interest in the plaintiff, George Seagrave, only. The pleas denied, first the policy, upon which nothing turns; and, secondly, that the plaintiff had an insurable interest.

At the trial, before Mr. Baron Martin, at the last Winter Assizes at Liverpool, the plaintiff had a verdict for 200*l.* In the last term, the defendants obtained a rule for a new trial, upon various grounds, which came on for argument at the Sittings after term, before Mr. Justice Keating, Mr. Justice Smith and myself, when we took time to consider.

It appears that, in the year 1864, M'Carter, of Londonderry, suing in the name of Joyce, recovered in this court against Swann and other underwriters, upon an insurance upon the same cargo for the same voyage, the sum of 1,200*l.*, of which he received 1,150*l.* M'Carter's interest was alleged to be that of buyer of the guano before its loss from the now plaintiff's firm; so that one set of underwriters has already paid the whole amount at which the guano was valued and insured in the policy now sued upon.

The details were as follows: Upon the 14th of February, 1863, M'Carter, who had from time to time bought guano of or through the now plaintiff's firm, wrote to them, stating that if it suited them to ship soon 100 tons of guano, at 6s. 6d. freight, to be paid for on the 1st of May, they might do so. Upon the 26th of February the plaintiff's firm wrote to M'Carter, stating that they had engaged the *Ann and Isabella*, to take about 115 tons at 6s. 6d., and that they expected to have the cargo on board about the middle of the next week, and proposed to draw upon him for it at 10l. per ton. M'Carter must have made up his mind to take the cargo thus offered, for he did not write to countermand it; and upon the 2nd of March he effected an insurance through one Joyce of this very cargo, per *Ann and Isabella*, for 1,200l. Upon the 3rd he wrote complaining that the price charged was 10l. a ton, when it was only 9l. 15s. net in Scotland, but not refusing it; on the contrary, stating that he expected the usual allowance, which was a matter of course. Upon the 4th of March the cargo was shipped at Liverpool under a bill of lading, making the goods deliverable "to the order of George Seagrave & Co. (the plaintiff firm) or to their assigns." The invoice was made out the same day, describing the guano as "delivered to the account of M'Carter," according to the letter of the 26th of February. Then the plaintiff's firm, having upon the 4th of March received the letter of the 3rd, effected with the present defendants the policy upon which this action is brought, upon the cargo, valued at 1,150l., to which extent from that time there were two insurances. The plaintiff at that time was at Belfast, and intended to visit Londonderry; and the invoice and bill of lading were forwarded to him, to be handed there to M'Carter. Upon Saturday, the 7th of March, in the evening, the plaintiff arrived at M'Carter's private house upon a visit, and informed him of what had been done; to which M'Carter made no objection. Afterwards upon that night, the ship and cargo were lost. Upon Monday, the 9th, before the loss was known, the plaintiff and M'Carter went to the office of the latter, and there, without more, the bill of lading was indorsed by the plaintiff, and handed to M'Carter with the invoice; and he accepted a bill for the amount. He learned of the loss the same day; but, so far as appears, neither did M'Carter ask to have back, nor did the plaintiff offer to return the bill; indeed, that would have been inconsistent with all that had passed, and especially with M'Carter's tacit assent upon the Saturday evening before the loss, and the payment upon the Monday accordingly. Further, upon hearing of the loss, M'Carter asked, not for his bill, but for the policy effected by the plaintiff, which the latter declined to give, and referred M'Carter to his own underwriters. Both parties, therefore, treated the purchase as being between themselves effectual and binding, which it could not have been unless complete before the loss. Accordingly, M'Carter brought the action in the name of Joyce against his underwriters, and, principally upon his own evidence, with that of the documents, but without calling the now plaintiff as a witness, he established in fact, to the satisfaction of a London jury, under the direction of Lord Chief Justice Erle, and afterwards in law to the satisfaction of this Court, that what the parties, buyer and seller, had agreed to act upon was the true construction of the transaction, and that the sale was complete by the letters of the 26th of February, acted upon by the sellers by shipping on account of M'Carter, and by M'Carter not rejecting the offer, by insuring upon the 2nd of March (the goods being at his risk as well as on his account), by the letter of the 3rd of March, which in this Court was considered as a reluctant assent to take the cargo, by his assent and acquiescence upon the evening of Saturday, the 7th of March, when Seagrave (the plaintiff) informed him of what had been done, by taking the bill of lading, and paying upon the 9th, without any new terms, shewing that the transaction was complete at latest upon the Saturday, and by acting upon the sale as valid after news of the loss.¹ The non-indorsement of the bill of lading before the loss did not, it is scarcely necessary to remark, exclude that conclusion—

(1) See *Joyce v. Swann*, 17 Com. B. Rep. N.S. 84.

Coze v. Harden (4 East, 211) and *Browne v. Hare* (4 Hurl. & N. 822; s. c. 29 Law J. Rep. (N.S.) Exch. 6). M'Carter, the buyer, thus obtained judgment for 1,200*l.*, and he has been paid 1,150*l.*, the whole amount at which the guano was valued in the policy now sued upon, and he paid the sellers as upon a successful adventure; so that the sellers got all they could have got if the cargo was safe, and thus both buyer and sellers were indemnified against any risk which was insured against by the defendants, and it might have been supposed that the insurers had heard the last of the matter.

It appears, however, that M'Carter was dissatisfied with the amount which he recovered in the name of Joyce, as to the following particulars detailed by him at the trial, viz. 50*l.* of the former verdict not paid, 49*l.* extra costs, 104*l.* difference between the interest which he recovered and the interest which he had to pay his own bankers, in order to raise money, 20*l.* travelling expenses, not alleged to have come within the suing and labouring clause, or to have had anything to do with the insurance.

The mass of these items was irrecoverable, under any circumstances, against the underwriters upon either policy; and no one of them could by any proceeding be justly claimed against the present defendants. M'Carter, however, took a different view of his rights, and it appears now, plainly, that by arrangement between him and the plaintiff, the present action was brought, in effect to enforce payment of the enumerated items, though, under good advice, a verdict was not sought for the whole 1,150*l.*, a measure which, if resorted to, would, we believe, have so demonstrated the impropriety of the claim as to prevent the actual result of a verdict in the plaintiff's favour.

At the trial of this cause, the plaintiff's case was launched upon his own evidence, which was to the same effect as that given by M'Carter upon the trial of *Joyce v. Swann*,¹ with these exceptions: first, that, after the examination by counsel was over, in answer to a question put by the learned Judge (being the question for decision) the plaintiff made the following statement: "I made the sale to M'Carter on the 9th;" secondly, that the plaintiff stated, that, instead of being principal in the actual or intended sale, his firm were only commission-agents (*not del credere*) of Dixon & Co., of the same town. And, although the objection on the score of insurable interest was urged early in the case, the plaintiff's only account of his interest was, that his firm were brokers, not factors; nor did it appear that the guano ever was in their possession as bailees, nor that they had any lien. The evidence was quite bare upon this point; and it is consistent therewith that the guano went straight from the stores of Dixon & Co. to the ship, and that the name of the plaintiff's firm was put in the bill of lading in accordance with a not uncommon practice of brokers to carry on business in their own names, and not because they had any other interest in the transaction. And this appears to be the reasonable conclusion from the evidence of the plaintiff, who gave no further account of his interest than that he acted as broker and agent for Dixon & Co., coupled with the fact that he sought to recover nothing upon his own behalf, but all for M'Carter.

The last additional fact to which the plaintiff was examined, was as to the payment of the bill given him for the price of the guano. At first he stated, "It has not been paid; 200*l.* or 300*l.* is still unsatisfied;" "The bill has not been satisfied, to a considerable extent;" "Messrs. Dixon have suffered a loss." But, upon cross-examination, he said: "M'Carter dishonoured the bill at first; it was satisfied by mutual arrangement; we were put to expense by the dishonour and delay,"—not, be it observed, by the loss of the goods.

Now, the only way of reconciling these contradictory statements is to suppose that the 200*l.* or 300*l.* spoken of by the plaintiff represent the 200*l.* or 300*l.* made up of the items already enumerated as claimed by M'Carter, and which are, by agreement with M'Carter (who is probably a good customer), to be allowed or not allowed to him, according to the event of the present action.

Upon that evidence, without calling M'Carter, the plaintiff relied; whereupon certain objections were taken for the defendants, some of them founded upon mere formal variances, to which we attach no importance, and one which raises the main question, viz. that Dixon & Co., who had been indemnified by payment, and not the plaintiff, were the persons interested in the policy, and that the plaintiff had not proved any interest in the subject-matter of insurance.

The learned Judge overruled these objections; and the defendants called M'Carter (the real plaintiff) as a witness. M'Carter, like the nominal plaintiff, gave evidence to the same effect as in the former cause of *Joyce v. Swann*¹ with these exceptions, that, after the examination by counsel, he, in answer to a question put by the learned Judge (being the question for decision) made the following statement, viz. "The purchase by me was on the Monday morning, the 9th." As to the bill in payment of the guano, M'Carter stated, "It is paid or satisfied." As to the items of claim already set forth, he added, "*I expect to be made good this loss out of the policy now sued on.*" Such being the evidence, the learned Judge told the jury, that, upon M'Carter's evidence, it appeared to him clear that there was no contract before the 9th of March, at Londonderry, after the goods were lost; and upon that point he took the opinion of the jury, who adopted this direction and found a verdict for the plaintiff. No other question was left to them. With respect to the point of insurable interest, the learned Judge ruled, as matter of law, that the plaintiff had an insurable interest, "as an unpaid vendor, and with a bill of lading making the goods deliverable at Londonderry to him or assigns."

The damages were agreed at 200*l.* (representing the items already mentioned or some of them), in the event of the plaintiff being entitled to retain the verdict.

In the last term a rule was obtained for a new trial upon several grounds, amongst others, a miscarriage, in that the learned Judge rules, as matter of law, that the plaintiff had an insurable interest; and, the matter having been fully argued, and time taken to consider, we are of opinion that the rule for a new trial ought to be made absolute.

In considering the case, three prominent points present themselves: first, that both M'Carter and the plaintiff's policies were for the value of the guano only, and not for such extras as M'Carter detailed in evidence; secondly, that this action is for M'Carter's benefit; thirdly, that M'Carter has already received from his underwriters, through Joyce, the whole amount at which the goods are valued in the plaintiff's policy.

It was argued, therefore, that, according to the case of *Bruce v. Jones* (1 H. & C. 769; s. c. 32 Law J. Rep. (N.S.) Exch. 132), there was a complete answer to any further claim. We need not, however, consider this further at present, as there is no plea to raise the question; and if such a plea be added, it may, if necessary, be discussed upon a future occasion.

Next, it appears that the direction of the learned Judge in point of law, and the finding of the jury in pursuance of that direction, are in conflict with the verdict in *Joyce v. Swann*,¹ and the judgment of this Court thereupon, of which verdict and judgment M'Carter has already reaped and now retains the benefit. Nor was the evidence as to the question upon which the verdict passed substantially different from what was offered upon the trial of the former action, save in the answers given to the mixed questions of law and reasoning upon facts proposed to the nominal and to the real plaintiff, and which was the very question to be decided by the Court. Whether such a result can be deemed satisfactory it is at present unnecessary to consider, and the rule hardly raises the point with sufficient distinctness as an objection to the verdict.

Thirdly, and lastly, the report of the learned Judge is distinct. that he thought "the plaintiff had an insurable interest as an unpaid vendor, and with a bill of lading making the goods deliverable at Londonderry to him or hi

assigns." In this statement of law we are, after much consideration, unable to concur. In point of fact, the now verdict finds that the plaintiff was not "vendor," because it finds that there was no valid sale, and no sale until after the loss. In point of fact also, the evidence of the plaintiff and of M'Carter shews that payment was made by bill which has been paid or settled; so that if the plaintiff was a vendor, he was not an "unpaid vendor." This ground failing, and with it the argument that there might be an interest in respect of commission, which probably, like the price, was settled between the parties as upon a valid sale, it remains to consider what is the effect of the plaintiff being named as shipper and consignee in the bill of lading.

That this, as matter of fact, is, *prima facie*, evidence of interest, we entertain no doubt; but the question is, whether as matter of law it is conclusive that there is an interest, even though the facts should shew that the nominal shipper and consignee is a mere agent, having no lien upon the goods for advances, commission or otherwise, nor the possession or custody of them as carrier, factor, warehouseman or other bailee, nor any liability to account for their loss by the perils insured against,—such as sustained the insurance by a carrier—*Crowley v. Cohen* (3 B. & Ad. 478); a warehouseman declaring himself a trustee—*Waters v. the Monarch Life Assurance Company* (5 El. & B. 870; s. c. 25 Law J. Rep. (N.S.) Q.B. 102); a bankrupt or insolvent in possession of after-acquired property by permission of his assignees—*Marks v. Hamilton* (17 Exch. Rep. 323; s. c. 21 Law J. Rep. (N.S.) Exch. 109); a ship carpenter having a lien for repairs—*Tasker v. Scott* (6 Taunt. 234; s. c. 1 Marsh. 556); or a person having an equitable assignment—*Wilson v. Martin* (11 Exch. Rep. 684; s. c. 25 Law J. Rep. (N.S.) Exch. 217). The evidence did not bring the plaintiff within any of these categories, and the loss which took place was a loss of the goods to the intended seller or the intended buyer, according as the sale was complete or not, and not a loss to the mere intermediate agents.

It was argued that the liability for freight as shipper made an interest; but, by the loss of the goods on the way, the freight was also lost; and if the goods had arrived, the interest was in the shipowner's enforcing his lien, not in the goods themselves.

It was further argued that the bill of lading gave a remedy against the master, and was as against him an estoppel; but even as against the master, the bill of lading was not conclusive if Dixon & Co. chose to interfere, and to insist upon delivery to them; and such delivery would have been an answer to any claim by the plaintiff, as was decided in the case of *Sheridan v. the New Quay Company* (4 Com. B. Rep. N.S. 618; s. c. 28 Law J. Rep. (N.S.) C.P. 58).

The persons, if any, interested in the policy were Dixon & Co., and not the plaintiff. The property was theirs. The temporary possession of it was that of the ship's master as bailee; the plaintiff, if there was a valid sale, was interested at the outside to the extent of his commission, if it was at risk, which it was not, for it was earned by the fact of sale, and there would be no lien for it against the buyer: and if there was no valid sale, he was a mere agent who had suffered nothing, and incurred no liability by the loss, for he had discharged his functions, save that he held the shipping documents subject to the orders of his employers.

We are not aware that it has ever been held that a mere agent without possession or lien has an insurable interest to the extent of the value of the goods, simply because his name appears in the bill of lading instead of that of his principal; and the general rule is clear that to constitute interest insurable against a peril, it must be an interest such that the peril would by its proximate effect cause damage to the assured.

We are therefore, after much consideration, of opinion that the learned Judge was wrong in ruling as matter of law, even in the state of facts found by the jury, that there was an insurable interest in the plaintiff.

We were asked to amend the declaration by inserting a statement of interest in Dixon & Co., and, undoubtedly, if Dixon & Co. had sustained a loss, they might have adopted and recovered upon this policy: but we are of opinion that no such amendment ought to be allowed in this case, because the action is in our judgment brought for M'Carter, not for Dixon & Co., who have been paid, and such an amendment might tend to frustrate, and could not tend to promote the decision of the question which this action was brought to try. As to the formal objections raised to the declaration, they may be cured by amendment if and when the plaintiff thinks it worth while. We give the defendant leave to add a plea or pleas, within eight days, upon condition that the plaintiff may within eight days thereafter enter a *stet processus* and cancel the policy.

For these reasons, and with these directions, the rule for a new trial is made absolute, and we hope we are not outstepping our province if we add a suggestion that, in the event of the matters of law decided by the Court upon this or the former occasion being again contested by either party, the more convenient course will be that such party should be put to raise his objections by bill of exceptions, and thus obtain the benefit of reviewing our decision before a superior tribunal.

Rule absolute.

[IN THE COMMON PLEAS.]

May 2, 4, 1865; Jan. 12, 1866.

HIRSCHFIELD v. SMITH.

35 L. J. C.P. 177; 1 H. & R. 284; L. R. 1 C.P. 340; 14 L. T. 886;
14 W. R. 455; 12 Jur. N.S. 523.

Applied, *Rouquette v. Overmann*, [1875] E. R. A.; 44 L. J. Q.B. 221; L. R. 10 Q.B. 525; 33 L. T. 420 (Q.B.); *Horne v. Rouquette*, 1878, 3 Q.B. D. 514; 39 L. T. 219; 26 W. R. 894 (C. A.).

Bill of Exchange—Foreign Bill—Indorsement—Notice of Dishonour—Alteration.

BILLS OF EXCHANGE. INTERNATIONAL LAW.—A bill was drawn in England payable to drawer's order, directed to and accepted by the drawee in France, payable in France, and was indorsed by the drawer in blank and delivered to the defendant in England, and by him indorsed in blank and delivered to the plaintiff in England, and indorsed by the plaintiff and delivered to one B. in France. The bill was duly presented in France and dishonoured; a notice of dishonour was given—good by the law of France, bad by the law of England; by the law of France an indorsement must state a date and consideration. The plaintiff altered the bill by putting a date and consideration to the blank indorsements; but beyond this, on the special indorsement of the drawer to the defendant was inserted the rate of exchange, and on the face of the bill words purporting to make this part of the acceptors contract:—Held, first, that the notice of dishonour was good, both on the authority of *Rothschild v. Currie* (1 Q.B. Rep. 43; s. c. 10 Law J. Rep. (N.S.) Q.B. 77), and also because due notice is such notice as can be reasonably required under the circumstances, and it is reasonable to hold that notice of dishonour, valid according to the law of the place where the bill is payable, is reasonable notice for the different countries of the different parties to a bill, unless the particular circumstances of the case are exceptional; but secondly, that the alterations rendered the bill void in the hands of the plaintiff.

This was an action on a bill of exchange. The declaration alleged that

one Lion by his bill of exchange now overdue, directed to one Pollagot; required the latter to pay to his order 250*l.* three months after date; that the said Lion indorsed the bill to the defendant, who indorsed it to the plaintiff; that the bill was duly presented for payment and dishonoured, whereof the defendant had due notice, but did not pay the same. There was also the common money count for money paid, money lent and on accounts stated.

The defendant pleaded to the first count, first, that he had not due notice; secondly, that he did not indorse; thirdly, that his indorsement was made void by being materially altered without his consent: and, fourthly, that the plaintiff whilst holder, agreed for valuable consideration with Pollagot, the acceptor, to give him time. And he pleaded to the money count, never indebted.

The material facts which appeared at the trial were these: The bill was drawn by Lion in London, payable to his order, and was directed to and accepted by Pollagot in Paris, payable there; it was indorsed by Lion in blank and delivered to the defendant in London, and by him indorsed in blank and delivered to the plaintiff in London, and by him indorsed and delivered to one Berl  in Paris. The bill was duly presented for payment to Pollagot in Paris and was dishonoured. The holder then took all the steps required by the French law in order to enable him to recover against the other parties to the bill, i.e. the bill was duly protested at the proper office, and a copy of the protest sent to the French consul in London, who, in due course, according to French law, gave notice to the defendant. The notice was clearly good according to the French law, clearly bad according to English law. It also appeared that by the French law an indorsement should be special and state a date and consideration; and that the plaintiff had altered the bill by turning the indorsements in blank into special indorsements, with a statement of a date and a consideration, viz., for value received. Beyond this, on the special indorsement of Lion to the defendant, were inserted the words, "Pay to the order of E. T. Smith, at the rate of francs 25.75 for 1*l.* value received, the sum of francs 6437.50, *ut retro*," and on the face of the bill a superscription of the same words, purporting to make them part of the acceptor's contract. Evidence was given on the part of the plaintiff to shew that the only effect of 25.75 was to prevent the holder from demanding a higher rate of exchange, and that the acceptor or other person called on to pay might still pay according to the actually existing rate if lower, but this evidence failed.

A verdict was entered for the defendant, under the direction of the learned Judge, on the grounds that the notice of dishonour was bad, and that the alteration vitiated the bill; with leave to the plaintiff to move to set aside the verdict and enter it for himself for the amount claimed.

A rule having been obtained pursuant to such leave (though by mistake drawn up in an incorrect and too restricted form),

H. James and Harrington shewed cause.—It is admitted that the bill was duly protested, and that the notice of dishonour was good by the law of France, but was bad according to the law of England; and it is submitted, first, that this is an English bill, as to the indorsement, and that, if so, there is not a proper notice of dishonour; and, secondly, that if it be a French bill, there is no sufficient indorsement by the French law, and that even if this has been complied with, yet there was no authority to make the indorsement which was made here, and which is not only special, but regulates the rate of exchange, which cannot be put higher than the rate on the day on which it becomes due. Now, first, in general terms, is this a French or English bill as to the indorsement? It is submitted that each indorsement was a new bill, a contract of indemnity; and that this contract being in England is a contract of guarantee by English law. It is admitted that *Rothschild v. Carrie* (1 Q.B. Rep. 43; s. c. 10 Law J. Rep. (N.S.) Q.B. 77) is an authority the other way; and that the only distinction is, that there the bill was accepted on its face payable in Paris, whereas here it is open, and also (as we say) was

sent for collection to Paris. In the case of *Gibbs v. Fremont* (9 Exch. Rep. 25; s. c. 22 Law J. Rep. (n.s.) Exch. 302) the case of *Rothschild v. Currie* (1 Q.B. Rep. 43; s. c. 10 Law J. Rep. (n.s.) Q.B. 77) is referred to as doubtful, and in *Allen v. Kemble* (6 Moo. P.C. 314) it is disapproved of. Again, Mr. Justice Byles, in his treatise on *Bills of Exchange*, 8th edit. 372, thus refers to *Rothschild v. Currie* (1 Q.B. Rep. 43; s. c. 10 Law J. Rep. (n.s.) Q.B. 77): "It has even been held, but perhaps erroneously, that not only the protest, but the notice, must be regulated by the law of the country where the bill is payable." This question is also discussed in *Chitty on Bills* (edition of 1859), 172, and in *Story on Bills* (s. 296. and the notes to that section), and also in *Story's Conflict of Laws*. M. Demangeat, in his treatise *Traité de Lettres de Change*, states that the law of England governs an indorsement made there, and makes an indorsement which is good there also good against an acceptor in France. Any other construction would lead to great inconvenience, as the indorsee cannot well know the law of another country. Secondly, the French law requires that the indorsement should contain the name of the indorsee, the date and the value (whether on account for goods, &c.)—*Code de Commerce*, arts. 136, 137, 138, *Nouguier, Des Lettres de Change*. And as to the alteration, it is admitted that there is a right to alter; but here the alteration has gone too far, because there is no right to fix the sum as is here done; and one of the reasons why the acceptor refuses to pay is, that he has this sum demanded of him; and, as appears from *Nouguier, Des Lettres de Change*, 420, by the French law, a man has no right to modify the ordinary rules of indorsement.

E. James and Tapping, in support of the rule.—There is no conflict of authority. In *Gibbs v. Fremont* (9 Exch. Rep. 25; s. c. 22 Law J. Rep. (n.s.) Exch. 302) the question was simply on what rate of interest the damages were to be calculated against the drawer in case of non-acceptance. The acceptor's engagement is to pay in France, and the indorser engages, on non-performance by the original debtor in France, to pay himself in England. *Rothschild v. Currie* (1 Q.B. Rep. 43; s. c. 10 Law J. Rep. (n.s.) Q.B. 77) is in point. First, it is submitted that this is a French bill as against the indorser. Lord Mansfield, in the case of *Robinson v. Bland* (1 W. Black. 258), said, "The general rule established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, where the parties at the time of making had a view to a different kingdom," and here at the time of indorsement it was contemplated that the contract should be fulfilled in France.

[BYLES, J.—It is said in *Allen v. Kemble* (6 Moo. P.C. 314), "Since the cases above referred to were decided, the whole law on this subject has been most carefully, elaborately and learnedly examined by Mr. Justice Story in his treatise on *Bills of Exchange*, and he disapproves of the decision in *Rothschild v. Currie*" (1 Q.B. Rep. 43; s. c. 10 Law J. Rep. (n.s.) Q.B. 77).]

Where a contract is made in one country to be performed in another, the latter is deemed the country where it is made—*Byles on Bills*, 370, *Story on Bills*, s. 129, the judgment of Lord Brougham in *Don v. Lippmann* (5 Cl. & F. 1).—[They further referred to *Nouguier, Des Lettres de Change, Les Codes Annotés, de Sirey, par Gilbert, et Dictionnaire des Lois, par Chicoisneau*.]—As to the argument from inconvenience, it cuts both ways, and is rather in favour of our construction, as it would be highly inconvenient that the holder should have to ascertain where every indorsement was made and the law of those places. He cannot tell where the indorsements were made; the proper time may elapse from no default, and, indeed, the bill might be indorsed where there was no law on the subject. Secondly, as to the alteration. According to the evidence, these words are always put in, and merely denote the maximum, not minimum, which was to be paid; and it is clear that immaterial words in favour of the party sued do not affect the

contract. The only mention as to alteration in the Code is found in *Code de Commerce*, s. 139, which prohibits ante-dating, but not such an alteration as the present.

Cur. adv. vult.

The judgment of the Court (Erle, C.J., Byles, J., Keating, J., and Smith, J.) was now (Jan. 12) delivered by—

ERLE, C.J.—In this action, by the holder against the indorser, the defendant relied on two grounds of defence: first, that he had not received due notice of dishonour, and, secondly, that the bill was rendered void by alteration. As to the first ground, the facts were that the bill was drawn in England, payable to the drawer's order, directed to and accepted by the drawee in France, payable in France, and was indorsed by the drawer in blank and delivered to the defendant in England, and by him indorsed in blank and delivered to the plaintiff in England, and indorsed by the plaintiff and delivered to one Berl , in France. The bill was duly presented in France and dishonoured, and the holder took the steps required by the law of France to entitle him to recover from the other parties to the bill. That is to say, the bill was taken to the proper office and a due protest was made, and a copy of the protest was transmitted to the consul of France in the foreign country where the party to the bill was residing, that is to say, as respects this defendant, to the French consul in London, and by that consul the protest was in due course, according to the French practice, made known to the defendant without delay. If the action on the bill had been brought in France, upon an indorsement made in France, these facts would have amounted to such notice of dishonour as the law of France requires, and would have entitled the plaintiff to recover. As this action was brought in England against an indorser indorsing in England, the present question is, whether these facts are evidence of due notice of dishonour against this defendant in an action brought in England.

Our answer is in the affirmative, on two grounds: first, because the point has been decided in *Rothschild v. Currie* (1 Q.B. Rep. 43; s. c. 10 Law J. Rep. (N.S.) Q.B. 77), where the bill was drawn, accepted, indorsed and dishonoured under circumstances similar to those relating to the present bill, and the facts adduced to shew notice of dishonour were also similar and were decided to be sufficient because they were sufficient according to the law of France. Secondly, if the reason assigned in that case be not now adopted, and if the contract of an indorser in England of a bill accepted payable in France be held to be a contract governed by the law of England, and so the holder be not entitled to sue in England such an indorser, unless he has given due notice of dishonour, according to the law of England, then the question is what notice, under such circumstances, amounts to due notice. If the parties lived in England, and their addresses were known, the rule is that notice should be sent by the post on the day following the day of dishonour. But, in respect of bills dishonoured in a foreign country, such a rule cannot always have a literal application, because, among other reasons, the postal regulations may make it impossible. Due notice is such notice as can be reasonably required under the circumstances, and the reasonableness of the notice proved in evidence is a question of law depending on the facts of each particular case, which facts are for the jury. In the course of practice rules have been recognized by the Judges, and so have become law—see the judgments of Grove, J., Lawrence, J., and Le Blanc, J., in *Darbishire v. Parker* (6 East, 3). If, by the law of the place where the bill is payable, there are regulations for giving notice of dishonour, in order to make indorsers liable to the holder, a presumption is raised that notice, according to those regulations, is all that the indorser should require. The indorser of a bill accepted payable in France, promises to pay, in the event of dishonour in France, and notice thereof. By this contract, he must be taken to know the law of France relating to the dishonour of bills, and notice of dishonour is a portion of that

law. Then, although his contract is regulated by the law of England relating to indorsement, and, although he may not be liable unless reasonable notice of dishonour has been sent to him, yet the notice of dishonour according to the law of France may be, and, we think, ought to be deemed reasonable notice according to the law of England, and be sufficient in England to entitle the plaintiff to recover according to that law. It is reasonable to hold that the foreign holder should have time to make good his right of recourse against all the parties to the bill, in whatever country they may be; here the holder was a Frenchman in France, the indorsement to him was by the plaintiff, a Frenchman in France, the indorsement to the plaintiff was by the defendant, an Englishman in England, and the indorsement to that Englishman by Lion, the payee, may have been in any country. The inconvenience would be great if the holder was bound to know the place of each indorsement, and the law of that place relating to notice of dishonour, and to give notice accordingly, on pain, in case of mistake, of losing his remedy; whereas there would be great convenience to the holder if notice, valid according to the law of the place where the bill is payable, should be held to be reasonable notice for each of the countries of each of the parties, unless an exceptional case should give occasion for an exception.

The defendants' second ground of defence was the alteration of the bill after the indorsement by the defendant. The facts were, that the bill had been indorsed in blank by Lion, the payee, and delivered to the defendant, by him indorsed in blank in England and delivered to the plaintiff, who took or sent the bill to France, where it was indorsed by one Berl . The law of France requires an indorsement to be special, and to state a date and consideration, and one alteration made by the plaintiff was turning the indorsements in blank into special indorsements, with the statement of a date and a consideration, viz. for value received. If this had been all it might be held to make no change in the liability of the parties but to be a completion of the intention of the parties to indorse, and, probably, would not have been thought to make the bill void. For a man may convert a blank indorsement into a special indorsement in his own favour—*Clark v. Piggot* (1 Salk. 126; s. c. 12 Mod. 193). But, beyond this, on the special indorsement of Lion to Smith was inserted the rate of exchange, according to which payment was to be made thus: "Pay to the order of E. T. Smith, at the rate of francs 25.75 for 1l. value received, the sum of francs 6437.50, *ut retro*;" and beyond this, there was placed on the face of the bill a superscription of the same words, purporting to make them part of the acceptor's contract. The defendant contended that these alterations altered the contract of the acceptor and of himself, which was in substance to pay according to the rate of exchange at the time of dishonour, a rate which might be lower than 25.75. And as it is law that an alteration of a written contract in a material part makes it void this contract was rendered void thereby.

The plaintiff attempted to answer this defence by offering evidence to prove that the effect of the words in the indorsement, "pay at 25.75," did not create a right to demand payment at that rate of exchange, but was a declaration obligatory on the holder, whoever he might be, not to demand a higher rate than 25.75, even if the actual rate should be higher, leaving the right of the acceptor or other party to pay at a lower rate, if the actual rate should be lower, unaffected thereby. On this part of the case it is not necessary to say more than that this evidence appears to us to have failed.

We have, therefore, to decide whether these alterations render the bill void in the hands of the plaintiff, by whom or on whose behalf they were made, and our answer is in the affirmative; they appear to us to bring this case within the numerous authorities deciding that alterations of an instrument containing a contract, having the effect of altering the rights and liabilities of the parties to that contract, render that instrument void.

Judgment for the defendant.

[IN THE COMMON PLEAS.]

Jan. 26, 1866.

THE UNION MARINE INSURANCE COMPANY (LIMITED) v. MARTIN.

35 L. J. C.P. 181.

Marine Insurance—Double Insurance—Amount Recoverable on Policy of Re-insurance.

MARINE INSURANCE.—By a policy of insurance a vessel was insured from Bombay to Calcutta, and for thirty days after she had been moored at the latter place. She had arrived there ten days before such policy was effected; and on receiving news of her said arrival, her owners effected a second policy on her with the same insurers, by which she was insured at and from Calcutta to Bombay. The vessel was totally lost at Calcutta during the continuance of the risk under both policies, and the insurers, having paid the owners as for a total loss upon the second policy, sought to recover the full amount upon a policy of re-insurance which they had effected of the risk under the second policy, without deducting the money payable upon the first policy. The Court, being at liberty to draw inferences of fact as a jury, were of opinion from the above facts that the said second policy as intended as a substitution for the first, and that the original insurers were liable only on the second policy, and were, therefore, entitled to recover the full amount on the policy of re-insurance.

This was an action for the recovery of 50*l.* under a policy of re-insurance on forty sixty-fourth shares of a ship called the *Aladdin*, and by the consent of the parties, and by the order of Byles, J., the following CASE was stated for the opinion of the Court, without any pleadings.

On the 20th of September, 1864, the owners of the *Aladdin* effected a policy of insurance with the plaintiffs in the sum of 7,000*l.* on forty sixty-fourth shares of the said ship, such shares being valued in the said policy at 7,000*l.*, and the insurance being at and from Bombay to Calcutta, and for thirty days after she had been moored at Calcutta in good safety. A copy of this policy was annexed to the case, marked No. 1.

The ship arrived at Calcutta on the 10th day of September, 1864, and on receiving news of the arrival the owners effected another policy with the plaintiffs on the aforesaid forty sixty-fourth shares, the shares being likewise valued in this policy at 7,000*l.*, and the insurance being at and from Calcutta to Bombay, and during her stay there for thirty days after arrival. A copy of this policy was annexed, marked No. 2.

On the 16th of November, 1864, the plaintiffs effected with the defendant and other underwriters a policy of insurance in the sum of 2,000*l.* on the said forty sixty-fourth shares of the said ship, the insurance being at and from Calcutta to Bombay, and the said shares were valued at 7,000*l.* This policy, a copy of which was annexed, numbered No. 3, was a policy of re-insurance on the second mentioned policy.

On the 5th of October, and during the continuance of the risk under both the first and second policies, the vessel was driven ashore, in the cyclone which raged at Calcutta, and became a complete wreck; and it is admitted that the loss was a total loss. The plaintiffs have settled with the owners as for a total loss of the ship on the policy No. 2, and claim from the defendant the sum of 100*l.*, being the full amount of his subscription of the re-insurance policy, No. 3. The defendant has paid 50*l.* on one-half of the amount of his subscription.

The Court to be at liberty to draw such inferences of fact as a jury would be entitled to do.

The question for the opinion of the Court was, whether the defendant was liable to pay to the plaintiffs the full amount of his subscription to the re-insurance policy.

Cohen, for the plaintiffs.—The plaintiffs have paid the whole amount on policy No. 2, they being liable for the same under such policy to the owners of the vessel. There is no reason, therefore, why they should not recover the full amount underwritten by the defendant, who had, by policy to the extent he had so underwritten, re-insured the plaintiffs against loss in the second policy. No doubt policy No. 1. overlapped part of the time covered by policy No. 2, but both policies being made by the owners of the vessel with the plaintiffs, the plaintiffs could never recover anything under policy No. 1. They have, therefore, had to pay the whole amount insured, and are entitled to be indemnified under the policy of re-insurance to the full extent of such re-insurance.

Crompton, contra.—The question is as to the amount payable under a policy of re-insurance where the original insurers were liable under two policies, under each of which the loss could be claimed. If these two policies are to be considered in the same way as they would have been had each been made with different underwriters, the interest of the plaintiffs in the risk insured by the third policy, which was underwritten by the defendant, would have been only that of one-half, for in such a case the plaintiffs would only have been ultimately liable on the second policy to the extent of one-half the amount thereby insured—*Rogers v. Davis* (*Park on Insurance*, 423) and *Davis v. Gildart* (*Ibid.* 424). “In France over-insurance is not permitted; and in case of policies identical as to the party interest and risks exceeding the amount of the insurable interest without fraudulent intent, the first underwriters only to the amount at risk are liable”—1 *Phillips on Insurance*, 202 (3rd edit.), citing *Code de Commerce*, a. 359. If there was here a double insurance the defendant would be entitled to share with the plaintiffs the benefit arising from the over-insurance. It is submitted that there was such double insurance. According to 1 *Phillips on Insurance*, 205 (3rd edit.), “two insurances may be double, though the risk commence or terminate at different times. During the time while the two insurances concur and run parallel, the risks being specified by the same description in both, are identical, and come within the phraseology and the object of the provision relative to prior and subsequent policies.” With respect to re-insurances, such could not have been legally made in this country until the 27 & 28 Vict. c. 56. s. 1; there are, therefore, no decisions as to the amount recoverable thereunder. It is stated in *Arnould on Insurance*, vol. 1. p. 94. (3rd edit.), that, “in every other country, except France, the re-assured is allowed to cover by his re-assurance the whole amount of the original insurance, without deducting therefrom the premiums of the original insurance, or the premium of the premium. In France the great authority of Emérigon supports this practice, but Pothier, Valin, Estrangin, the learned commentator on Pothier, and Boulay-Paty, are all opposed to Emérigon on this point, upon the ground that the premium of the original insurance having been already paid to the underwriter, he runs no risk upon it, and, therefore, cannot insure it.”

Cohen replied.

ERLE, C.J.—We are of opinion that judgment should be for the plaintiffs in this case. The intention of the parties, as gathered from the dates at which the first and second policies were made was, that the first policy should be considered at an end when the second policy was made, and that the second policy should be the one on which the ship was insured by the owners. Then the plaintiffs re-insured that risk, and the liability of the defendant for the full amount, under his contract of insurance, is therefore clear.

WILLES, J., KEATING, J. and MONTAGUE SMITH, J. concurred.

Judgment for the plaintiffs.

[IN THE COMMON PLEAS.]

Jan. 29, 1866.

TOMLINSON v. GOATLEY.

35 L. J. C.P. 183; L. R. 1 C.P. 230; 12 Jur. N.S. 431.

Practice—Common Law Procedure Act, 1852, s. 17.—Order to Proceed as if Service Effected.

PRACTICE.—*The Court will not interfere with the discretion of a Judge at chambers in refusing to make an order to proceed as if personal service had been effected, because he was not satisfied that there had been sufficient reasonable efforts to effect service.*

Kingdon moved, under the Common Law Procedure Act, 1852, s. 17, for leave to proceed as if personal service had been effected. The defendant was an attorney living at Bromley, in Kent, and having his office at No. 5, Bow Street, Covent Garden. He was sued in this action as the acceptor of a bill of exchange, payable at 5, Bow Street, Covent Garden, and it appeared from the affidavit of the process server, that the latter went to the defendant's office in Bow Street for the purpose of serving him with the writ on the 11th of January, 1866, when he saw a clerk there, who told him that the defendant was not in; that the deponent then made an appointment with the clerk for seeing the defendant on the next day, at his office, at three o'clock, which he was told by the clerk was the best time for that purpose; that deponent called accordingly at that time at the said office on the 12th of January, when the same clerk whom he had seen there the previous day told him that the defendant was not then in, but that he had been there that day, and he was expected to be there again in the course of the day; that the deponent then left with such clerk a copy of the writ inclosed in an envelope, addressed to the defendant, and that the deponent called again at the office on the 17th of January, and asked the same clerk, whom he again saw there, if he had given the envelope to the defendant, when the clerk said he had given it to him on the same day it had been left there, viz. the 12th, and that there was no answer. The deponent also stated that he had afterwards seen at the office in Bow Street a person who promised that the defendant should call upon **Mr. Comins** (the plaintiff's attorney) and enter into some arrangement for settling the action; and the deponent stated that he had made all reasonable efforts to serve the defendant personally with a copy of the said writ, and that for the reasons aforesaid he believed the writ came to the defendant's knowledge on the 12th of January. A similar application, on the same affidavit, had been made to **Mr. Justice Byles** at chambers, but that learned Judge had declined to make an order, because, in his opinion, no sufficient reasonable efforts had been made to serve the defendant. The learned Judge seemed to consider that there should have been an attempt to serve the defendant at his place of residence, but that would be only putting the plaintiff to great unnecessary expense.

[**ERLE, C.J.**—Whether reasonable efforts have been made to effect service is a matter which must be decided by the Judge to whom the application for the order to proceed is made. I do not mean to lay down any rule as to what would be sufficient, for that cannot be done, as each case must entirely depend on its own facts.]

In *Davies v. Westmacott* (7 Com. B. Rep. N.S. 829; s. c. 29 Law J. Rep. (N.S.) C.P. 150) the Court declined to interfere with the decision of the learned Judge at chambers, because they considered service at a club to be an offensive mode of proceeding.

ERLE, C.J.—We do not wish to lay it down that attempts to effect service

must in all cases be made at the place of residence of the party; but it must be always left to the discretion of the Judge before whom the matter comes.

WILLES, J.—I think it would be a bad precedent if we were to interfere with a Judge's decision as to what are reasonable efforts to effect service. I agree that it is not necessary to go to the party's residence where the Judge is satisfied that the place of business is a reasonable place to find such person. In this case there were, however, other circumstances, namely, only two appointments and one call, which might have justified the refusal of the application, although I do not say that it is always requisite there should be these. It also appears that the process server made no statement to the clerk of the purpose for which he wanted the appointment.

KEATING, J. and MONTAGUE SMITH, J. concurred.

Rule refused.

[IN THE COMMON PLEAS.]

Jan. 25, 27, Feb. 26, 1866.

INDERMAUR v. DAMES.

35 L. J. C.P. 184; L. R. 1 C.P. 274; 14 L. T. 484; 14 W. R. 586; affirmed, [1867] E. R. A.; 36 L. J. C.P. 181; L. R. 2 C.P. 311; 16 L. T. 293; 15 W. R. 434 (Ex. Ch.).

Negligence—Injury to Person on Premises by Invitation.

NEGLIGENCE.—*The defendant agreed with one D. for the setting up of some gas-regulators in his sugar-refinery. The contract stipulated they were not to remain unless a certain saving was effected, and that this was to be tested. In order to do this it was necessary to examine the burners, and D.'s manager and the plaintiff, as his servant, went to the sugar-refinery for that purpose. In the refinery there was a shaft for raising and lowering sugar, and necessary, usual and proper for the business; this shaft was unfenced, though when out of use it might have been fenced round. The plaintiff was warned that the place was dangerous and lights not allowed, and that he should keep by a man who would have a light; but having left a tool in a part of the refinery where he had been he went back for it, and in returning to the man with the light fell through the shaft without any fault on his own part:—Held, that where a person resorts to a building in the course of business on the express or implied invitation of the occupier, such person using reasonable care is entitled to expect the occupier to use reasonable care to prevent damage from unusual danger which he knows or ought to know; that where there is evidence of neglect it is a question for the jury; and that in this case there was evidence for the jury that the plaintiff was on the defendant's premises on business by his tacit invitation; that the shaft was an unusual danger known to the defendant, and that damage accrued to the plaintiff from the defendant and his servants not using sufficient means to avert and warn him of it.*

This was an action to recover damages for personal injury alleged to have been caused by the negligence of the defendant.

The declaration alleged, that the defendant was possessed of a sugar-refinery, containing several floors; that inside it there was a shaft passing through these floors to the basement and dangerous to persons entering the building and unacquainted with it, as the defendant well knew; that the plaintiff was so unacquainted and was employed by the defendant to enter the building and do certain work as a gasfitter, after dark, on one of the upper floors, and that the defendant negligently allowed the said shaft to be open,

unfenced, unguarded and unlighted, whereby the plaintiff, whilst so employed, fell down the shaft and received certain injuries.

The defendant pleaded, first, not guilty; secondly, a denial of the dangerous character of the shaft; thirdly, a denial of the defendant's knowledge; fourthly, a denial of the employment of the plaintiff.

At the trial, the following facts appeared. The plaintiff was a journeyman gasfitter, in the employment of one Duckham, who was patentee of an improved gas-regulator; and the defendant was a sugar-refiner possessed of the refinery mentioned in the declaration. In June, 1864, one Hargreaves, as agent for Duckham, agreed with the defendant to fit up his refinery with two gas-regulators, and the contract stipulated that if a certain per-centage of gas was not saved Duckham should remove these regulators and restore the fittings at his own expense, and that if this saving was effected the regulators, after test, should be considered purchased at a certain price, and a three years' guarantee of them given. In the same month, Hargreaves, accompanied by the plaintiff and a man and lad also in Duckham's employ, went to the refinery to put up the regulators; but as the plaintiff was not sober the manager of the refinery would not allow him to enter the premises, and the work was done by the other man and the lad. A few days after Hargreaves, accompanied by the plaintiff, went to the refinery to examine the burners and see in what state they were (without which it was impossible to test the regulators), and to test the regulators. Before going, Hargreaves had warned the plaintiff that sugar-refineries were peculiar places, that candles and lucifers were not allowed, and that he should keep close to Hargreaves, who would follow the man who carried the light. A workman of the defendant accompanied Hargreaves and the plaintiff to the first floor, where they examined a burner, and then went round the floor to examine another; but the plaintiff having left one of his tools near this first burner, went back for it; and, in coming back again, instead of going round, walked straight across the floor, and fell through the shaft, which was 4 feet 3 inches square, and fenced only on two sides, and which he could not see in the darkness, there being, according to his evidence, only two burners alight. Such shafts are necessary, usual and proper in all such refineries, and are used for raising and lowering sugar, and sometimes for ventilation. When so in use it is, of course, necessary to have the shaft open; and when not in use it is equally possible to have it entirely fenced; but the plaintiff produced no evidence to shew that it was usual in other refineries to fence the shafts.

At the end of the plaintiff's case it was submitted, on behalf of the plaintiff, that there was no obligation on the plaintiff to fence the shaft; but the learned Judge thought there might be a distinction between the case of a person permanently, and that of one only temporarily employed, and thought that the case should proceed, but reserved the point.

Evidence was then adduced for the defendant, in order to shew that the refinery was constructed similarly to other refineries, that there were several burners alight, and quite sufficient light for the plaintiff to have avoided the accident, with due care. The jury found a verdict for the plaintiff.

Huddleston obtained a rule nisi calling on the plaintiff to shew cause why a non-suit should not be entered on the ground that the evidence did not shew any cause of action; or why final judgment should not be stayed, on the ground that the declaration shewed no cause of action; or why there should not be a new trial on the ground that the verdict was against the weight of evidence. The following authorities were cited on moving for the rule: *Hounsell v. Smyth* (7 Com. B. Rep. N.S. 731; s. c. 29 Law J. Rep. (N.S.) C.P. 203), *Seymour v. Maddox* (16 Q.B. Rep. 326; s. c. 20 Law J. Rep. (N.S.) Q.B. 327) and *Wilkinson v. Fairrie* (1 H. & C. 633; s. c. 32 Law J. Rep. (N.S.) Exch. 73).

Ballantine, Serj. and Raymond (Jan. 25) shewed cause.—The plaintiff was a stranger to the dangerous nature of the premises, and, as he went there upon lawful business with the defendant's knowledge, it was the defendant's

duty to have taken care to have so protected the shaft that it should not have caused him an injury. It is different from the case of *Hounsell v. Smyth* (7 Com. B. Rep. N.S. 731; s. c. 29 Law J. Rep. (N.S.) C.P. 203), where the plaintiff had a mere licence or permission, as one of the public, to cross the waste land of the defendant; and had, moreover, the knowledge or the means of knowing the danger he incurred in doing so, by reason of there being a quarry there. There is an implied duty on persons who have property under their control that it shall not be a dangerous trap to those who are invited to go on the premises or who may be authorized to go there—*Barnes v. Ward* (9 Com. B. Rep. 392; s. c. 19 Law J. Rep. (N.S.) C.P. 195), and *Corby v. Hill* (4 Com. B. Rep. N.S. 556; s. c. 27 Law J. Rep. (N.S.) C.P. 318), within the principle of which cases the present one falls. The case of *Seymour v. Maddox* (16 Q.B. Rep. 326; s. c. 20 Law J. Rep. (N.S.) Q.B. 327), cited on moving the rule, was, whether the alleged duty arose out of the relation of master and servant; and that case is, therefore, clearly distinguishable from the present one. The strongest authority in support of the defendant's rule is that of *Wilkinson v. Fairrie* (1 H. & C. 633; s. c. 32 Law J. Rep. (N.S.) Exch. 73); there, a carman being sent by his employer to the defendant's for some goods, was directed by a servant of the defendant's to go to the counting-house, and, in proceeding along a dark passage of the defendant's premises, in the direction pointed out, he fell down a staircase, and was injured. On these facts appearing, in an action by the carman against the defendant for negligence, Mr. Baron Bramwell nonsuited the plaintiff, on the ground that either the plaintiff could see, and therefore the accident was the result of his own negligence, or, if he could not see, he ought not to have proceeded without a light; and the Court of Exchequer held the nonsuit to be right. But there is a great distinction between a staircase and a hole such as this shaft was, and this distinction is alluded to in that case: "If it was sufficiently light that he could see," said Mr. Baron Bramwell in that case, "he might have avoided the staircase, which is a very different thing from a hole or trapdoor, down which a man may fall."

[WILLES, J. referred to *Farrant v. Barnes* (11 Com. B. Rep. N.S. 553; s. c. 31 Law J. Rep. (N.S.) C.P. 137), and *Holmes v. Clarke*.¹]

Huddleston and Griffiths (Jan. 27), in support of the rule.—There was no duty on the defendant either arising out of the contract or otherwise to fence this shaft, or to do anything to his premises to make them especially fit for the plaintiff to go over. In fact, there was no permission given to the plaintiff at all to go on the premises, for the defendant had, on the contrary, expressly objected to the plaintiff working there. However, at the utmost, the plaintiff can only be said to have gone there with the defendant's licence. As between the defendant and his own servants, there clearly was no duty to have fenced this shaft: then what obligation was there on the defendant to guard this particular aperture? He had done the utmost that any moral duty could have imposed on him when he had deputed a competent person to go over the premises with the persons who might be sent by Duckham to test the regulators. The plaintiff had no more right to protection than the visitor in *Southcote v. Stanley* (1 Hurl. & N. 247; s. c. 25 Law J. Rep. (N.S.) Exch. 339) or the plaintiff who was licensed to cross the waste land in *Hounsell v. Smyth* (7 Com. B. Rep. N.S. 731; s. c. 29 Law J. Rep. (N.S.) C.P. 203). The cases on the subject are all reviewed at length in the judgment of Chief Baron Pigot in *Sullivan v. Waters* (14 Ir. Com. Law Rep. N.S. 460), where that learned Judge deduces the conclusion, "that a mere licence given by the owner to enter and use premises which the licensee has full opportunity of inspecting, which contained no concealed cause of mischief, and in which any existing source of danger is apparent, creates no such obligation in the owner." The declaration in the present case discloses no cause of action; it alleges no duty

(1) 6 Hurl. & N. 349; s. c. 30 Law J. Rep. (N.S.) Exch. 135; and in Ex. Ch. 7 Hurl. & N. 937; s. c. 31 Law J. Rep. (N.S.) Exch. 356.

and no contract, nor does it shew facts from which any such a duty as would make the defendant liable can be implied. It is not averred that there was any danger on the premises of which the defendant knew the plaintiff did not know or had not the means of knowing. The case of *Wilkinson v. Fairrie* (1 H. & C. 633; s. c. 32 Law J. Rep. (N.S.) Exch. 73) is quite in point. There the carman chose to walk down a dark passage, and did not take that care of himself which it was his duty to do, and so was unable to recover for the injury he had sustained; and here the plaintiff chose not to follow the guide which had been provided, and therefore cannot complain of what happened in consequence.

[WILLES, J.—The case perhaps resembles *Toomey v. the London and Brighton Railway Company* (3 Com. B. Rep. N.S. 146; s. c. 27 Law J. Rep. (N.S.) C.P. 39).]

The case of *Hounsell v. Smyth* (7 Com. B. Rep. N.S. 731; s. c. 29 Law J. Rep. (N.S.) C.P. 203) has been followed by that of *Bolch v. Smith* (7 Hurl. & N. 736; s. c. 31 Law J. Rep. (N.S.) Exch. 201), which also shews that a mere licensee cannot maintain an action for insufficient fencing. Either the plaintiff was on the premises with the defendant's permission or not; if he was not, then there is no liability; if he was, then the question arises whether he was there as Duckham's servant simply, or as servant of Duckham in his character of employee of the defendant. In the former case, the plaintiff would only be a licensee, and the case would then fall within that class of cases which apply to licensees; in the latter case, he would be a servant of the defendant, and would fall within *Seymour v. Maddox* (16 Q.B. Rep. 326; s. c. 20 Law J. Rep. (N.S.) Q.B. 327) and *Priestly v. Fowler* (3 Mee. & W. 1; s. c. 7 Law J. Rep. (N.S.) Exch. 42), and similar cases, and he must bear the risk. There is no difference between this case and *Seymour v. Maddox* (16 Q.B. Rep. 326; s. c. 20 Law J. Rep. (N.S.) Q.B. 327), where a player fell through a trap-door left open in the stage. No doubt a servant should have the means of knowledge; but here the hole was not a trap, but a proper and necessary thing, and the only notice required, therefore, was that "you are embarking on something dangerous, and must look out." As to *Farrant v. Barnes* (11 Com. B. Rep. N.S. 553; s. c. 31 Law J. Rep. (N.S.) C.P. 137), there was deceit in that case; and as to *Holmes v. Clarke*,¹ the fencing of a dangerous machine was worn out, full notice given, and therefore wilful neglect.

[WILLES, J.—And also a breach of a statutory duty.]

There is, no doubt, an obligation on every man to use his land properly with respect to the public, and he must not place a hole near a road; and so, also, he must not leave one in a shop into which he invites the public; and there also may be a statutory liability. But here the liability must arise out of contract, and therefore the question really turns on what the contract was. Now, the contract with Duckham was, that he was to do certain work, and to come and see it afterwards. Assume that to be so, then the duty undertaken by the plaintiff is that he will provide a sugar refinery in the ordinary state for Duckham and his servants to pass through, and no duty arises to give protection beyond the usual means in a sugar refinery. If this hole had been unusually dangerous, it might be that the defendant would be liable; but it was one always left in a refinery. There is also another view of the matter. Assume that there was a duty to point out or guard this hole, it was Hargreaves who got permission; the defendant did not know any one else was coming, and Hargreaves knew the place was dangerous, and, therefore, there could be no duty on the defendant to inform the plaintiff, who happened to come with Hargreaves.

Cur. adv. vult.

The judgment of the Court² was now (Feb. 26) delivered by—

(2) *Erle, C.J., Willes, J., Keating, J. and Montague Smith, J.*

E. R. A. [1866]—VOL. 2

WILLES, J.—This was an action to recover damages for a hurt sustained by the plaintiff by falling down a shaft at the defendant's place of business, through the actionable negligence, as it was alleged, of the defendant and his servants.

At the trial, before the Lord Chief Justice, at the Sittings here after last Michaelmas Term, the plaintiff had a verdict for 400*l.* damages, subject to leave reserved.

A rule was obtained by the defendant last term to enter a nonsuit or to arrest the judgment or for a new trial, because of the verdict being against the evidence.

The rule was argued during last term, before Lord Chief Justice Erle, Mr. Justice Keating, Mr. Justice Montague Smith and myself, when we took time to consider. We are of opinion that the rule ought to be discharged.

It appears that the defendant was a sugar-refiner, at whose place of business there was a shaft, 4 feet 3 inches square and 29 feet 3 inches deep, used for moving sugar. The shaft was necessary, usual and proper in the way of the defendant's business. Whilst it was in use, it was necessary and proper that it should be open and unfenced. When it was not in use, it was sometimes necessary with reference to ventilation that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might then without injury to the business have been fenced by a rail.

Whether it was usual to fence similar shafts when not in use did not distinctly appear, nor is it very material, because such protection was unquestionably proper (in the same sense of reasonable) with reference to the safety of persons having a right to move about upon the floor, where the shaft, in fact, was, because in its nature it formed a pitfall there. At the time of the accident it was not in use, and it was open and unfenced.

The plaintiff was a journeyman gasfitter in the employ of a patentee who had supplied the defendant with his patent gas-regulator, to be paid for upon the terms that it effected a certain saving; and for the purpose of ascertaining whether such saving had been effected, the plaintiff's employer required to test the action of the regulator. He accordingly sent the plaintiff to the defendant's place of business for that purpose; and whilst the plaintiff was engaged upon the floor where the shaft was, he (under circumstances as to which the evidence was conflicting, but accidentally, and, as the jury found, without any fault or negligence on his part) fell down the shaft, and was seriously hurt. It was argued that, as the defendant had objected to the plaintiff's working at the place upon a former occasion, he (the plaintiff) could not be considered as having been in the place with the defendant's leave at the time of the accident; but the evidence did not establish a peremptory or absolute objection to the plaintiff's being employed, so as to make the sending of him, upon the occasion of the accident, any more against the defendant's will than the sending of any other working man; and the employment, and the implied authority resulting therefrom to test the apparatus, were not of a character involving personal preference (*dilectus personæ*), so as to make it necessary that the patentee should himself attend. It was not suggested that the work was not journeyman's work.

It was also argued that the plaintiff was at the best in the condition of a bare licensee or guest, who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the colour of ingratitude, so long as there is no design to injure him—see *Hounsell v. Smyth* (7 Com. B. Rep. N.S. 731; s. c. 29 Law J. Rep. (N.S.) C.P. 203). We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and defendant had an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment and that a person testing the work he had stipulated with

the defendant to be paid for, if it stood the test whereby impliedly the workman was taken to be allowed to apply that test, and a reasonable opportunity of doing so. Any duty to enable the workman to do the work in safety seems equally to exist during the accessory employment of testing, and any duty to provide for the safety of the master workman seems equally owing to the servant workman, whom he may lawfully send in his place.

It is observable that in the case of *Southcote v. Stanley* (1 Hurl. & N. 247; s. c. 25 Law J. Rep. (N.S.) Exch. 339), upon which much reliance was properly placed for the defendant, Mr. Baron Alderson drew the distinction between a bare licensee and a person coming on business, and Mr. Baron Bramwell between active negligence in respect of unusual danger known to the host and not to the guest, and a bare defect of construction or repair which the host was only negligent in not finding out or anticipating the consequence of. There is considerable resemblance, though not a strict analogy, between this class of cases and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the lender or giver for damage sustained for the loan or gift except in case of unusual danger known to and concealed by the lender or giver—*MacCarthy v. Young* (6 Hurl. & N. 329; s. c. 30 Law J. Rep. (N.S.) Exch. 227). The case of the carboy of vitriol was one in which this Court held answerable the bailor of an unusually dangerous chattel, the quality of which he knew, but did not tell the bailee, who did not know it, and who as a proximate consequence of his not knowing, and without any fault on his part, suffered damage. The cases referred to as to the liability for accidents to servants and persons employed in other capacities in a business or profession which necessarily and obviously exposes them to danger, as in *Seymour v. Maddox* (16 Q.B. Rep. 326; s. c. 20 Law J. Rep. (N.S.) Q.B. 327), also have their special reasons. The servant or other person so employed is supposed to undertake, not only the ordinary risks of the employment into which he enters, but also all extraordinary risks which he knows of and thinks proper to incur, including those caused by the misconduct of his fellow-servants, not, however, including those which can be traced to mere breach of duty on the part of the master. In the case of a statutory duty to fence, even the knowledge and reluctant submission of the servant who has sustained an injury are held to be only elements in determining whether there has been contributory negligence; how far this is the law between master and servant where there is danger known to the servant and no statute for his protection we need not now consider, because the plaintiff in this case was not a servant of the defendant, but the servant of the patentee. The question was adverted to, but not decided, in *Holmes v. Clarke*.¹

The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business upon his invitation, express or implied. The common case is that of a customer in a shop; but it is obvious that this is only one of a class; for whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trapdoor left open, unfenced and unlighted—*The Lancaster Canal Company v. Parnaby* (11 Ad. & E. 223; s. c. 7 Law J. Rep. (N.S.) Q.B. 258), per Curiam; *Chapman v. Rothwell* (El. B. & El. 168; s. c. 27 Law J. Rep. (N.S.) Q.B. 315), where *Southcote v. Stanley* (1 Hurl. & N. 247; s. c. 25 Law J. Rep. (N.S.) Exch. 339) was cited, and the Lord Chief Justice, then Mr. Justice Erle, said, "The distinction is between the case of a visitor,—as the plaintiff was in *Southcote v. Stanley* (1 Hurl. & N. 247; s. c. 25 Law J. Rep. (N.S.) Exch. 339),—who must take care of himself, and a customer who, as one of the public, is invited for the purposes of the business carried on by the defendant." This protection does not depend upon the fact of a contract being entered into in

the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop, in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And if a customer were after buying goods to go back to the shop in order to complain of the quality or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master.

The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier and upon his invitation, express or implied.

And with respect to such a visitor, at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know, and that where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

In the case of *Wilkinson v. Fairrie* (1 H. & C. 633; s. c. 32 Law J. Rep. (N.S.) Exch. 78), relied upon for the defendant, the distinction was pointed out between ordinary accidents, such as falling down stairs, which ought to be imputed to the carelessness or misfortune of the sufferer, and accidents from unusual covert danger, such as that of falling down into a pit.

It was ably insisted for the defendant that he could only be bound to keep his place of business in the same condition as other places of business of the like kind, according to the best known mode of construction. And this argument seems conclusive to prove that there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business. But we think the argument is inapplicable to the facts of this case, first, because it was not shewn, and probably could not be, that there was any usage never to fence shafts; secondly, because it was proved that when the shaft was not in use a fence might be resorted to without inconvenience, and no usage could establish that what was in fact unnecessarily dangerous was in law reasonably safe as against persons towards whom there was a duty to be careful.

Having fully considered the notes of the Lord Chief Justice, we think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant upon business in which he was concerned; that there was by reason of the shaft unusual danger known to the defendant; and that the plaintiff sustained damage by reason of that danger, and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it, and we cannot say that the proof of contributory negligence was so clear that we ought on this ground to set aside the verdict of the jury. As for the argument that the plaintiff contributed to the accident by not following his guide, the answer may be that the guide knowing the place ought rather to have waited for him, and this point as matter of fact is set at rest by the verdict. For these reasons, we think there was evidence of a cause of action, in respect of which the jury were properly directed; and as every reservation of leave to enter a nonsuit carries with it an implied condition that the Court may amend, if necessary, in such a manner as to raise the real question, leave ought to be given to the plaintiff, in the event of the defendant desiring to appeal or to bring a writ of error, to amend the declaration by stating the facts as proved in effect, that the defendant was

the occupier of and carried on business at the place; that there was a shaft very dangerous to persons in the place, which the defendant knew and the plaintiff did not know; that the plaintiff by invitation and permission of the defendant was there near the shaft upon business of the defendant, in the way of his own craft as a gasfitter for hire, &c., stating the circumstances of the negligence, and that by reason thereof the plaintiff was injured.

The details of the amendment can, if necessary, be settled at chambers. As to the motion to arrest the judgment for the reasons already given and upon condition that an amendment is to be made if and when required by the defendant, it will follow the fate of the motion to enter a nonsuit. The other arguments for the defendant to which we have not particularly adverted, were no more than objections to the verdict as being against the evidence; but it would be wrong to grant a new trial without a reasonable expectation that another jury might take a different view of the facts; and so the Lord Chief Justice does not express any dissatisfaction with the verdict, the rule upon this the only remaining ground must also be discharged.

Rule discharged.

[IN THE COMMON PLEAS.]

Jan. 13, 1866.

BERRY v. DA COSTA.

35 L. J. C.P. 191; 1 H. & R. 291; L. R. 1 C.P. 331; 14 W. R. 279;
12 Jur. N.S. 588.

Approved, *Millington v. Loring*, [1881] E. R. A.; 50 L. J. Q.B. 214; 6 Q.B. D. 190; 43 L. T. 657; 29 W. R. 207 (C. A.).

Damages—Breach of Promise to Marry—Seduction.

HUSBAND AND WIFE.—*In estimating the damages for breach of promise of marriage where the defendant has seduced the plaintiff, the jury may take into consideration that the plaintiff's prospect of marrying has become less by reason of such seduction, and the mortification to her feelings in ceasing to be a respected member of her family. The Court will not interfere with the discretion of the jury as to the amount of damages, if they have not acted in error, or from misconception, or from undue motives.*

Action for breach of promise of marriage, tried before Erle, C.J., at the Middlesex Sittings after Michaelmas Term, 1865. Evidence was given of the promise to marry, and that the plaintiff was the daughter of a widow who kept a lace-shop at Notting Hill, and that the defendant was a young gentleman possessed of property worth 700*l.* a year. It appeared also that the plaintiff, who had been living with her mother and assisting her in her business, was persuaded by the defendant to leave her mother's house under such promise of marriage, and was afterwards seduced by him. At the trial, the plaintiff's witnesses were cross-examined by the defendant's counsel as to the plaintiff's conduct with other men before her acquaintance with the defendant: the questions put on such cross-examination imputing want of chastity on her part, and that she had been previously seduced before her introduction to the defendant. No evidence, however, was given for the defendant in support of such imputations.

The learned Judge, in the course of his summing up the case to the jury, told them that, in computing the amount of damages they gave the plaintiff,

if they found a verdict for her, they had a right to take into account compensation for the pain to her feelings, and the change in her prospects in life, arising from a proclaimed contract of marriage which had been broken off: "The chances of her situation in life," said the learned Judge, "are very materially damaged if there has been anything like an engagement; very much more materially damaged by the circumstances which have been alluded to here, and which went on proclaimed for some time. Under these circumstances, I think that you are fully entitled to take into your consideration the loss she has sustained, because the position that she had of humble industry has been lost to her. It was a very humble path of life, going out to sell her mother's lace; but allow me to say, it was a happy and respectable home. There was a daughter, supported by a mother, who might have been the comfort of the mother's life. If the daughter comes back a wreck, with an imputation on her, and all the matters that have been suggested here to-day, that home, instead of being a home of family affection, is a home where there is something worse than desolation by the loss of that daughter that has come upon her."

The jury found a verdict for the plaintiff, with 2,500*l.* damages.

Huddleston now moved for a new trial, on the ground of misdirection, and that the damages were excessive.—The direction of the learned Judge, it is submitted, was calculated to mislead the jury into believing that they might give damages for the desolation which the defendant's conduct had brought on the plaintiff's home. In *Toulmin v. Hedley* (2 Car. & K. 157), where the Court was of opinion that the direction of the learned Judge who tried the cause, though in terms correct, might still have been misunderstood by the jury, they granted a new trial.—He also contended that the damages were excessive.

WILLES, J.—In this case a rule for a new trial is asked for on two grounds: first, that the Chief Justice misdirected the jury, and, secondly, that the damages are excessive. With respect to the first, I am of opinion that there was no misdirection. In an action for breach of promise of marriage, the jury are not limited in estimating the amount of damages to the pecuniary loss which the plaintiff has suffered; but are bound also to take into their consideration the injured feelings of the plaintiff upon the occasion. This has been frequently acted upon, and it is only necessary for me to refer to the case of *Smith v. Woodfine* (1 Com. B. Rep. N.S. 660) as containing all the authorities on the subject. Mr. Huddleston complains that the Chief Justice, in his direction to the jury, pointed out to them the position the plaintiff had occupied as a member of a respectable family, and the desolation which had been brought on her home, and told them that that was a circumstance which they might take into consideration in assessing the amount of damages. If my Lord had directed the jury that they might add, in their calculation of damages, something as a *solatium* for the inhabitants of the plaintiff's home, whose feelings had been outraged by the defendant's conduct, that would have undoubtedly been a misdirection; but it is clear that my Lord did not intend, and could not have been understood as intending, that the jury should take such course. What the summing-up amounted to is this, that the plaintiff was not merely entitled to damages in respect of the loss she had sustained in not marrying a gentleman of property, but also the loss she had sustained by reason of the seduction, not that they were to give damages in respect of this seduction, but that they might give greater damages for breach of promise of marriage, in that her prospect of afterwards marrying had become less by reason of such seduction. The Chief Justice, no doubt, further intended to point out, that part of the injury the plaintiff had sustained was the fact that in returning to her home she would do so not as a respected member of the family; that therefore the mortification she would feel in not being able to look the other members of her family in the face might be taken into consideration in estimating the amount of damages. No doubt, the rule of

damages in respect of a breach of promise of marriage is different from what it is in respect of the breach of an ordinary contract. With respect to the amount, the Court is called on to exercise a nice jurisdiction. In *Smith v. Woodfine*, in which large damages were also given, it was laid down by this Court that it would not interfere with the discretion of the jury as to the amount unless there has been some obvious error or misconception on the part of the jury, or that they have been actuated by undue motives. I do not think that there has been any error or misconception. Then, have they been actuated by undue motives? The only ground for saying so is that the damages are said to be excessive. We are not called upon to say whether, if acting as jurymen, we might under the circumstances have given a less amount. I think, however, it was a case for considerable damages, and without expressing any opinion as to what the amount should have been, I content myself with saying that it was within the province of the jury to say what was the proper amount, and I cannot impute to them any misconduct or error, and therefore I think we ought not to interfere.

The rest of the Court concurred.

Rule refused.

[IN THE COMMON PLEAS.]

Jan. 25, 1866.

THE EARL OF LISBURNE v. DAVIES.

35 L. J. C.P. 193; 1 H. & R. 172; L. R. 1 C.P. 259; 13 L. T. 795;
14 W. R. 333; 12 Jur. N.S. 340.

See *Whitmore v. Humphries*, [1872] E. R. A.; 41 L. J. C.P. 43; L. R. 7 C.P. 1; 25 L. T. 496; 20 W. R. 79 (C.P.).

Landlord and Tenant—Encroachment—Presumption that same was made for the Landlord—Intervention of a Brook.

LANDLORD AND TENANT.—Where a tenant has inclosed waste land during his tenancy, the intervention between such inclosed land and the demised premises of a brook or small river which is fordable by cattle during dry weather, is not sufficient to rebut the presumption that the inclosed land should be considered as part of the holding, so as to go to the landlord on the termination of the tenancy.

This was an action of ejectment, brought to recover a field called "Caenewydd," otherwise "Caerhos," in the parish of Caron, in the county of Cardigan, and which was tried, before Shee, J., at the last Summer Cardiganshire Assizes.

The defendant had been for many years tenant to the present and the previous Earls of Lisburne of a farm called Bryneithynog, in the said parish of Caron, and one of the questions at the trial was, whether the field "Caerhos," which consisted of about four acres, and had formerly been waste land within the manor of the Earls of Lisburne, and had been inclosed between thirty and forty years ago, formed now part of the farm Bryneithynog, so as to go to the plaintiff on the expiration of the defendant's tenancy of such farm. The field "Caerhos" had, whilst it was such waste land of the manor, and before being inclosed, been separated from the farm by the farm fence, and also by a brook called Flur Brook, which ran across the end of the field nearest to the farm, in a waving line, so as to leave some small part of the field, but of no value, between the brook and the farm fence. The inclosure was made of

that part of the field which was on the side of the brook furthest from the farm. The defendant occupied the field "Caerhos" with the farm, but there was a dispute at the trial whether "Caerhos" had been inclosed by the defendant or by a stranger; but the Court, in drawing inferences as a jury, found as a fact that such inclosure was made by the defendant, and therefore so much of the argument and judgment of the Court as related to this is omitted in this report, and it is to be assumed as proved that the defendant during his tenancy of the farm inclosed the field "Caerhos" and occupied it with his farm. There was no evidence of the width or depth of the Flur Brook, but it appeared carts could never pass over it. The defendant's cattle, however, used to ford it during dry weather, and at other times they went over a bridge which crossed the brook in a neighbour's land, through which, with the permission of such neighbour, they entered "Caerhos," there being no other means of access to it from the farm.

A verdict was given for the plaintiff, with leave to the defendant to move to enter a verdict for him, the Court having power to draw inferences of fact.

Pursuant to such leave, a rule *nisi* was accordingly obtained by *T. Allen*, for the defendant, to set aside the verdict and to enter it for the defendant on the ground that the evidence shewed that the piece of land so inclosed was not approved for the landlord's estate, and was not part of it. Against such rule,

Giffard, H. Allen and I. W. Bowen shewed cause.—Even where an encroachment is made by the tenant on waste land which does not belong to his landlord, if he occupies it with his holding it will be presumed to be part of it, and the mere intervention of a road will not matter—*Andrews v. Hailes* (2 El. & B. 349; s. c. 22 Law J. Rep. (N.S.) Q.B. 409). But where the landlord is also lord of the manor and the waste encroached on is within such manor, the case becomes an *a fortiori* one; thus, in *Andrews v. Hailes* (2 El. & B. 349; s. c. 22 Law J. Rep. (N.S.) Q.B. 409), Lord Chief Justice Campbell, who repudiates the doctrine of stealing for the benefit of the landlord, but holds that at the end of the demise the tenant cannot dispute the landlord's title to the encroachment more than any part of the land with which it is held, goes on to say, "the strange doctrine as to stealing for the benefit of the landlord originated in those cases where the landlord was lord of the manor and the tenant encroached on the waste. In such cases it might well be presumed that the tenant approved for the benefit of the lord, who had a right to approve." Contiguity is not necessary, but the question is, whether the encroachment was held with the demised premises; this is shewn by the last-mentioned case and by *Doe v. Jones* (15 Mee. & W. 580; s. c. 16 Law J. Rep. (N.S.) Exch. 58) and *Kingsmill v. Millard* (11 Exch. Rep. 313), in which last case Mr. Baron Parke laid down, that even if subsequently the tenant should convey away, the landlord would not be prejudiced unless he knew of it.

[WILLES, J.—He had previously held, in *Doe v. Rees* (6 Car. & P. 610), that encroachments were for the benefit of the landlord.]

T. Allen, in support of the rule.—Assuming the inclosure was made by the defendant, the presumption that he inclosed for the landlord is rebutted by the circumstances of the case, which shew that the encroachment was made for his own benefit. In all cases in which the presumption has been raised in favour of the landlord, the contiguity of the land inclosed to the demised premises has been deemed important. In *Kingsmill v. Millard* (11 Exch. Rep. 313) the land was contiguous to the demised premises, for it was adjacent to the fence of the garden which formed part of the demised premises; therefore it was not necessary for the decision of that case for Mr. Baron Parke to have said, "it is not necessary that the land inclosed should be adjacent to the demised premises; the same rule prevails when the encroachment is at a distance." It is submitted that such dictum is not warranted by any decision. Where the only separation between the encroachment and the demised premises is a road, such road makes no difference to raising the presumption in favour of the encroachment being considered as part of the holding, for a

road is beneficial to the enjoyment of the two together. On that ground rest the decisions of *Andrews v. Hailes* (2 El. & B. 349; s. c. 22 Law J. Rep. (N.S.) Q.B. 409) and *Doe v. Jones* (15 Mee. & W. 580; s. c. 16 Law J. Rep. (N.S.) Exch. 58). "Caerhos," the field in question in this action, cannot be said to be either adjacent or contiguous to the demised farm; the Flur Brook, which intervened between them, was really a river, and there was no way of communication between the farm and the field, except in dry weather, without going on the land of others. To raise the presumption that the encroachment was for the benefit of the landlord, it should be, as it was in *Doe v. Rees* (6 Car. & P. 610), adjacent to the farm.

[ERLE, C.J.—*Webster* says, "contiguous" means touching, but that this word is sometimes used in a wider sense, though not with strict propriety, for "adjacent" or "near," without being absolutely in contact, and he says "adjacent" means "lying near."]

The guiding principle must be the intention of the tenant at the time he made the encroachment. The defendant never could have intended that this inclosure should be held with the farm as part of the same holding, when there was no regular access to it from the farm.—[The rest of the argument was to shew that the inclosure was not made by any one employed to do so by the defendant.]

ERLE, C.J.—I am of opinion that this rule should be discharged, and in giving this opinion I perform the duty of a jurymen who has to draw inferences of fact. I take it that the farm occupied by the defendant and the strip of land outside the farm and the field "Caerhos" were all within the manor and lands of Lord Lisburne. I take it also that the encroachment, if inclosed by the defendant, is sufficiently near to his farm, Bryneithynog, to fall within the decisions which have been cited, wherein it is laid down that a tenant inclosing waste land adjacent or contiguous to the farm which he holds, is presumed to inclose for the benefit of his landlord, so that when his tenancy has ended it would go to the landlord as part of the holding. I think the distance here is not enough to found a distinction. A road intervening does not make the distance so great as to rebut such presumption. In the present case there is the intervention of a small river, and much no doubt depends on the nature of the river, for if it had been such a river as the Rhine instead of such a stream as this brook, the presumption would probably have been otherwise. The only doubt I have entertained in this case was, whether the defendant, the tenant of the farm, did in fact inclose this waste land, because if the inclosure was made by a stranger with the intention of making it his own and he sold it to the defendant, I could not have given the judgment I am now giving.—[The learned Judge then explained the reasons why he came to the conclusion, from the evidence, that as a matter of fact the inclosure was made by the defendant.]

WILLES, J.—[After adverting to the question whether the land encroached had been inclosed by the defendant or a stranger, the learned Judge thus proceeded:—]—With respect to the other point, Mr. Allen contends that as the land inclosed is not contiguous in the sense of being conterminous with the farm, the general presumption of law ought not to apply. I agree with him that an encroachment may be at such a distance as that in no sense it can be said to be connected with the occupation of the demised premises. Dealing with it as a presumption of fact rather than of law, it would arise according as it might appear that the encroachment was so near to the demised premises that the tenant had thereby an opportunity of making the encroachment, and next, that the landlord had an opportunity of winking at the tenant making the encroachment. Here there was nothing but the river interposing to remove the land encroached to such a distance as to make that a reason for rebutting the presumption of law. The history of the law upon this subject is curious. The general doctrine appears to be of some antiquity and never to have been questioned, except in the case before Lord Kenyon of *Doe d. Colclough v. Mulliner* (1 Esp. 460). There Lord Kenyon appears to have thought the

doctrine irrational and to have considered that the encroachment made by the tenant ought never to belong to the landlord, because the landlord might thereby be treated as a trespasser. However, in the case of *Doe d. Challnor v. Davies* (Ibid. 461), which was tried at the same assizes before Baron Thomson, this very question arose, whether the encroachment made by the tenant was for the benefit of the landlord, although the encroachment was not conterminous with the farm occupied by the tenant. The facts of that case were, that after Challnor's farm had been let to the defendant the latter took a patch of land belonging to the common immediately contiguous to the farm, but there was no communication between the farm and the inclosure, though the gate from the inclosure led from the waste. The tenant also made another encroachment on the common by inclosing another piece of land adjoining the first encroachment, but not communicating with the farm. That was therefore a case where the encroachment was not conterminous with the farm which the tenant held. The learned Judge was disposed to have nonsuited the landlord, but on being referred to a case, before Baron Perryn, where it had been admitted that encroachments by tenants were for the benefit of their landlords, and that the same doctrine had been recognized by Mr. Justice Heath and Mr. Justice Buller, he changed his opinion and the plaintiff obtained a verdict. Therefore the doctrine of Lord Wensleydale in *Kingsmill v. Millard* (11 Exch. Rep. 313) is far from being a modern doctrine. It is not necessary that the land encroached should be conterminous with the demised premises; it is enough if it is so near that the tenant has by reason of such nearness an opportunity of making the encroachment, or the landlord of winking and so acquiescing in its being made.

KEATING, J. concurred.

MONTAGUE SMITH, J.—The only point of law is that which Mr. Allen raised when he contended that the inclosure must be adjacent in the sense of conterminous or communicating with the demised premises. I think the law is not so. Distance may be an element in forming the presumption, but in almost all cases the question must depend not on the relative distance between the demised premises and the inclosure, but upon the circumstances under which the inclosure was made, and in that way only is it material to consider the distance.

Rule discharged.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Common Pleas.)

Feb. 5, 1866.

TAMVACO v. SIMPSON.*

35 L. J. C.P. 196; 19 C.B. N.S. 453; 1 H. & R. 374; L. R. 1 C.P. 363; 14 L. T. 893; 14 W. R. 376; 11 Jur. N.S. 926.

Referred to, *Coulthurst v. Sweet*, 1866, L. R. 1 C.P. 649 (C.P.); *Allison v. Bristol Marine Insurance Co.*, 1876, 1 App. Cas. 209; 34 L. T. 809; 24 W. R. 1039 (H.L.).

Charter-Party—Freight payable in Advance—Lien.

SHIPPING.—*M. chartered the defendant's ship to carry a cargo of coal to Alexandria, where the same was to be delivered on freight being paid; and the*

* *Coram* Pollock, C.B., Martin, B., Channell, B., Blackburn, J., Mellor, J., Pigott, B. and Lush, J.

charter-party stipulated "the freight to be paid on unloading and right delivery of the cargo less advances, in cash, at current rate of exchange; one-half of the freight to be advanced by freighter's acceptance at three months on signing bills of lading; owner to insure the amount and deposit with charterer the policy, and to guarantee the same." M. accordingly gave his acceptance for the half freight, and a receipt on account of such freight as per charter-party was indorsed on the bill of lading, which bill of lading was signed by the captain and afterwards duly indorsed to the plaintiff for value. On the arrival of the ship at Alexandria, M. having in the mean time become insolvent, the master refused to deliver the cargo to the plaintiff unless the whole of the freight was paid or guaranteed, although the acceptance given by M. was not then due. A guaranty was then given by one B. for the plaintiff under protest, and the cargo was delivered, and B. being afterwards compelled to pay the amount of such guaranty on the dishonour of M.'s acceptance, the plaintiff repaid him:—Held, that the plaintiff was entitled to recover the half freight from the defendant, as during the currency of M.'s acceptance the defendant had no lien for it, and the refusal to deliver the cargo was therefore wrongful.

Appeal from the decision of the Court of Common Pleas on a SPECIAL CASE, stated without pleadings. The case is set out at length in the report below (34 Law J. Rep. (N.S.) C.P. 268; s. c. 19 Com. B. Rep. N.S. 453).

The following summary of the facts is sufficient for the purpose of the question before the Court of Appeal.

On the 1st of October, 1863, Mr. De Mattos, of London, entered into a charter-party with the defendant, by which it was provided that the defendant's ship the *Parthenon* should proceed to Sunderland and there load a complete cargo, and therewith proceed to Alexandria, and there deliver the same on being paid freight at the rate, &c., "the freight to be paid on unloading and right delivery of the cargo, less advances, in cash, at current rate of exchange; one-half of the freight to be advanced by freighter's acceptance at three months on signing bills of lading; owner to insure the amount and deposit with charterer the club policy, and to guarantee the same."

In accordance with this charter-party, De Mattos shipped a cargo of coal, and the captain signed a bill of lading, by which the cargo was made deliverable at Alexandria unto order or charterer's assigns. On the bill of lading being signed, De Mattos gave his acceptance at three months for 301l. 17s. 6d., which was half the amount of the freight, in favour of the defendant, and there was indorsed by the defendant's agent on the bill of lading the following, "Received on account of the within freight 301l. 17s. 6d., as per charter-party."

The ship arrived at Alexandria on the 5th of January, 1864, De Mattos having in the mean time become insolvent. The plaintiff, who was an indorsee for value of the bill of lading, informed the captain that he was prepared to pay the balance of the freight due after deducting the 301l. 17s. 6d.; but the captain having learnt that De Mattos had suspended payment, refused to deliver the cargo unless he was paid the full amount of the freight without any deduction, or had a guarantie for the payment of the same, and he claimed a lien on the cargo for the full chartered freight. The acceptance so given by De Mattos did not become due until the 3rd of February, 1864, when it was dishonoured. On the 20th of January, 1864, Messrs. Barker & Co., at the plaintiff's request, gave the guarantie required, in order to procure a delivery of the cargo. The cargo was accordingly delivered to the plaintiff, and upon the dishonour of the acceptance Messrs. Barker were required by the captain to pay the amount of their guarantie, which they did by order of the plaintiff, who, however, protested against the same. The plaintiff having afterwards and before action repaid Barker & Co., the question was, whether he was entitled to recover from the defendant, the shipowner, the amount in dispute, viz., 301l. 17s. 6d., the moiety of the freight. The Court below gave judgment for the plaintiff for that amount.

Lewers, for the appellant (the defendant below).—The question is, whether the captain had a right to claim a lien for the whole freight, and that depends on the construction of the charter-party. The Court below held, that the acceptance was given as a payment in advance of the freight; but it is submitted that such a construction cannot be reconciled with the clause in the charter-party respecting the owner's undertaking to insure the amount, for if such acceptance was taken as payment of the freight the owner to that extent would have no insurable interest. The acceptance was intended to be taken, not as a pre-payment but as a loan from the charterer. The case of *Kerchner v. Venus* (12 Moo. P.C. 361), relied on by the plaintiff in the argument below, only shews that where the shipowner has entered into a stipulation which is inconsistent with his lien he waives his claim for freight; but that is not the case here. Moreover, it is submitted that there was only a suspension of the right of lien by this advance of freight, supposing the acceptance to amount to such advance; and upon the insolvency of *De Mattos*, which took place when he executed the deed of composition (which deed has been held by a Court of error to be binding), the right of lien was revived. It was the same as if the bill had been dishonoured at maturity, and it therefore ceased to be an advance in respect of freight—*In re the London, Birmingham and South Staffordshire Bank* (34 Law J. Rep. (N.S.) Chanc. 418). Next, what, took place at Alexandria when the guarantee was given and paid must affect the amount of damages.

[*POLLOCK, C.B.*—There was before the actual dishonour of the acceptance a demand and refusal to deliver the cargo. We must deal with the facts as they were at that time. The defendant cannot put himself in a better position by reason of his having refused to do what at the time the demand was made he ought to have done.]

Mellish appeared for the respondent (the plaintiff below), but was not heard.

POLLOCK, C.B.—We are all of opinion that the judgment of the Court below must be affirmed. The Court below, in an elaborate judgment of my Brother Willes, enters largely into the question as to the rights of the shipowner under the charter-party. I do not think it necessary for me to do more than say this, that it appears to me that the giving of this acceptance was not a loan, but a pre-payment, and so I think the receipt given on the bill of lading treats it. I think that, as the shipowner had put that receipt on the bill of lading and the latter had been transferred to the plaintiff *bona fide* and for value, the plaintiff was entitled to have a delivery of the cargo to him upon payment of the half freight only. A demand of the delivery of the cargo was made by the plaintiff and refused by the master on behalf of the shipowner, unless payment was made of the whole freight, including therefore that half of the freight which had been dealt with by the freighter and shipowner as paid beforehand. Now, I do not think that any matter which subsequently arose altered the rights of the parties at that time, and that the payment of more than the half freight which was made in order to get the cargo may be recovered back. The case has been stated without pleadings, and it is therefore unnecessary to consider whether the remedy ought to have been in the form of trover or for money had and received. In any case I consider it to be money which has been paid for the delivery of goods to which the plaintiff was entitled without being obliged to make such payment.

MARTIN, B.—I am of the same opinion; but I give my judgment on the ground that there was no lien on the cargo in respect of the insolvency of the acceptor of the bill and the probability of the bill being dishonoured. I think the cargo was the property of the plaintiff, and that he was entitled to the delivery of it on payment of half only of the freight.

CHANNELL, B.—I also concur in thinking that there was no lien.

BLACKBURN, J.—I am of opinion also that the judgment should be affirmed. I only wish to say that I do not desire to express any opinion whether this bill,

which was given by the charterer, was a pre-payment of part of the freight or an advance on account of it. If the ship and cargo had been lost the question would have arisen, but no such question has now arisen, and I am clearly of opinion that upon the construction of this charter-party the freight was to be paid on unloading less advances; and I cannot believe that whilst this bill, which had been accepted for half the freight, was current, it was intended that the shipowner should be paid in cash the whole of the freight. Therefore, so long as such bill was current there would be no lien for the whole freight, and as the ship arrived at Alexandria before the bill became due and was dishonoured, the master had no right to refuse the delivery of the cargo.

MELLOR, J., PIGOTT, B. and LUSH, J. concurred.

Judgment affirmed.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Common Pleas.)

Feb. 5, 1866.

THE CITY OF DUBLIN STEAM PACKET COMPANY v. THOMPSON.*

35 L. J. C.P. 198; 19 C.B. N.S. 553; 1 H. & R. 369; L. R. 1 C.P. 355; 15 L. T. 112; 14 W. R. 376.

See now Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 77 *et seq.*; and Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), s. 54.

Ship and Shipping—Measurement of Tonnage of Steamships—Merchant Shipping Act, 17 & 18 Vict. c. 104. ss. 23, 29.—Validity of Rules.

SHIPPING.—With reference to regulating the mode of ascertaining the register tonnage of steamships, the 23rd section of the Merchant Shipping Act (17 & 18 Vict. c. 104), designated in the margin of the statute "Rule 3," provides that in every ship propelled by steam power an allowance shall be made for the space occupied by the propelling power, and that the amount so allowed shall be deducted from the gross tonnage of the ship, and states, "such deduction shall be estimated as follows." The section then, under divisions marked (a) and (b), points out how this deduction is to be estimated, and, in doing so, directs, *inter alia*, that where the tonnage of the space occupied by the boilers and machinery is above 30 per cent. of the gross tonnage, and there is no agreement between the Commissioners of Customs and the owners, the deduction shall consist of the tonnage of the actual space so occupied, with the addition, in case of paddle-wheels, of one-half, and, in case of screws, of three-fourths of the tonnage of such space, "and the measurement and use of such space shall be governed by the following rules,"—which are afterwards set out in that section. The 29th section empowers the Commissioners, with the approval of the Board of Trade, to make such modifications and alterations in the tonnage rules as may become necessary, "in order to the more accurate and uniform application thereof, and the effectual carrying out of the principles of admeasurement therein adopted":—Held, that the divisions of section 23, marked (a) and (b), form no part of the tonnage rules which section 29. empowers the Commissioners of Customs to alter.

This was an appeal from the decision of the Court of Common Pleas, giving judgment for the plaintiffs upon a special case stated, without pleadings, for the

* *Coram* Pollock, C.B., Martin, B., Channell, B., Blackburn, J., Mellor, J., Pigott, B. and Lush, J.

opinion of that Court, and which is fully set out in the report below (19 Com. B. Rep. N.S. 553; s. c. 34 Law J. Rep. (N.S.) C.P. 316).

The question was as to the validity of certain rules made by the Commissioners of Customs, with the approval of the Board of Trade. The rules (which are given at length in the report of the case before the Court below) professed to be made in pursuance of the powers granted by the 29th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104): "With a view to the more accurate and uniform application of the principle of granting a certain allowance to steamers for their propelling powers," and to be "in lieu of the rules set forth in section 23. of the Merchant Shipping Act."

The 29th section of that act empowers the Commissioners of Customs, with the approval of the Board of Trade, to make alterations in the tonnage rules prescribed by the act. The 23rd section, fully set forth in the report below, except that in the margin of the statute the section is called "Rule 3," provides for the allowance which, in ascertaining the tonnage of steamships, is to be made for the space occupied by the propelling power and deducted from the gross tonnage, and in the parts of the section marked (a) and (b), it points out how such deduction is to be estimated, and such deduction, in the case of a vessel whose tonnage space solely occupied by boilers and machinery is above 30 per cent. of her gross tonnage (which was the case of the *St. Colomba*, the plaintiff's steamer), is to consist of the tonnage of the space actually occupied for the proper working of the boilers and machinery, "with the addition, in the case of ships propelled with paddle-wheels, of one-half, and, in the case of ships propelled with screws, of three-fourths of the tonnage of such space, and the measurement and use of such space shall be governed by the following rules." Then follow in that section rules numbered (1), (2), (3), (4) and (5).

By the measurement of the tonnage of the *St. Colomba*, (which was a paddle-wheel steamer), made under the rules in question of the Commissioners of Customs, no such addition of one-half of the tonnage of the said space to the deduction allowed for the space occupied by the propelling power was made, as required by section 23.

The Solicitor General (Giffard and C. Pollock with him), for the appellant.—The 21st, 22nd and 23rd sections of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), are all tonnage rules. Section 21 is called in the margin Rule I. and it enacts that the tonnage, previously to the ship being registered, is to "be ascertained by the following rule, hereinafter called Rule I." Section 22, called in the margin Rule II., says that ships which "cannot be measured by the rule above given shall be measured by the following rule, hereinafter called Rule II." Then comes section 23, and that in the margin is called "Rule III." It is submitted that the whole of that section is a tonnage rule, and can therefore be altered by the Commissioners of Customs, with the consent of the Board of Trade, under the authority of the 29th section. What are called rules in that 23rd section are, it is submitted, sub-rules of Rule III., and it is a mistake to suppose, as the Court below considered, that these sub-rules only are the rules to which the power to make the alteration in the tonnage rules given by section 29. is limited.

Bovill (Watkin Williams with him) appeared for the respondents, but was not called on.

POLLOCK, C.B.—We are all agreed that the judgment of the Court of Common Pleas should be affirmed. The substantial question is, whether the Commissioners of Customs, with the approval of the Board of Trade, may make the regulations which they have made. By the 29th section of the act they may, with such approval, "make such modifications and alterations as from time to time become necessary in the tonnage rules hereby prescribed." Speaking for myself, I will observe that when an act is passed which apparently gives, as this does, power to individuals (whether it be with or without the approval of the Board of Trade) to make alterations in what the act has prescribed, we

ought to look at the act with care, and endeavour so to ascertain the true sense of the language used in it, that while we give full effect to it we do not enable a private body to make an alteration in the statute which the legislature did not intend should be within such power. Now, on looking at the 23rd section of the act, it obviously consists of three parts, one part being represented by letter (a), and another part by letter (b), and those parts of the section direct the allowance which is to be made for the space occupied by machinery, and the manner in which it is to be made, and then they go on to say—"and the measurement and use of such space shall be governed by the following rules, that is to say," and then numbers 1, 2, 3, 4, and 5, are given, and I believe that there is nothing else in the act which can be called tonnage rules. Then section 29 enables the Commissioners of Customs, with the approval of the Board of Trade, to make such alterations as may be necessary in the tonnage rules. We think, therefore, that the portions of section 23. marked with the letters (a) and (b) are not amongst the rules, and that consequently the Commissioners of Customs have made these alterations *ultra vires*; and we agree with the Court of Common Pleas that the Commissioners had no power to deal with the provisions of section 23. in the way they have done by these rules.

MARTIN, B.—I think the case is clear; and I doubt whether the Commissioners of Customs meant by these rules to make any alteration in the allowances for the space occupied by the machinery. I think, however, that they clearly had only an authority to deal with the rules mentioned in the 23rd section, and not with those portions of that section which are marked (a) and (b), so that they had no power to deprive the owners of vessels of the allowance which is there given. I have little doubt that for large vessels it might be more beneficial for the admeasurement to be made according to these new rules, but for small vessels, such as that of the *St. Colomba*, they would tell much against them.

CHANNELL, B.—I concur in thinking that the judgment of the Court below should be affirmed.

BLACKBURN, J.—I am of the same opinion. The words at the end of the 29th section give power to the Commissioners of Customs, with the approval of the Board of Trade, to make alterations "in the tonnage rules hereby prescribed, in order to the more accurate and uniform application thereof, and the effectual carrying out of the principle of admeasurement therein adopted." These latter words, I think, define what power was intended. The legislature says in substance, in (a) and (b) of section 23, that a space shall be allowed for the propelling power, with a percentage in addition thereto. Now I think the Commissioners of Customs, with the approval of the Board of Trade, have power to make regulations for measuring that space, but they have no power to cut off the percentage.

MELLOR, J., PIGOTT, B., and LUSH, J. concurred.

Judgment affirmed.

[IN THE COMMON PLEAS.]

Jan. 16, 18, 1886.

THOMAS v. WELCH AND OTHERS.

35 L. J. C.P. 200; L. R. 1 C.P. 192; 12 Jur. N.S. 316.

Patent—Complete Specification not noticing all in the Provisional Specification—Limitation of Claim—Disclaimer striking out Claiming Clauses.

PATENT.—The provisional specification of a patent for improvements in apparatus for sewing or stitching stated the improvements to consist, first, in

moving the work after each stitch by an instrument acting on the surface of the fabric which the needle enters, and that this instrument, "or another acting therewith," acts to hold the work, &c. The complete specification described the formation of an instrument (marked g in an annexed drawing) for holding and moving the fabric during the operation of making the stitches, and stated that "it is the arranging an instrument g, as herein described, which, whilst it is the means of holding the fabric during the insertion and withdrawal of the needle is also the means by which the step by step movement is given to the fabric for the succession of stitches, which constitutes the peculiarity of my invention":—Held, that an omission in the complete specification of all notice of the other instrument referred to in the provisional specification did not make the specification void, it not appearing that such omission was made fraudulently, or that any one had been misled thereby.

Held, also, that the patentee did not claim every kind of instrument in which the means of holding are also the means of moving the fabric, but only the holding and moving instrument described in the specification, or other like instruments used in the way so described there.

It is no objection to the specification that a disclaimer strikes out all the claiming clauses at the end of the specification, if the rest of the specification sufficiently describes the nature of the invention and the mode of making it.

Action for the infringement of a patent. The declaration alleged the grant to the plaintiff of letters patent for "improvements in apparatus for sewing or stitching." It also alleged the filing of the specification, and of a disclaimer, and the infringement of the patent by the defendants.

Pleas, *inter alia*, first, not guilty; fourthly, that the invention was not new; seventhly, that the plaintiff did not duly file an instrument particularly describing the nature of the said invention; ninthly, that the disclaimer extends the exclusive right granted by the patent; tenthly, that the invention described in the specification, as altered by the disclaimer, was different from that for which the patent was granted. Issue was taken and joined on these pleas.

It appeared that in the provisional specification it was stated that "the improvements consist, first, in moving the work after each stitch by an instrument acting on that surface of the fabric which the needle enters, to facilitate which movement the face of the instrument which acts upon the fabric is serrated or roughened. This instrument also, or *another acting therewith*, acts to hold the work during the insertion of the needle, and again during its withdrawal."

One of the objections taken by the defendants was, that the complete specification does not shew what other instrument there was acting with the instrument referred to in the provisional specification.

The complete specification contained a description of a drawing which was annexed to it, and in which the nature of the machinery for sewing or stitching was delineated; and in such description the patentee referred to an instrument indicated in the drawing by the letter *g*, by which the work was held correctly in position during the insertion and withdrawal of the needle, and the fabric was moved a distance equal to the length of stitch required. How the various movements to this instrument were to be effected were then described, and the patentee stated that he sometimes formed the instrument in two or more parts, as shewn by figure 5 in the drawing; and that, although he preferred that arrangement he did not confine himself thereto, but that he sometimes formed the instrument as shewn by the detached views, figure 6, in which case a roller was the holding means. The arrangement of this instrument was stated in the specification to constitute one of the peculiarities of the invention, but at the end of the specification there were five distinct claims. The plaintiff afterwards filed a disclaimer, which contained in its recital the following statement: "As so much of the invention described in my said specification, which consists

in the combined apparatus for acting on that surface of the fabric on which the needle enters, to hold and to move the fabric, has become of great value, I desire to confine my claim of invention to such combined apparatus." By this disclaimer all the claiming clauses at the end of the specification were struck out, and the statement in the specification respecting the arrangement of the combined holding and moving instrument being a peculiarity of the invention, was, when altered by the disclaimer, as follows: "It is the arranging an instrument *g*, as herein described, which, whilst it is the means of holding the fabric or material during the insertion and withdrawal of the needle, is also the means by which the step by step movement is given to the fabric or material for the succession of stitches, which constitutes the peculiarity of my invention."

At the trial, before Erle, C.J., at the Middlesex Sittings after Trinity Term, 1865, a verdict was taken for the plaintiff for five guineas damages (the further damages to be referred, if necessary), with leave to the defendants to move to set the same aside, and to enter a verdict for them on points reserved. The Court to be at liberty to draw inferences of fact.

A rule *nisi* to that effect was afterwards obtained by *Sir H. Cairns* for the defendants, on the grounds *inter alia* of the want of novelty; that the complete specification differed from the provisional specification; that all the claims being struck out, there was no sufficient description of the nature of the invention, and that the specification did not distinguish between what was new and what was old, and that the claim was too wide, and would apply to all machines which held and moved the fabric.

Grove, Bovill, Hindmarch, Webster, T. Salter and Aston shewed cause.—There is no objection to striking out all the claims, provided the patentee leaves what sufficiently describes his invention, and the means of performing it. With regard to the objection that the final specification differs from the provisional one, the provisional specification says, "This instrument also, or another acting therewith, acts to hold the work," &c. The objection is, that the complete specification only describes one instrument, and contains no reference to any other acting therewith. The patentee was not bound to describe this other instrument. If there be two modes of carrying out an invention, and the inventor afterwards finds out that one of the modes is inefficient, the inventor is not bound to describe this in his complete specification—*Newall v. Elliot* (4 Com. B. Rep. N.S. 269; s. c. 27 Law J. Rep. (n.s.) C.P. 337). *Oxley v. Holden* (8 Ibid. 666; s. c. 30 Law J. Rep. (n.s.) C.P. 68). There is a mode of arranging the instrument which consists of two parts, one of which does in fact answer to the description of another instrument acting therewith. As to the last objection, that the claim is for every instrument which is the means of holding and moving the fabric, that is not so; the claim is limited to the instrument "as herein described"—*Barber v. Grace* (1 Exch. Rep. 339; s. c. 17 Law J. Rep. (n.s.) Exch. 122). A sufficient description of the nature of the invention claimed is given in the body of the specification. *Foxwell v. Bostock* (12 W. Rep. 723) is different from this, as there the claim was general and applicable to every sewing-machine with needle and shuttle. The striking out the claiming clauses in the present case has not made the invention different, and therefore the case of *Ralston v. Smith* (11 Com. B. Rep. N.S. 471; s. c. 31 Law J. Rep. (n.s.) C.P. 102) is distinguishable.

Manisty, Mellish and Macrory, in support of the rule.—The complete specification differs from the provisional specification, for the other instrument therein alluded to as acting with the instrument which operates on the fabric is nowhere described in the complete specification. Next, which is the main objection, the invention claimed after the claiming clauses had been struck out includes various parts of the sewing-machines which are old. The decision of Lord Westbury in *Foxwell v. Bostock* (12 W. Rep. 723) is in point. The specification should clearly shew what parts of the arrangement of the instrument are new. How far are the generality of the words used limited by the words

“as herein described”? It is submitted that the claim is of a principle common to the three forms of the instrument *g*. Now, what is the peculiar character of the invention common to the three forms but the combined holding and moving means? It follows, therefore, that every instrument which combines that is included in the claim.

ERLE, C.J.—I am of opinion that this rule should be discharged. One of the objections which have been taken is, that the complete specification is void, because it does not take notice of and specify everything that is referred to in the provisional specification. The latter describes an instrument, and says that this instrument, “or another acting therewith,” acts to hold the work during the insertion of the needle. In the complete specification no notice is taken of this alternative,—at least, I will assume, for the present purpose, that there is nothing in the complete specification shewing what other instrument there is to which the provisional specification refers. Now, I think that if there was not any such other instrument this objection ought not to prevail. It may be that the patentee at the time when he prepared the provisional specification had something which he considered a valuable invention in his mind, but which he afterwards, before the time of filing the complete specification, found out to be worth nothing. If it had been in the complete specification he could have cured it by filing a disclaimer; but being only in the provisional specification, I think in such a case as this, where nobody can be prejudiced or misled, the omission of all reference to such other instrument does not render the complete specification void. That is independent of the question whether the complete specification does not shew such other instrument. The main instrument is the movable foot; the solid foot is one form of the instrument and the jointed foot is another; and it may be that the additional part which would be analogous to the heel of the jointed foot is the other instrument referred to, and, if so, the objection would fail in point of fact; but if it does not so fail in fact, I think it fails in point of law. The real questions are, whether the patent is void for want of novelty, and whether there has been an infringement; and these two questions depend upon the construction of the specification. What was the mechanical combination in the mind of the patentee? and what was the purpose to be effected by such combination? This, the substance of the invention, is sometimes to be found in what are called the claims at the end of the specification, but by the disclaimer all the claiming clauses which were in the specification have been struck out. However, in the middle of his specification, the patentee has declared what is the peculiarity of his invention, and which is the substance of his claim, and it is “the arranging an instrument *g*, as herein described, which, whilst it is the means of holding the fabric, is also the means by which movement is given to the fabric;” and the specification goes on to shew how that material part of his invention is to be effectuated. It is always by an instrument referred to by the letter *g*, and the letter *g* refers to three different kinds, one being what I call the solid foot, another being the jointed foot, and the third the roller or ratchet-wheel; but the peculiarity of the invention lies in the movements that are given to the instrument “*g*”; and I agree with the learned counsel for the defendants that the invention claimed by the patentee goes to all the three kinds of the instrument “*g*” which I have spoken of, and which, whilst it is the means of holding, is also the means by which movement is given to the fabric. Now, has the patentee claimed every combination of instrument in which the means of holding are also the means by which movement is given to the fabric? I am of opinion that the claim ought not to be so construed. It is the arranging an instrument “as herein described,” and which is exemplified by the machine produced in Court, which is claimed by the patentee.—[The learned Judge then proceeded to explain how the plaintiff’s invention differed from and was an improvement on machines which had been previously used, and how the defendants had infringed the plaintiff’s patent by taking the substance of his invention.]

WILLES, J.—I also think the plaintiff is entitled to keep his verdict. With

respect to the point as to the complete specification being at variance with the provisional specification, I consider that to be settled by authority. It is not suggested that the statement either in the provisional specification or in the complete specification was a dishonest statement, or that there was any intention on the part of the patentee but to comply with the conditions upon which the patent was granted; and I apprehend that it was never intended by the legislature to throw a new snare of this kind in the way of the patentee. With respect to the words "as herein described" sufficiently limiting the claim to the one thing alleged, viz., the instrument to hold and to feed in respect of its action upon the fabric, I think the effect of those words is so to confine the claim, for the reasons stated by the Chief Justice, which I cannot add to nor express with the same clearness. I also think that the point with respect to the infringement fails.

KEATING, J.—I am of the same opinion. With reference to what has been termed the departure of the complete specification from the provisional specification, it seems to me that there is no ground for holding the specification void, and that the words "or another acting therewith," even if they were not adverted to in the complete specification, would not be such a departure or a means of deception as should invalidate the patent. I also quite agree with the Chief Justice in thinking that if it were necessary that allusion should be made in the complete specification to satisfy those words, it probably has been done by means of the second form of the instrument referred to in the complete specification. With reference to the great question argued, no doubt if it could have been shewn that the patentee had claimed the principle, and not the particular means of carrying out that principle, the defendants might have made good their defence. It is not denied that the plaintiff has produced a valuable invention; but it is said that by means of the disclaimer the plaintiff has not confined himself to claiming the valuable improvement which he has made in these machines; but that he has thereby framed his claim so widely that what was effected by previous machines would be affected by his claim. However, for the reasons already given by the Chief Justice and by my Brother Willes, it seems to me that the claim is sufficiently confined to the instrument specified under the letter "g" in the specification; and I have therefore come to the conclusion that the plaintiff is entitled to retain the verdict.

MONTAGUE SMITH, J.—I am of the same opinion. The main question has been whether the specification has made too wide a claim. The construction contended for by the defendants is, that the plaintiff claims every method of holding and moving the cloth by the same instrument during the insertion and withdrawal of the needle. I think that is not the construction of the specification; but that it is confined to the holding and moving instrument described, used in the way described, and to other like instruments used in the like way. The whole scheme of the specification as it stands after the disclaimer seems consistent with that view. Therefore, I think it would be hard upon the patentee to say that he had made a general claim of the means by which the holding and moving can be produced. That being the general construction, the evidence is, that the patent has not been anticipated. With regard to the other points, I do not think it necessary to add anything to what has been said by the rest of the Court.

Rule discharged.

[IN THE COMMON PLEAS.]

May 3, 7, 8, 1866.

BATEMAN v. THE MID-WALES RAILWAY COMPANY.
 THE NATIONAL DISCOUNT COMPANY (LIMITED) v. THE MID-WALES
 RAILWAY COMPANY.
 OVEREND, GURNEY & CO. (LIMITED) v. THE MID-WALES
 RAILWAY COMPANY.

35 L. J. C.P. 205; 1 H. & R. 508; L. R. 1 C.P. 499; 14 W. R. 672;
 12 Jur. N.S. 453.

See *In re Peruvian Railways Co.*, [1867] E. R. A.; 36 L. J. Ch. 864; L. R. 2
 Ch. 617; 15 W. R. 1002 (L. JJ.); *Atkins v. Wardle*, [1889] E. R. A.;
 58 L. J. Q.B. 377; 61 L. T. 23 (Q.B. D.).

Railway Company—Bill of Exchange.

BILLS OF EXCHANGE. COMPANY.—*A railway company, incorporated by a special act of parliament containing the usual clauses inserted in such statutes, cannot accept bills of exchange.*

The plaintiffs in these actions, as indorsees, sued the defendants, as acceptors, of certain bills of exchange; and the defendants pleaded that they did not accept.

The defendants were a railway company, constituted under the 22 & 23 Vict. c. lxiii. This special act was in the usual form, both as to the powers given to and the restrictions placed on the company, and as to the incorporation of general acts; and there was no difference between the cases, except that in the last case evidence was given of the defendants having actually commenced business.¹

The bills were directed to the Mid-Wales Railway Company, and were accepted in the following form: "Accepted by order of the board of directors, and payable at the Agra & Masterman's Bank, John Wade, Secretary," with the seal of the company affixed under these words. And there was no question but that there was a resolution of the board of directors to the above effect.

At the trial, a verdict was entered for the plaintiffs, with leave to the defendants to move to enter a verdict for themselves, on the grounds, first, that the defendants had no power by law to accept the bills, and, secondly, that the acceptances were not binding on them, and that even if bills could be accepted by them, the bills were not accepted in such a form as to be binding on them.

Rules *nisi* having been obtained, pursuant to such leave, in all three actions: in the first two actions

Edward James and Sir G. Honyman shewed cause.—No such point arises here as arose in the case of *Chambers v. the Manchester and Milford Railway Company* (5 Best & S. 588, 723; s. c. 33 Law J. Rep. (N.S.) Q.B. 268), where the question was, whether what are called Lloyd's bonds were valid or not. But the questions are, first, can a railway company accept bills of exchange? secondly, if they can, is the form of the bills of exchange in the present cases sufficient to bind them? First, then, has a railway company power to accept bills of exchange? It is submitted they have. It may well be that the old kind of corporations, not constituted for trading purposes, may not be able to do so, but that the new kind of trading companies which of later years have sprung up can. The present cases are not like *Broughton v. the Manchester Waterworks Company* (3 B. & Ald. 1), because here the company is constituted

(1) It appears, however, that this was admitted at the trial in the first two actions, and no point was made of it in the argument.

to carry on business. In *Story on Bills*, s. 79, after saying that corporations, according to the old law, could generally (though there always were some admitted exceptions) contract only under their seal, but that the rule was relaxed as to objects and purposes within their charters, the author goes on: "But the question is more nice as to the right of a corporation to become drawers or indorsers or acceptors of bills of exchange, or to become parties to any other negotiable paper. That an express authority is not indispensable to confer such a right is admitted. It is sufficient if it be implied as an usual and appropriate means to accomplish the objects and purposes of the charter." He then alludes to the 3 & 4 Ann. c. 9, and says, "It implies that by the custom of merchants they may, in some cases at least, draw, indorse, accept or sue upon bills of exchange. But where drawing, indorsing or accepting such bills is obviously foreign to the purposes of the charter or repugnant thereto, there the act becomes a nullity and not binding on the corporation." This is the correct rule as to whether they have power or not. Now here the company have authority to carry goods and passengers, and must buy goods, *e. g.*, coke, rolling stock, &c., in order to carry on their business, and surely they may accept bills of exchange in the usual course for payment for these matters: they surely are not restricted to cash payments. The statute 3 & 4 Ann. c. 9, clearly assumes that a corporation may make a promissory note, for it provides as to notes "made and signed by any . . . body politic or corporate." With respect to authorities, the first case relied on by the other side is *Broughton v. the Manchester Waterworks Company* (3 B. & Ald. 1). The Judges there relied on two grounds for coming to the conclusion that the defendants could not accept: one was, that there would be a violation of the rights of the Bank of England; the other, that the defendants were not a trading company. The former ground is now untenable, as by alterations in the law there would be no such violation at present; as to the latter ground, it is only necessary to say that it is not for the plaintiffs to contend that the Court were wrong in deciding that the particular company was not a trading company. Here the accepting of bills is not contrary to the objects for which the company was constituted, but just the reverse. In *Slark v. the Highgate Archway Company* (5 Taunt. 792) all that was decided was, that if the power of issuing bills be given to a company specially for particular purposes, they cannot do so for any other purpose. In *The East London Waterworks Company v. Bailey* (4 Bing. 283) Lord Chief Justice Best says, "The same principle of necessity applies to corporations created for the purposes of trade, such as the Bank of England. The very object of that institution requires that it should have the power of issuing bills of exchange and promissory notes;" and then, after alluding to *Slark v. the Highgate Archway Company* (5 Taunt. 792), he says that he was correctly reported to have said, in *Broughton v. the Manchester Waterworks Company* (3 B. & Ald. 1), "When a company like the Bank of England or East India Company is incorporated for the purposes of trade, it seems to result from the very object of their being so incorporated that they should have power to accept bills or issue promissory notes. It would be impossible for either of these companies to go on without accepting bills." And it would appear that before their drawing, &c. bills was regulated by act of parliament, the East India Company had power to do so, for in *Murray v. the East India Company* (5 B. & Ald. 204) it is said that power was "recognized and regulated by act of parliament."

[BYLES, J.—All the cases where corporations have been decided to be capable of accepting bills seem to resolve themselves into two classes: first, where express power is given; secondly, where the corporation may be said to have been incorporated for the very purpose.]

The importance of a corporation having full liberty to contract for the purposes of trade like other persons, is shewn by the case of *Henderson v. the Australian Royal Mail Steam Navigation Company* (5 El. & B. 409; s. c. 24 Law J. Rep. (N.S.) Q.B. 322), in which Crompton, J. says, "I concur in that

important principle suggested in *Broughton v. the Manchester Waterworks Company* (3 B. & Ald. 1), that a modern corporation incorporated for trading purposes may make binding contracts in furtherance of the purposes of their incorporation without using their seal." And in the present case not only were the defendants entitled to, but actually did carry on the trade of carriers, and there seems no reason why they should not, as incidental thereto, have power to accept bills of exchange. Further, if the defendants be right, they even ought to have demurred or ought to move in arrest of judgment. They cannot ask for a verdict on the issue; that must be for the plaintiffs. But secondly, assuming that the defendants have such a power, are the bills of exchange accepted in a binding form? The other side rely on 8 Vict. c. 16. s. 97; but that act merely gives a cumulative power. At common law the company would have been obliged to contract by seal, but the act, in consequence of that being inconvenient, allows, in certain cases, another process to be adopted: this, however, does not interfere with the already existing power.

[KEATING, J.—Has 7 & 8 Vict. c. 85. s. 19 been repealed?]

That section was to prevent companies from improperly raising money by loan notes; and the preamble would seem to recognize the general power, but to say that companies shall not issue notes as a security for money advanced unless by authority of some act of parliament.

Karslake and Holland, in support of the rules.—First, neither in the special act nor general ones is any power given to accept bills; nor was it necessary. *Prima facie*, a corporation can only contract by deed, i. e., not merely by the corporate seal, but by an actual deed. A seal put on a bill does not make it a deed; and, further, if the matter be *ultra vires*, the seal does not avail—*The South Yorkshire Railway and River Dun Company v. the Great Northern Railway Company* (9 Exch. Rep. 84; s. c. 22 Law J. Rep. (n.s.) Exch. 305), per Mr. Baron Parke; *Payne v. the Mayor of Brecon* (3 Hurl. & N. 579; s. c. 27 Law J. Rep. (n.s.) Exch. 495), per Mr. Baron Martin; *Chambers v. the Manchester and Milford Railway Company* (5 Best & S. 588, 728; s. c. 33 Law J. Rep. (n.s.) Q.B. 268). But even if a corporation have power to bind themselves by simple contract, yet it does not follow that they can bind themselves by a bill; for there is a marked difference between the cases of ordinary simple contracts and negotiable instruments. The crucial test on the question of whether a corporation can enter a particular contract is *necessity*. Is it necessary for the purposes of the corporation? This is shewn by the following cases—*The East London Waterworks Company v. Bailey* (4 Bing. 283), *Broughton v. the Manchester Waterworks Company* (3 B. & Ald. 1), *Slark v. the Highgate Archway Company* (5 Taunt. 792), *Murray v. the East India Company* (5 B. & Ald. 204), *The Mayor of Ludlow v. Charlton* (6 Mee. & W. 815; s. c. 10 Law J. Rep. (n.s.) Exch. 75), *Dickinson v. Valpy* (10 B. & C. 128), *Steele v. Harmer* (14 Mee. & W. 831; s. c. 15 Law J. Rep. (n.s.) Exch. 217). And the fact that no special power is given to railway companies to make bills and notes is the more marked, because power is given to certain other companies by the 7 & 8 Vict. c. 110. s. 45. But, further, a railway company is not a trading company. There is a distinction between a corporation that may by possibility trade and one formed for trading. Again, carriers were made traders by the 5 & 6 Vict. c. 122; they were not traders before; and as the Bankrupt Acts apply to persons as distinguished from companies, and as a railway company comes under the Winding-up Acts, they still remain non-traders. "Trading" means selling and buying, as distinguished from merely carrying on a business. This is shewn by the definitions of "trade" and "trader" given in *Johnson's Dictionary*, in *Bailey's Dictionary*, and in *Richardson's Dictionary*. As Mr. Justice Willes said, in *Harris v. Amery* (1 Law Rep. C.P. 154; s. c. 35 Law J. Rep. (n.s.) C.P. 89), "'Business' has a more extensive signification than 'trade.'" Secondly, there is no power by the law merchant for a corporation to accept a bill under the common seal, unless special power be given them to do so. The ordinary rule is, that a corporation cannot contract,

except by deed; and these bills are not deeds. Assumpsit can be brought on these bills—*Halford v. Cameron's Coalbrook, &c. Railway Company* (16 Q.B. Rep. 442; s. c. 20 Law J. Rep. (n.s.) Q.B. 160). These bills, therefore, are not deeds within the first clause of section 97. of 8 & 9 Vict. c. 16; and they are not within the second clause, because they are not signed by two directors. The formalities of the statute must be complied with—*The Leominster Canal Company v. the Shrewsbury and Hereford Railway Company* (3 Kay & J. 654; s. c. 26 Law J. Rep. (n.s.) Chanc. 768), per Vice Chancellor Wood; *The Midland Great Western Railway Company v. Johnson* (6 H.L. Cas. 819), per Lord Wensleydale; and this although there are no words of nullification, per Lord Campbell, in *Halford v. Cameron's Coalbrook, &c. Railway Company* (16 Q.B. Rep. 442; s. c. 20 Law J. Rep. (n.s.) Q.B. 160). And, lastly, these objections can be taken under the plea of *non acceptit*—*Byles on Bills*, p. 62, 8th edit., *Hill v. the Manchester and Salford Waterworks Company* (5 B. & Ad. 866; s. c. 1 Law J. Rep. (n.s.) Q.B. 230).

In the third case,

Borill and Matthew shewed cause.—First, we have here bills of exchange under the seal of the company, and purporting to be issued by order of the directors, and the onus is thrown on the other side to get rid of the liability. There is *prima facie* nothing to prevent a corporation from accepting a bill of exchange; 3 & 4 Ann. c. 9. assumes that they can. The judgment of Mr. Justice Bayley in *Broughton v. the Manchester Waterworks Company* (3 B. & Ald. 1), if examined carefully, will be found to assume that in certain cases this is so; and the case of *Serrell v. the Derbyshire, Staffordshire and Worcestershire Railway Company* (9 Com. B. Rep. 811; s. c. 19 Law J. Rep. (n.s.) C.P. 371) shews that they may draw cheques. This, then, being granted, how does a corporation authenticate a contract? Why by seal. Specific modes are, no doubt, given to some companies, but that does not alter the common law power. As, therefore, *prima facie* the bills are binding, the other side must make out that there is some law which prohibits their issue; the onus is on them to shew they are *ultra vires*—per Lord Wensleydale, *The Scottish North-Eastern Railway Company v. Stewart* (3 Macqueen, 415), and per Chief Justice Erle, in *Bostock v. the North Staffordshire Railway Company* (4 El. & B. 819; s. c. 24 Law J. Rep. (n.s.) Q.B. 225). How is the contract prohibited? The defendants must shew that under no circumstances can it be necessary for a railway company to give bills, and that the legislature has said, though such a company may enter into contracts, and incur liabilities thereon to pay money thereon, it must use cash payments. Secondly, the statute 8 Vict. c. 16. was an enabling, not a disabling statute—*Wilson v. the West Hartlepool Harbour and Railway Company* (34 Law J. Rep. (n.s.) Chanc. 241); and as the intention governs, the seal does not prevent these from being bills—*Halford v. Cameron's Coalbrook, &c. Railway Company* (16 Q.B. Rep. 442; s. c. 20 Law J. Rep. (n.s.) Q.B. 160), *Stark v. the Highgate Archway Company* (5 Taunt. 792).

Holland, in support of the rule.—The matter has been already so fully argued in the previous cases that it is necessary to say very little now. With respect to the case of *Wilson v. the West Hartlepool Harbour and Railway Company* (34 Law J. Rep. (n.s.) Chanc. 241), in the first place, the judgment of Vice Chancellor Wood is opposed to that of one of the Lords Justices; and, further, the case was one where the equitable interference of the Court was prayed to enforce specific performance; again, the judgment in *Halford v. Cameron's Coalbrook, &c. Railway Company* (16 Q.B. Rep. 442; s. c. 20 Law J. Rep. (n.s.) Q.B. 160) shews the requisites of the statutes must be complied with. With respect to what has been said as to the onus lying on the defendants, there is a difference between corporations for specific purposes and the old common law corporations, and in the case of the former the onus lies on the other side to show capability. The contention of the defendants is fully borne out by the remarks of Mr. Justice Crompton in *Chambers v. the Manchester and Milford Railway Company* (5 Best & S. 588, 723; s. c. 33 Law

J. Rep. (N.S.) Q.B. 268), by *Lindley on Partnership*, *Grant on Corporations*, and *Byles on Bills*.

ERLE, C.J.—These were actions by the indorsees against the acceptors of certain bills of exchange, and the defendants (who were defendants in all the actions) pleaded that they did not accept. It appears that the defendants are a corporation constituted for making a railway by virtue of a special act of parliament and certain general statutes incorporated therewith, a corporation constituted for the distinct purposes stated in these statutes. It has been perfectly established, that a corporation constituted for a specific purpose cannot be bound by a contract which is not connected therewith: such contract does not bind, because it is *ultra vires*. This company, then, being a corporation constituted for making a railway, can it be bound by a bill of exchange? I am of opinion that it cannot. A bill of exchange is a cause of action in itself, a contract of itself, which binds not only as between the original parties, but also in the hands of the third persons, the indorsees. And I consider that it is altogether contrary to the principles of the law of bills of exchange, that a bill can be valid or not according as the consideration between the original parties was good or bad, or, in the case of a corporation, whether or not it was accepted for the purposes for which the corporation was constituted. The consideration of bills of exchange given at the very same time by a railway company, might be partly for work done on the railway, a valid consideration, and partly for money borrowed in fraud of their borrowing powers, an invalid one, and it would be most pernicious to hold that the bills given for work were valid, and that those given to obtain money, invalid. So much for the principle of the matter. Now, what is the state of the authorities? I can find no case as to the acceptance of a bill of exchange where the bill has been enforced subject to the question of whether the original consideration was valid. The only cases in which it has been held that a corporation could validly accept a bill of exchange are the cases of the Highgate Archway Company, the Bank of England and the East India Company, and in all these cases the corporations were specially authorized to do so. And in *Broughton v. the Manchester Waterworks Company* (3 B. & Ald. 1), Mr. Justice Bayley entertained a doubt whether a holder of such a bill of exchange could sue without the proof lying on him that there was power to accept. What he laid down generally, applies *a fortiori* where the corporation is formed for specific purposes. This being so, I think, both on principle and authority, the acceptances were not binding on this company, constituted for purposes of which we have judicial notice.

BYLES, J.—I am of the same opinion. The cases are important, and raise the question of whether it is competent for a railway company to accept a bill of exchange. We have asked for a precedent, and none can be produced. This is a corporation created by statute. But even if it were a common law corporation, there is authority for saying that it could not accept a bill of exchange. There are only three cases in which it has been held that a corporation can do so. First, the Bank of England, created specially for banking purposes; secondly, the East India Company, whose authority is ratified by two statutes; thirdly, the Highgate Archway Company, where express power was given. With these exceptions, there is no authority for saying that a common law corporation can accept a bill of exchange, and there is more difficulty in saying that a statutable one can. In *Broughton v. the Manchester Waterworks Company* (3 B. & Ald. 1), it is clear that Mr. Justice Bayley thought a corporation could not issue bills of exchange. Even, therefore, if we knew nothing more than that the defendants were a railway company, it is plain they could not accept. But we have judicial cognizance of the constitution of the company by means of the acts of parliament, and we find that it is constituted to make a railway, just as in *Broughton v. the Manchester Waterworks Company* (3 B. & Ald. 1) the company was constituted to make waterworks. Even if this were not before us, the matter would be plain; but

with this constitution of the company before us, it is still plainer. It is said that the present is not the proper method of raising the question, but the persons signing purport to be agents of the defendants, and the plea in effect says that they are not agents; and this, therefore, is a proper mode of raising the question.

KEATING, J.—I am of the same opinion. It is unnecessary to go into the wider question discussed by my Brother Byles; in this case the question is whether this particular company can accept a bill of exchange. I rest my decision on the act of parliament. It is clear that the legislature has guarded against their powers of raising money, by statutory provisions, as to the sum that may be raised, and although certain general acts are incorporated with the special act, neither in the special act nor the general ones is any power conferred on the company to accept a bill of exchange. One of the general acts refers to the mode of contracting. And if the legislature had intended that the company should have this power, it would be found in some of the acts. It is said that it seems absurd that a railway company, which, as carriers, must buy, &c., must not pay by a bill of exchange. But it is an entirely different thing to say that a company shall be liable to parties who supply goods, and to say that they may be liable on negotiable instruments, which may pass into the hands of third parties, and be void or not, according as the purposes for which they were issued were *ultra vires* or not. It seems to me the case may be decided on the simple ground that the legislature did not intend to intrust the company with this power. I think that they cannot accept a bill of exchange, and I also think that the objection may be taken in the present form.

MONTAGUE SMITH, J.—I am of the same opinion. The plaintiffs as indorsees sue the defendants as acceptors, so that the action is not between the immediate parties to the bills. I think a railway company is not competent to accept bills of exchange. A railway company is incorporated to make and maintain a railway; its powers and resources are limited by the incorporating statutes; but if they may accept bills of exchange, they either may do so to any extent, or there would have to be an inquiry whether the purposes for which the bills were accepted were within their powers in each particular case. I think the legislature did not intend to give them the power. It is admitted that there is no authority in favour of it; and there is a great abundance of authority to shew that in the analogous cases of mining, water-works, gas, and other companies, the companies cannot draw bills of exchange, though they are more trading companies than a railway company. The first object in the constitution of a railway company is to make a railway, though, it is true, they may and practically always do become carriers. Corporations for the purposes of trade have the power of issuing bills of exchange as incidental to such trading; but this doctrine only applies where the primary object is trade, buying and selling. In addition to the authorities referred to there is the distinct authority of various eminent text-writers that such a company as this cannot accept a bill of exchange. Amongst others, Mr. J. W. Smith, in his treatise on *Mercantile Law*, says, "However it has been considered that a trading corporation may differ from others, as to its powers of contracting, and its remedies on contracts relating to the purposes for which it was formed. Thus, such a corporation may in some cases bind itself by promissory notes and bills of exchange; and it was even held that the Bank of England might without deed appoint an agent for such purposes. But a corporation will not have these extraordinary powers unless the nature of the business in which it is engaged raises a necessary implication of their existence" (Page 114, 5th edit. by Dowdeswell). Now, clearly, here there is no express power, nor is there any necessary implication. For these reasons, I am of opinion that the defendants were not competent to accept a bill of exchange; and on the other point I also agree with the rest of the Court.

[IN THE COMMON PLEAS.]

April 24, 1886.

THE GREAT NORTHERN RAILWAY COMPANY, *appellants*, v.
TAYLOR, *respondent*.

35 L. J. C.P. 210; 1 H. & R. 471; 14 L. T. 363; 14 W. R. 639.

Referred to, *Att.-Gen. v. Manchester Corporation*, [1906] E. R. A.; 75 L. J. Ch. 330; [1906] 1 Ch. 643; 54 W. R. 307 (Ch. D.).

Common Carrier—Reasonable Time for Delivery—Negligence of Third Persons—Railway Companies—Running Powers—Railway Clauses Consolidation Act, 1845, ss. 87, 92.

CARRIERS.—*In the absence of a contract to deliver at a particular time, the duty of a common carrier is to deliver goods intrusted to him at a reasonable time, looking at all the circumstances of the case; and since his first duty is to carry safely, he is justified in incurring delay and delivering after the usual time where delay is necessary to secure the safe carriage.*

By virtue of an agreement made under the provisions of the Railways Clauses Consolidation Act, 1845, and confirmed by a private act, the M. Railway Company exercised running powers over the line of the G. N. Railway Company. Goods intrusted to the G. N. Company were, solely by the negligence of the M. Company, in the exercise of those powers, delayed in the transit and delivered so late as to cause loss to the consignor:—Held, that since the powers of the M. Company were conferred on them by statute for the benefit of the public traffic, the G. N. Company were not responsible for the negligence of the M. Company in the exercise of those powers, and that the G. N. Company having used all reasonable efforts to forward the goods, and having delivered them at a reasonable time, were not answerable to the consignor for the loss occasioned by the delay.

Appeal from the County Court of Boston, the Judge having stated the following

CASE.

This is an action, by the respondent, against the appellants, who are common carriers of goods along their line of railway from Boston to London. The appellants having admitted that the plaintiff was entitled to a certain sum, the only dispute is as to a balance of 4l. 16s. 6d.

On the 1st of June, 1858, the appellants, under the provisions of the 8 Vict. c. 20. s. 87, entered into an agreement with the Midland Railway Company for the use, by the latter company, of that part of the said line of railway lying between Hitchin and London; and since the date of the agreement the Midland Company have always used the said part between Hitchin and London in accordance with the terms thereof.¹

The appellants are in the habit of despatching from Boston every evening a goods train, which, under ordinary circumstances, arrives in London in time for the early markets on the following morning. Meat and poultry sent by this train are understood by the company to be intended and are

(1) This agreement and the 23 Vict. c. lxxvii., which, by section 16, confirmed the agreement, formed part of the case.

The preamble of the act recited, *inter alia*, that it was expedient that better provision than then existed should be made in London for merchandise and general traffic coming from or destined for the Midland Railway. The preamble of the agreement recited that by means of the London and Hitchin line and the Midland lines a continuous railway communication between London and many parts of the midland and northern districts of England, might be effected with advantage both to the public and to the two companies respectively. By article 53. of the agreement the Midland Company agreed to indemnify the Great Northern Company against all penalties, damages, costs, claims, &c., to be in any way occasioned by reason of any act or default of the Midland Company or their servants in relation to the working by them of the said line. or of their traffic thereon.

usually delivered in time for these markets. The rate for the carriage of perishable articles (including meat and poultry) is and is authorized by the company's act, 13 & 14 Vict. c. lxi., to be higher than the rate for the carriage of non-perishable articles.

On the 30th of August last the respondent, a poulterer in Boston, there delivered to the appellants three hampers of poultry for conveyance from Boston to London, and paid the appellants 13s. 9d., being the ordinary charge for the carriage of poultry from Boston to London.

The appellants were aware that the said poultry was intended for the early London market on the following morning, but no special contract was made for its carriage, unless any such contract can be implied from the circumstances above stated. No time-bill of the times of arrival or departure of the said train has ever been published. The respondent's poultry would have arrived in London at the usual time, so that it could have been delivered in time for the early market but for the occurrence between Hitchin and London of an accident by which both lines of railway were blocked up. The accident was caused by a passenger train belonging to the Midland Company, and then running over the said line of railway between Hitchin and London by virtue of the said agreement, which came into collision with a coal train belonging to the appellants. At the time of the accident the said passenger train was under the charge and control of the servants of the Midland Company solely, and the collision was solely caused by the negligence of the servants of the Midland Company. Immediately after the occurrence of the collision, every possible step was taken to clear the line and restore the traffic, but in spite of every exertion that could be made the line remained blocked up for some hours, and several trains of the appellants, including that conveying the respondent's poultry, were necessarily detained until the line was sufficiently cleared to admit of their proceeding. Upon the clearing of the line, the said goods train was despatched to London, but, solely in consequence of the delay caused by the collision and the time necessarily occupied in clearing the line, arrived in London six hours after the usual time. Upon its arrival, the poultry was delivered in the ordinary course, but, solely in consequence of the late arrival caused in the manner mentioned, was not in time for the early market, and the respondent sustained thereby damage to the amount of 4l. 16s. 6d. Upon this state of facts, it was contended, on behalf of the respondent, that there was an implied contract by the appellants that the poultry should arrive in time for the market. That the appellants being common carriers, and in the nature of insurers, were not excused by the negligence of the Midland Company for the non-fulfilment of the contract. That the appellants were responsible for any negligence of the Midland Company who used the line by their permission. And further, that the facts shewed a breach of contract to carry and deliver within a reasonable time.

For the appellants, it was urged that there was no contract to deliver in time for the early market; and that the delay, caused, as it was, solely by the negligence of the Midland Company, was not unreasonable. I was of opinion that there was no implied contract to deliver in time for the early market, but merely a contract to carry and deliver within a reasonable time; and I held that as the Midland Company used the said railway by the permission of the appellants, the latter were responsible for delay caused by the negligence of the servants of the former company, and therefore that the delivery in this case was not within a reasonable time, and I gave judgment for the respondent for the whole amount claimed.

The question for the opinion of this Court is, whether I was right in holding that the appellants were responsible for delay caused by the negligence of the servants of the Midland Company under the circumstances above stated.

If the Court shall be of opinion that there was an implied contract to deliver in time for the early market, or that the appellants were responsible for the delay arising under the circumstances above stated, the verdict is to stand.

If the Court shall be of opinion that there was no such contract, and that the appellants were not responsible for such delay, the verdict is to be reduced by the sum of 4l. 16s. 6d.

Cave (Mellish with him), for the appellants.

[*Hayes, Serj.*, for the respondent, here admitted that he could not now contend that there was an implied contract on the part of the appellants to deliver in time for the early market, since the county court Judge had found, as a fact, that there was none.]

Then the question is, whether the appellants are responsible for the negligence of the servants of the Midland Company, the appellants having no control over those servants, and having only contracted to deliver within a reasonable time. There is no authority precisely on the point. The delay was caused not by the legitimate exercise of the powers granted to the Midland Company, but by the improper and negligent use of those powers. The delay having occurred by no fault of theirs, the appellants were not bound to do more than use reasonable expedition in forwarding the train, and the case expressly finds that they did everything in their power to clear away the obstruction, and restore the traffic. It has been held, that carriers are not responsible for obstructions caused by the act of God, such as a fall of snow—*Briddon v. the Great Northern Railway Company* (28 Law J. Rep. (N.S.) Exch. 51). A carrier's first duty is to deliver safely, and if a waggon and horses are crossing the line, a driver of a train is justified in incurring delay to avoid a collision. It may be contended on the other side, that the indemnity clause in the agreement between the two companies would enable the appellants to recover from the Midland Company any damages which the respondent may recover from the appellants; but even if that were so, the respondent not being a party to this agreement, cannot, in any way, take advantage of it. He must stand upon his rights at Common Law.

Hayes, Serj. (*Thesiger* with him), for the respondent.—I am precluded by the finding of the Judge from arguing that there was an implied contract to deliver in time for the early market; but the case finds that there was a contract to deliver within a reasonable time, and that the appellants broke it. What then is a reasonable time? That which allows ample scope for the delivery. The invariable practice was to deliver in time for the market, and the goods were only sent for that purpose. If the appellants were not bound to deliver within that time, they might have kept the goods twelve months. The delay would never have happened if the appellants had not, for the purpose of profit, introduced on to their own line the traffic of the Midland Company, which is more than the line can bear. As the appellants obtain the profits, they must pay the penalty. A common carrier is an insurer, to carry safely and within a reasonable time, and nothing will excuse him but the act of God or the king's enemies—*Chitt. Contr.* 435, 7th edit., *Briddon v. the Great Northern Railway Company* (28 Law J. Rep. (N.S.) Exch. 51.). The indemnity clause is designed to meet just this case, and if the appellants are not liable, the respondent is without compensation, for he cannot sue the Midland Company.

Cave, in reply.—A carrier is not an insurer of punctual delivery, but only of delivery within a reasonable time, looking at all the circumstances. This agreement between the two companies is not merely voluntary, for by section 92. of 8 & 9 Vict. c. 20. any company or person is entitled to run trains over the appellants' railway on payment of tolls, and section 87, which authorizes the making of such an agreement as the present, merely enables the company to regulate the mode of exercising the running powers.

ERLE, C.J.—I think that our judgment should be for the appellants, and that the decision of the County Court Judge should be reversed. The action was brought against the Great Northern Railway Company for not delivering goods within a reasonable time, and the train which conveyed the goods was delayed between Hitchin and London by reason of a break-down of a train of

the Midland Railway Company, which has running powers concurrently with the Great Northern Company over the part of the line between Hitchin and London. The Judge has found rightly, as I think, that the contract was to deliver goods, sent from the north, in London within a reasonable time. I think that the duty which the law imposes upon a common carrier to deliver the goods safely has nothing to do with the time for delivery; the time at which he is to deliver is part of the contract. I think that a carrier using all reasonable diligence to get goods to their destination would fulfil his duty to deliver them within a reasonable time. Now, the County Court Judge has found for the plaintiff against the Great Northern Company, on the ground that the Midland Railway Company having running powers over the Great Northern Company's line, and having broken down and caused a delay, the Great Northern Company were responsible for that delay, because they had permitted the Midland Company to use their line and so were responsible for what was done by the Midland Company. In that, I think, the Judge did not take a correct view of the relations between the Great Northern and the Midland Companies. As to the running powers, the legislature contemplated the exercise of them by the act 23 Vict. c. lxxvii., entitled 'An Act to authorize the Midland Railway Company to construct a station in the parish of St. Pancras, London, to effect arrangements with the Great Northern and certain other companies, and for other purposes.' The agreement which that statute confirms recites in the preamble that it was for the public interest that certain objects should be effected, and it gives the Midland Railway Company the rights in question for purposes of public convenience. It is clear also that the Railway Clauses Consolidation Act, 1845, which is incorporated with that act, when it provided for giving running powers over a railway to strange companies (8 & 9 Vict. c. 20. s. 92, and ss. 86-107), contemplated the facilitating of the traffic for public purposes. The Railway and Canal Traffic Act (17 & 18 Vict. c. 31. s. 3) also empowers this Court to issue writs of injunction to restrain railway companies from withholding facilities for forwarding the public traffic. I think that the Midland Railway Company, coming in as they did under the 23 Vict. c. lxxvii., a private act, by direction of parliament to run over the Great Northern Company's line, were exercising a right for which the Great Northern Company have no responsibility of the kind contended for, and if the Midland Company's train broke down, the Great Northern Company would not be responsible if they used all reasonable efforts to get the obstruction out of the way, and every reasonable exertion to get the goods to their destination consistent with the safety of their arrival. This is the view which the County Court Judge took in every respect, except as regards the rights of the Midland Company over the Great Northern Company. He thought the Midland Company were in the position of persons employed by the Great Northern; but I think they were not, as the Midland Company enjoyed the rights they did by virtue of a statutory power.

BYLES, J.—I am of the same opinion. The first duty of a common carrier is safely and securely to carry, and the next to deliver; and it is impossible to deny that this must be within a reasonable time, otherwise he might take twelve months about it. In a written judgment in this Court, Chief Justice Tindal speaks of a common carrier's "duty to deliver within a reasonable time being merely a term grafted by legal implication upon a promise or duty to deliver generally."² But my Brother Hayes seems to have treated the ordinary time for delivery as equivalent to a reasonable time, but I cannot agree with that. A carrier is not bound to deliver within the usual time, but within a reasonable time, looking at all the circumstances of the case. I was much struck by the illustration put by Mr. Cave. In approaching a crossing, suppose the servants of the company in charge of a train see a waggon and four horses in the act of crossing the railway. If they wait to allow them to get out of the way they will be behind their ordinary time. Are they to break the first duty of a carrier, namely, to carry safely, and render themselves

(2) The learned Judge probably referred to *Raphael v. Pickford*, 5 Man. & G. 558.

liable for a collision? Their duty clearly is to be behind their ordinary time. Then in this case, as between the plaintiff and the Great Northern Company, an accident, that is, a thing happening without any power of control by the company? I think that is so, and the relations between the Great Northern and the Midland Companies are shewn by the statute. This case, therefore, is precisely similar to that of the supposed waggon and horses, and I have no doubt that the Great Northern Company are not responsible. It may be that, even if they were responsible to the plaintiff, they still have their remedy over against the Midland Company; but we are not called upon to decide that.

KEATING, J.—I am of the same opinion. I think the county court Judge has found that everything was done by the Great Northern Company which ought to have been done when the stoppage occurred to have the obstruction removed within the shortest possible time. But the ground on which the Judge decided is stated in the paragraph where he says he was of opinion that there was merely a contract to carry and deliver within a reasonable time, and he held, that as the Midland Railway Company used the railway by the permission of the appellants, the latter were responsible for delay caused by the negligence of the Midland Company. It is not strictly correct to say that the Midland Company were using the railway by the permission of the Great Northern Company, so as to make the latter responsible for the negligence of the former, because, though it is true that the agreement was that the Midland should exercise the running powers by the permission of the appellants, still it was for the benefit not only of the appellants but also of the public. Though, possibly, it may be said to have been by the permission of the Great Northern Company in one sense, yet this is not so in the sense of making them responsible for the consequences of the negligence of the Midland Company.

MONTAGUE SMITH, J.—I am of the same opinion. No doubt a common carrier is an insurer to the extent that the goods shall be delivered safely and securely, but there is no authority for holding that he insures their arrival at any particular time or according to any usual course of delivery. He is bound to deliver them within a reasonable time, and the usual course of delivery would in most cases be *prima facie* evidence of what is a reasonable time; but it must depend on all the circumstances of the particular transaction as to what is a reasonable time. His duty is to convey the goods within a reasonable time without unnecessary delay; but it may be necessary, in order safely to deliver, to make a delay or even to deviate, and if the delay or the deviation are necessary for that purpose, then delay or deviation may be incurred, and the delivery of the goods may be retarded without any responsibility being cast on the carrier to make good the loss occasioned by the delay. In *Davis v. Garrett* (6 Bing. 725) the Court, in holding a carrier liable for a loss to goods which happened during a deviation from the usual course, used the words "unnecessary deviation," and said, "We cannot but think that the law does imply a duty in the owner of a vessel to proceed without *unnecessary* deviation in the usual and customary course." But it can never be said that, where a road is so bad that a carrier cannot safely proceed along it, he may not deviate. There is no authority for such a proposition. The circumstances of the case shew that the cause of the delay was one over which the appellants had no control, and it is not necessary to refer more to the acts of parliament. It is as if a common carrier were run into and impeded on his road, and I cannot see that in such a case he would be liable for the delay.

Judgment for the appellants to reduce the verdict.

[IN THE COMMON PLEAS.]

April 17, 1866.

VALIERI AND ANOTHER v. BOYLAND.

35 L. J. C.P. 215; L. R. 1 C.P. 382; 14 L. T. 362; 14 W. R. 637;
12 Jur. N.S. 566.*Shipping—Bill of Lading—18 & 19 Vict. c. 111. s. 3.*

SHIPPING.—*The 3rd section of the "Act to amend the Law relating to Bills of Lading" enacts, that in the hands of a consignee or indorsee for value (without notice), they shall be conclusive evidence against the master or person signing them that the goods were shipped, though, in fact, they were not; "provided that the master, &c. may exonerate himself in respect of such misrepresentation by shewing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder or some person under whom the holder claims." The shipper having bought certain bales, his vendor put them on board; a dispute arose between the latter and the mate as to the number shipped; the mate gave a receipt for the larger number, with a note thereon, which by mistake stated that four "over" were in dispute, the master on seeing this note signed a bill of lading for the larger number, with a note, four "more" in dispute, the plaintiff as indorsee of the bill of lading claimed to be entitled to at least this larger number:—Held, that the taking such receipt by the vendor was evidence for the jury of fraud in him, and that the shipper could not separate himself from the effect of his acts.*

The declaration alleged a default in the delivery of certain bales of skins, under a bill of lading signed by the defendant and delivered to one Katinakis, who had shipped them on board the defendant's ship, and indorsed the bill of lading to the plaintiff.

The pleas were, denials of, first, the agreement; secondly, the delivery of the bill of lading; thirdly, the indorsement; fourthly, the default; fifthly, the defendant being guilty; sixthly, the plaintiff's property.

The main question at the trial was, whether the bill of lading was conclusive as to the goods being on board, by virtue of the 18 & 19 Vict. c. 111. s. 3, which enacts, that "every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been, in fact, laden on board: provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by shewing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder or some person under whom the holder claims."

The following facts appeared at the trial: One Katinakis bought a quantity of lamb-skins to be shipped on board the steamship *Brenda*, of which the defendant was master, at Constantinople for London. What quantity he had so bought did not appear. The vendor, as Katinakis's agent, proceeded to ship a large quantity of bales of skins, and as these were put on board, he and the mate of the ship kept count of them. A dispute arose as to the number marked K which had been shipped; the vendor alleged that sixty-nine had been shipped, the mate only sixty-five; and the mate, in giving his receipt, put down that sixty-nine were shipped with the written remark thereon, "four over in dispute," by mistake for "four less in dispute." A bill of lading was drawn up (by whom it did not clearly appear), which, as far as it is material, was as follows: "Shipped, &c. . . 119 bales skins, being

marked and numbered as in the margin. . . .” and in the margin, “K 69; I 18; B 32; 119; K 4 bales *more* in dispute if on board to be delivered.” This bill of lading was brought to the defendant, who, on comparing it with the mate’s receipt (which was brought with it), signed it. This bill of lading was indorsed to the plaintiff, who duly demanded delivery according to its terms. It then turned out that there were only sixty-five bales marked K; and the plaintiff claimed to be entitled to have at least sixty-nine, and four more if it turned out they were on board.

The learned Judge left it to the jury to say whether sixty-five or sixty-nine had been shipped, and, if sixty-five only, whether there was fraud on the part of the shipper, and no negligence on the part of the captain, in which case the defendant would be entitled to a verdict. The jury found a verdict for the defendant, and the learned Judge reserved leave to the plaintiff to enter a verdict for 43*l.* 12*s.*, on the ground that there was no evidence of fraud on the part of the shippers, their agents or servants, which ought to have been left to the jury.

Sir G. Honyman now moved pursuant to such leave, and also for a new trial, on the ground of misdirection, and the verdict being against the evidence.—There was no evidence that these goods were not shipped, and inasmuch as the bill of lading states that they were, it lies on the other side to give evidence that they were not. Again, even if they were not, still there was no evidence of any fraud in the shipper *Katinakis*; he had bought the goods, and his vendor took them to the ship, and, therefore, even if there were more than a *bona fide* dispute, and any attempt at fraud by such vendor (of which it is submitted there was not the slightest evidence), yet the shipper was untainted with this; he relied on the mate’s receipt as much as the master of the ship, for checking his vendor, and is damnified by the mistake. The whole matter has originated in the mistake of the mate, which misled the shipper as well as the master.

ERLE, C.J.—I am of opinion that there should be no rule in this case, because I think that there was evidence to go to the jury, that the mistake in the bill of lading was caused by the fraud of the shipper. The shipper named in the bill of lading is *Katinakis*, and he or his agent brought the bales to be shipped, and I think that there was evidence that the person putting them on board was guilty of fraud. The mate said there were only sixty-five, this person said sixty-nine; the mate is induced to sign a receipt which contained a mistake, and there was evidence to go to the jury, that the person putting the bales on board was overreaching the mate,—that he knew there were not so many, and took advantage of the mistake of the mate.

BYLES, J. and KEATING, J. concurred.

MONTAGUE SMITH, J.—I am of the same opinion. *Katinakis* cannot be separated from the person who actually shipped the bales. There may have been an honest dispute as to the four bales, and if the mate had given a receipt for sixty-five, with a note that four more were in dispute, such receipt might have been honestly taken; but the person who shipped must have known that sixty-nine were not shipped without dispute, and his taking such a receipt imposed on the captain, and was no less a fraud because there was a mistake of the mate. The proviso in the 3rd section of the statute means, that those on board the ship must not be mixed up with the fraud.

Rule refused.

[IN THE COMMON PLEAS.]

April 19, 1866.

BAKER v. ALEXANDER.

35 L. J. C.P. 217; 12 Jur. N.S. 692.

Assignment of Debt—Set-off—Equitable Defence.

SET-OFF.—*The plaintiff and the defendant had transactions in corn, which resulted in a claim by the plaintiff of a large sum; this balance he assigned to F, of which the defendant had notice; the defendant asserted that the balance was in his favour. An action was brought by F. in the name of the plaintiff, which was referred, and an award made in his favour; an action was then brought on the award. It turned out that one of the transactions previous to the assignment was that the defendant, as agent for the plaintiff, purchased a cargo of corn under a contract which provided that any dispute should be referred in a specified way; that the plaintiff had tried to avoid the contract by first asking the defendant to take the corn, then denying the agency, and then disputing the proper state of the cargo; and that the defendant compromised the claim of the vendor by giving two bills of exchange, one of which became payable before the first action, the other long after; but that neither in the account rendered by the defendant, nor in the set-off in the first action, nor in the arbitration, was the claim as to these bills mentioned. In the action on the award the defendant claimed to set off this amount:—Held, that he was entitled to do so.*

The first count of the declaration stated that an action brought by the plaintiff against the defendant was referred under a Judge's order, and that an award was duly made thereunder, deciding that the plaintiff was entitled to recover in the said action 299l. 4s. 9d., and ordering the defendant to pay the said sum on a day which had elapsed before the action; and further, that the costs of the said action had been taxed at 17l. 6s.; which sums the plaintiff claimed from the defendant. The second count was the common count for goods sold and delivered, goods bargained and sold, work and materials, commission, money lent, money paid, money had and received, money due under an award, interest, and money due on accounts stated.

Under a Judge's order the defendant pleaded a set-off to the first count, and to the second count never indebted, with liberty thereunder to raise the equitable question hereinafter mentioned.

The plaintiff was a corn-merchant and the defendant a corn-broker, who had had large transactions in corn together, which at the end of the year 1864 resulted in a claim by the plaintiff of 976l. 15s. 3d. On the 18th of May, 1865, the plaintiff entered into the following arrangement with Messrs. Fowler & Son: "In consideration of the monies I am indebted to you, I hereby transfer to you as agreed the balance that is or may be due to me from Messrs. Alexander & Co. on settlement of accounts between us, and engage to execute a deed of assignment of same when required." The same day the plaintiff wrote to the defendant, "I beg to give you notice that I have transferred to Messrs. Fowler & Son whatever balance is or may be due to me on settlement of accounts between us, and hereby request you to hold said balance at their disposal." And on the 20th of May Messrs. Fowler & Son inclosed a copy of Baker's undertaking in the following letter: "We beg to hand you inclosed letter from Mr. R. Baker, and shall feel obliged by your confirming to us the contents of the same." Messrs. Fowler & Son made applications to the defendant for payment, the defendant rendered an account, claiming a balance of 101l. 9s. 8d. in his own favour, and Messrs. Fowler & Son then, on the 14th of July, 1865, brought in Baker's name the action mentioned in the declaration of the present action. On the 21st of September, 1865, "the cause" was referred under a Judge's order, the costs of the cause to

abide the event; and on the 22nd of November, 1865, the award in the declaration mentioned was made.

It appeared that on the 5th of August, 1864, the defendant bought of Messrs. Pim & Co. a cargo of corn under a contract which (as far as it is material) was as follows: "Bought from Messrs. Pim & Co. the cargo of Ibraila Indian corn, of fair average quality when shipped; . . . payment in London in cash, less interest, at Bank rate on arrival of documents. . . . In case of any dispute this contract not to be void, it being agreed by buyers and sellers to leave the same to two London corn-factors mutually chosen, or their umpire, and to be bound by their decision. . . . Alexander & Co." On arrival of the documents Messrs. Pim & Co. asked the defendant to take them up, and he then communicated with the plaintiff, for whom he had bought. The plaintiff then desired the defendant to take the cargo himself or arrange with Pim & Co. to hold the documents till the arrival of the corn. The corn arrived, and Pim & Co. continued to press the defendant to pay. The defendant communicated with the plaintiff, who then asserted that he had not accepted the contract, but that a certain Messrs. Palmer & Co. were principals; and on further pressure denied that the cargo was shipped in good condition, it having certainly arrived damaged. Pim & Co. eventually sold the cargo at a loss of 523*l.*, which they proceeded to recover against the defendant, who compromised the matter for 461*l.* 13*s.* 6*d.*, which he paid by two acceptances, one for 226*l.* 12*s.* 6*d.*, payable two months after date, and due the 4th of July, 1865, the other for 235*l.* 1*s.*, payable eight months after date, and due the 4th of January, 1866. Neither in the account rendered, nor in the set-off in the previous action, nor on the arbitration, was this transaction mentioned. But the defendant now claimed to set off in the present action the amount of the said bills which he had paid; the question in the cause was, whether he was entitled to do so. Fowler had continued to make advances to the plaintiff till December, 1865.

At the trial a verdict was found for the defendant, and

Hawkins now moved for a rule *nisi* for a new trial, on the ground of misdirection and the verdict being against evidence.—First, there was no right of set-off against the present plaintiff, putting the question of Fowler & Co. aside for the present. No doubt, after the verdict of the jury, we must take the defendant to have been the agent of the plaintiff. But still there was a dispute as to the state of the cargo. The contract provides that certain steps are to be taken to settle such dispute; the defendant, as agent, had only authority to take those steps; he had no authority to compromise; and therefore he cannot set off these sums against the plaintiff, his principal. Secondly, even assuming that he had such right as against Baker, he still has no such right as against Fowler & Co., the real plaintiffs in this action. From the very beginning the defendant knew of the assignment to them, yet he never mentions this matter in his account, in his former set-off, or in the arbitration. He cannot lie by in this manner and then try to get rid of the effect of the award, and it is highly inequitable as against Fowler & Co., who, not knowing of this matter, were induced to go on advancing money to the plaintiff. If a person induces another to act on the assumption that a certain state of facts exists, he will not be allowed in equity by a denial of the existence thereof to damnify the person so induced—*Williams v. the Earl of Jersey* (1 Cr. & Ph. 91; s. c. 10 Law J. Rep. (N.S.) Chanc. 149). And in *Wilson v. Gabriel* (4 Best & S. 243) the Chief Justice says, "I can conceive a state of circumstances in which equity would prevent a party setting off a debt, namely, where by his own act he has placed the assignee in a worse position than he was before, *i. e.* if he stands by and allows the assignor to assign the debt to him, knowing that there is a set-off. I quite agree that that is inequitable, and it is a rule that he who seeks equity must do equity." But at all events the costs of the action cannot be set-off, as there can be no set-off of costs to the prejudice of the attorney's lien—*Practice Rules*, Hilary Term, 1853, rule 63,

Sympson v. Protheroe (26 Law J. Rep. (N.S.) Chanc. 671), and *Eisdell v. Conyngham* (28 Law J. Rep. (N.S.) Exch. 213).

BYLES, J.—I am of opinion that there should be no rule. The misdirection complained of is, that I did not tell the jury that the defendant was not in a position to avail himself of this set-off. Now, the reference was simply of the cause, and this set-off was secured by two bills of exchange, one of which was not due, and therefore could not be set off in the former action; and the other of which bills, though due, the defendant was not bound to set off, as he might reasonably think he had a sufficient set-off without it. The fact therefore of his not setting this matter off in the former action seems to me to be no objection to his doing so in this action on the award. The question then is, was there ever any right of set-off? If these bills had been given for the exact amount of the claim of the vendors and nothing more were known to us, I should think it clear that there would be a claim against the plaintiff; it is however said, that the defendant has given bills for less, and that he had no authority; but *prima facie* the plaintiff was liable to pay, and there is nothing to displace this state of things; and I therefore think, first, that there was a right of set-off against the plaintiff; and, secondly, that there is nothing inequitable in the set-off being made in this action.

KEATING, J.—I am of the same opinion, and think that the defendant should be allowed to plead this set-off. The plaintiff says that there was no set-off in law; but clearly there was. It is suggested that, though the plaintiff was *prima facie* liable, yet there was a dispute, and he was not bound to pay because the liability was not examined into, as provided by the contract. But the contract was to buy a cargo of corn, and though it is suggested that the plaintiff was not satisfied with the cargo, this is qualified by the fact that he wished to throw the contract on to Palmer & Co.; this shews him to be conscious of a liability, and there is ground to suppose that the dispute was an after-thought. The defendant was liable to pay, and he paid what he might have been compelled to pay, and he is therefore entitled to recover what he paid, unless he has precluded himself as respects Fowler & Co. It is suggested that he has, on the equitable ground that on the reference he had the opportunity of setting the matter off and did not do so, and thereby induced Fowler & Co. to think that there was no such set-off. But one bill of exchange could not have been set off, and the other he was not bound to set off. Is, then, his not doing what he was not bound to do such an inducement to Fowler & Co. to act as if there were no further set-off as precludes him now from availing himself of it? I am of opinion that it is not, and that it would be most inequitable to hold so. The proceedings were hostile, and the defendant had a perfect right to say, "Take your proceedings as you like, and I shall defend myself as I think advisable," and, further, to say that he is a stranger to the matter of the additional advances, and may set off now in the present action. I am therefore of opinion, that there is nothing inequitable in the present set-off. A distinction has been taken as to the 17*l.*, because it is said that Fowler & Co., have incurred a liability to their own attorney on the same matter; they, however, are not on the record, and I can see no distinction. It appears to me that in the present case there was clearly a legal set-off against the plaintiff, and that the defendant is not precluded by equitable considerations from availing himself of it, and therefore the learned Judge was right in ruling so.

MONTAGUE SMITH, J.—I am of the same opinion. There is a good legal set-off, and no ground for saying that a Court of equity would interfere. It has been argued that there is no legal set-off because the payment was without authority. It is true there was no direct authority, but there was ample evidence of implied authority. The foundation of the whole matter is the contract of the defendant on behalf of the plaintiff, which created a liability to pay for the corn on its arrival,—a liability to pay the whole price. A specific cargo was sold, and though an action

might be brought for deterioration, yet the defendant was liable to pay the whole price, for it is not pretended that the cargo which arrived was not the cargo which was bought. The plaintiff refuses to take: what is the defendant to do? The vendors re-sell and call on the defendant to pay the difference, for which he is liable unless he can shew the cargo was deteriorated. But on whom does the onus of shewing this lie? Why on the plaintiff, for the cargo is *prima facie* to be accepted and paid for. The defendant made a compromise, which reduced the amount, and which any jury would find to be the reasonable thing to do; and therefore I think that there was ample evidence of an implied authority from the plaintiff to the defendant to pay the smaller sum. If, then, there is a legal set-off, what is there to indicate that a Court of equity would interfere? I find nothing whatever. If there were a legal set-off before notice, equity would not interfere unless the defendant had done something to lose his right. He has done nothing more than what he had a perfect right to do in his own interests; there was a claim and a counter-claim which overtopped it; the reference was of the action only, and therefore it was not necessary to put in the set-off where there was enough to overtop the claim; and it was to the defendant's interest not to bring the matter forward then, and unnecessarily prejudice it by a discussion. It was further said, that there was no legal debt payable before the assignment; there was, however, a liability, and those who call for the interference of equity must do equity. With respect to the question of the costs, there is no question here of an attorney's lien, and they follow the principal debt.

Rule refused.

[IN THE COMMON PLEAS.]

May 1, 1866.

PHILLIPS AND ANOTHER v. IM THURN.

35 L. J. C.P. 220; L. R. 1 C.P. 463; 14 L. T. 406; 14 W. R. 653.

See *Vagliano v. Bank of England*, [1889] E. R. A.; 58 L. J. Q.B. 27; 22 Q.B. D. 103; 59 L. T. 864 (Q.B. D.); affirmed, [1889] E. R. A.; 58 L. J. Q.B. 357; 23 Q.B. D. 243; 61 L. T. 419; 37 W. R. 640 (C. A.).

Bill of Exchange—Fictitious Payee—Forgery—Acceptance for Honour—Estoppel.

BILLS OF EXCHANGE.—A person calling himself P. presented to S. in England a Spanish bill of exchange, professing to be drawn by C, of Lima, on S, payable to order of R. and indorsed by R. & P. S, having stopped payment, sent to the plaintiffs the bills and a letter telling them that no doubt the defendant would intervene for the honour of C, and that with his signature they would perhaps not object to discount the bill; the plaintiffs sent the bill and letter to the defendant, who accepted for honour of C, and on the faith thereof the plaintiffs discounted the bill. The bill turned out to be a forgery on C, who had not drawn the bill, and did not know any such persons as R. & P.:—Held, that as the bill was discounted by the plaintiffs on the faith of the defendant's acceptance, they were entitled to recover against him. And if it had been necessary to decide the point, the Court were inclined to hold that the bill must be considered to have been accepted as a bill payable to bearer.

This was an action brought by the plaintiffs, as indorsees, against the defendant, as the acceptor for honour, of the bill of exchange hereinafter mentioned. By the consent of the parties and by a rule of Court there was stated for the opinion of the Court, without any pleadings, the following

CASE.

The plaintiffs are discount brokers in London. The defendant is a merchant in London, and is the correspondent and agent there of a firm carrying on business at Lima, under the name of "Canevaro & Co." In the month of June, 1864, a person calling himself 'Enrique Plana,' or 'Henry Plana,' presented to Henry H. Sultzberger, at Liverpool, for acceptance a bill of exchange in the Spanish language, of which the following is a translation:

"No. 771, Lima, 12th of May, 1864.

"For 400l.

"At sixty days' sight please pay by this first of exchange (second and third not being paid), to the order of Mr. Carlos Raffo, the sum of four hundred pounds sterling, value received, which place to account according to advice of

"Canevaro & Co.

To Mr. H. H. Sultzberger, Liverpool."

At the time the said bill was so presented to the said H. H. Sultzberger it bore the following indorsements—

"Pay to the order of Mr. Enrique Plana,

"Lima, 12th May, 1864.

"Carlos Raffo,

"Henry Plana."

The said bill of exchange was a forgery on Canevaro & Co., and it may be taken that no persons named Carlos Raffo or Enrique, or Henry, Plana were known at Lima, or to Messrs. Canevaro & Co. A clerk of Canevaro & Co. named Arnaboldi absconded from Lima by the mail-packet which left for England on the night of the 13th of May, 1864. A person named José Moretti, who was not in the employment of Canevaro & Co., left Lima with Arnaboldi. It may be taken for the purposes of this case that Arnaboldi assumed the name of Plana, and that he was the person mentioned above as calling himself "Enrique," or "Henry, Plana." The written parts of the bill are undoubtedly in the handwriting of Arnaboldi, and it may be taken that the indorsement "Henry Plana" was written by him. It does not appear by whom the other indorsement was made, but it may be taken for the purposes of this case to have been made by Arnaboldi, or José Moretti. These facts, however, were not known to the said H. H. Sultzberger at the time the said bill was presented to him for acceptance, nor were they known to the defendant when he accepted the said bill as hereinafter mentioned, or to the plaintiffs. Mr. H. H. Sultzberger having stopped payment declined to accept the said bill, but wrote to the plaintiffs, with whom he was in the habit of dealing, the following letter:

"Liverpool, 21st June, 1864.

"Messrs. B. S. & J. Phillips & Co., 19, Birchin Lane, London. Dear Sirs,—I have this day given your address to Mr. Henry Plana, the holder of two drafts on myself for 400l. and 800l., which I was prevented from accepting in consequence of having lately been under the painful necessity to suspend my payments. Messrs. J. C. im Thurn & Co. will intervene and accept on behalf of the drawers, Messrs. Canevaro & Co., Lima (who themselves are safe for any amount), and as Mr. Plana is quite a stranger here and might have some difficulty to get the bills discounted, I wished to render him some service and therefore gave him your address, thinking that with Messrs. im Thurn's signature you will not object to discount the bills for him.

"I am, dear Sirs, yours truly,

"per H. Henry Sultzberger,
Henry Schlatter.

"Mr. Plana tells me that he intends making some purchases, and would be glad to get the notes, if possible, by return of mail."

The bill for 400l. mentioned in this letter is the bill mentioned above.

This letter was accompanied by the following letter from the person calling himself "Plana" to the plaintiffs inclosing the bills referred to:

"Liverpool, June 21, 1864.

"Messrs. B. S. & J. Phillips & Co., 19, Birch Lane, London. Gentlemen,—I am indebted for your address to Mr. Henry Sultzberger of this town, in consequence of which I take the liberty of inclosing you two drafts of Messrs. Canevaro & Co. at Lima, for £400 at 60 days' sight and £800 at 90, on the said Mr. Sultzberger, who tells me that certain reasons prevent him from accepting them; but that Messrs. J. C. im Thurn & Co., London, will accept on behalf of the drawers. I now request you to get these two drafts presented for that purpose to Messrs. J. C. im Thurn & Co., and afterwards to get them discounted for my account as favourably as possible, and remit me the balance in notes, per registered letter, to the address at foot. In the event of your not feeling disposed to discount the bills, I request you to return them to me, provided with the needful. Excusing the trouble, I am, Gentlemen, yours respectfully,

Henry Plana.

"Care of Mr. H. Henry Sultzberger."

Upon receipt of these letters, the plaintiff shewed them, with the bills and the indorsements on them, to the defendant, and inquired whether he would accept for honour of Messrs. Canevaro & Co., and the defendant stated that he would. The plaintiffs afterwards informed Mr. H. H. Sultzberger and the person calling himself Plana that they would discount the said bills upon their being accepted by the defendant. The bills were thereupon duly protested for non-acceptance, and were then presented to the defendant, and were left in his office for acceptance for twenty-four hours in the ordinary course of business, and he accepted the same in the following form:

"Accepted for honour and account of Messrs. Canevaro & Co., with charges 4/-. London, 24th June. J. C. im Thurn & Co."

The plaintiffs thereupon discounted the said bills upon the faith of the acceptance of the defendant, and remitted the proceeds as directed in the letters before set out. Shortly after the plaintiffs had discounted the said bills, the defendant received the information of the facts above stated, and informed the plaintiffs thereof, and upon the bills being presented to the defendant at maturity, he refused to pay the same.

The Court is to be at liberty to draw any inferences from the above facts which a jury might draw.

The question for the opinion of the Court is, whether, on the above-stated circumstances, the plaintiffs are entitled to recover the amount of the bill from the defendant. If the Court should be of opinion in the affirmative, then judgment to be entered for the plaintiffs for 400*l.* and interest, with costs; if in the negative, judgment to be entered for the defendant, with costs.

Hannen, for the plaintiffs.—This case was formerly before the Court on a demurrer to a plea, which set up as a defence that the payee was a fictitious person, and which the Court held bad, because the defendant, as acceptor for honour, was in the same position as the drawer (18 Com. B. Rep. N.S. 694). The plaintiffs, innocent parties, take the bill to the agent of the drawer; he says that he recognizes the writing, and accepts for his honour, and he is therefore equally estopped with the drawer. It is precisely the same as if there were a genuine acceptance by Canevaro. The defendant is estopped from denying the existence of the payee. In *Byles on Bills*, 8th edit., p. 184, it is said, "By acceptance the drawee admits the signature and capacity of the drawer; . . . he, moreover, admits . . . the then capacity of the payee, to whose order the bill . . . is made payable, to indorsee." In *Cooper v. Meyer* (10 B. & C. 471; s. c. 8 Law J. Rep. K.B. 171) Lord Tenterden says, "If there is, in reality, no such person (as the drawer), I think that the fair construction of the acceptor's undertaking is, that he will pay to the signature of the same person that signed for the drawer"; and that doctrine applies to the present case. Further, the

defendant had the bill and the correspondence for some time before he accepted; he had full knowledge of the facts, and time for deliberation; and surely there is an estoppel. As was said by Mr. Justice Wightman in *Ashpitel v. Bryan* (3 Best & S. 474; s. c. 32 Law J. Rep. (N.S.) Q.B. 91), "No doubt, as a fact, the bill was not indorsed by T.P.; and the question is, whether the defendant can be admitted, after what has taken place, to gainsay that which has been done by arrangement between the parties, and which he authorized and agreed to. . . . There are authorities which go to shew that after value received and agreement with the person who has given value and is the holder, that the bill is to be drawn and indorsed in a particular name, the acceptor is not permitted to shew that the name is false or fictitious, and to set up what would be a fraud on the person who has given value." So here, the defendant agreed to guarantee that the bill was what it represented itself to be, and that, as between the plaintiffs and himself, it was to be taken as such; on the faith of this, the plaintiffs advanced their money, and the defendant is therefore estopped from raising this defence. The bill, in effect, must be taken to be a bill payable to bearer, accepted by the defendant.

J. A. Russell for the defendant.—The meaning of the transaction is that the defendant took the existence of Raffo and Plana on the faith of Sultzberger and the plaintiffs, and on the faith of the representations to that effect accepted the bill. The defendant accepted for honour, and it is said that he thereby vouched the signature of the drawer: be that so, he still vouched nothing more; and the result of the facts is, that there has been a mutual mistake. No doubt the defendant is in the position of the drawer, but if the action had been brought against the drawer he could have defended himself on the ground of his not having signed the bill, whereas if the defendant is to be held liable, he has no remedy over and bears the loss without being recouped. But further, there is no authority which lays down that an acceptor "for honour" is able under no circumstances to deny the signature of the drawer, and at all events he is not estopped as to the other signatures. But then the other side say, that the bill must be treated as if drawn payable to bearer, and no doubt rely on *Gibson v. Minet* (1 H. Black. 569); but in that case the drawer and the acceptor knew all the facts, and as was said by Justice Willes, when it was cited in the case of *Ashpitel v. Bryan* (5 Best & S. 723; s. c. 33 Law J. Rep. (N.S.) Q.B. 328), in the Exchequer Chamber, "In *Gibson v. Minet* (1 H. Black. 569), in the House of Lords, it was decided that if a bill of exchange be drawn in favour of a fictitious person, and the name of the payee be indorsed on it by the drawer, which fictitious indorsement purports to be to the drawer or his order, and the acceptor at the time of accepting the bill knew these facts, he shall not take advantage of his own wrong, and a *bona fide* holder may recover against him." A general acceptor might have denied the indorsements and the circumstances—*Beeman v. Duck* (11 Mee. & W. 251; s. c. 12 Law J. Rep. (N.S.) Exch. 198). The cases on estoppel divide themselves into two classes, first, where a direct representation has been made; and, secondly, where the parties have agreed that a certain state of facts shall be assumed, both knowing all the circumstances; but here there was a mutual mistake and the case falls within neither category.

Hannen, in reply.—It is said that there was a mutual mistake, but the question is, who took the first step; here the plaintiffs on the faith of the defendant's acceptance advanced their money. Again, the defendant is in the position in which Canevaro would have been if he really had drawn the bill, and he would have started the bill with a payee he knew to be fictitious; this would have constituted an engagement to pay to the order of the person who in fact signed, and the bill in effect would be a bill payable to bearer. Further, where one man induces another to alter his position on the representation of certain facts existing, the former is estopped from denying their existence—*Freeman v. Cooke* (2 Exch. Rep. 654; s. c. 18 Law J. Rep. (N.S.) Exch. 114).

ERLE, C.J.—I am of opinion that our judgment should be for the plaintiffs. If it were necessary, I should be inclined to decide on the facts that this should

be treated as a bill payable to bearer. The acceptor here cannot dispute the writing of Canevaro, and as there is no such person as Raffo, I should be inclined to hold that the defendant must be taken to be in the position of Canevaro, and he would have been held to be the acceptor of a bill payable to bearer according to the cases. I, however, rest my judgment on another ground. The bill in question was sent to the defendant, together with a letter written by Sultzberger to the plaintiffs, in which he expressed a hope that, with the defendant's signature as acceptor on behalf of the drawer, they would discount the bill; the defendant did so accept, and the plaintiffs discounted on the faith thereof. It is clear that the plaintiffs were induced by the defendant to advance their money on the faith of his guaranteeing that the bill was a properly indorsed instrument, and this being so, I am of opinion that the plaintiffs are entitled to recover in the present action.

BYLES, J.—I am of the same opinion. Suppose the defendant had said, these signatures are so genuine that I will accept and guarantee the payment of the bill. If he had said so in words he clearly could not set up his present defence, and I think that what took place amounted to the same; and if it were necessary to consider the point, I should agree with the rest of the Court that, as Raffo was not in existence, and Canevaro, if he had drawn the bill, would have known it, the bill is therefore payable to bearer.

KEATING, J.—I am of the same opinion. The facts are strong to shew that the defendant cannot contest the plaintiffs' right to recover. He knew that the plaintiffs were only prepared to give their money on the faith of his representations, and surely his acceptance was a representation which enabled Plana to obtain the money. The case is not only within the rule established in *Pickard v. Sears* (6 Ad. & E. 475), that if a man, by his words or acts, causes another to believe in the existence of a certain state of things, and induces him to act in that belief, so as to alter his own previous condition, the former is estopped from denying the existence of such a state of things; but also within the principle that where one of two innocent parties is to suffer, the one who enabled the perpetration of the fraud is to sustain the loss. Here the defendant, by his acts and representations, has enabled Plana to obtain the plaintiffs' money, and he, therefore, must bear the loss. With respect to the other point, I also quite agree with the rest of the Court.

MONTAGUE SMITH, J.—I am of the same opinion. I am disposed to agree, on the ground that it is here established that by the defendant's acceptance, and on the faith thereof, the plaintiffs were induced to part with their money. I am also of opinion that the bill is to be taken to be one payment to bearer. The defendant, by accepting for honour, admitted that the drawer had put his name to a bill which he had drawn and which was negotiable; and, as it turns out that Raffo, to whose order it is payable, is a fictitious person, then, under the circumstances, Canevaro must be taken to have drawn a bill payable to bearer.

Judgment for the plaintiffs.

[IN THE COMMON PLEAS.]

May 8, 1866.

WILKINSON v. EVANS

35 L. J. C.P. 224; 1 H. & R. 552; L. R. 1 C.P. 407; 14 W. R. 963;
12 Jur. N.S. 600.

Distinguished, *Caregan v. Richards*, 1866, 15 L. T. 252 (Ex.). See *Buxton v. Rust*, [1872] E. R. A.; 41 L. J. Ex. 173; L. R. 7 Ex. 279; 25 L. T. 502; 20 W. R. 1014 (Ex. Ch.). Referred to, *Dewar v. Mintoft*, [1912] E. R. A.; 81 L. J. K.B. 885; [1912] 2 K.B. 373; 106 L. T. 763 (Q.B. D.).

Statute of Frauds—Goods Bargained and Sold—Memorandum in Writing.

SALE OF GOODS.—*The plaintiff sent to the defendant, with certain cheese and candles, an invoice, specifying the names of the plaintiff and the defendant as seller and buyer respectively, the quantity of the goods and their price. The defendant returned the invoice with a signed memorandum on the back, saying that the cheese had arrived badly crushed, and therefore both the cheese and candles were returned:—Held, that this was a sufficient memorandum in writing of the bargain within the Statute of Frauds.*

This was an action to recover the price of certain cheeses, tried before the Under Sheriff of Chester, under a writ of inquiry.

The defendant had given the plaintiff a verbal order for certain cheeses and candles. These articles were sent by railway to the defendant, with an invoice which contained, in the usual way, the names of the buyer and seller, the quantity of cheeses and candles, the price of the cheeses, 7l. 1s. 3d., and the price of the candles, 5l. 13s. 9d. The defendant returned the invoice to the plaintiff, with the following memorandum written on the back: "The cheeses came to-day, but I did not take them in, for they were very badly crushed; so the candles and cheese are returned. You seem to think that I complain without cause, so now you will be able to see them as they are. I was glad to find that it was the first complaint that you have had from seven counties. I hope it will be the last. I am sure it will be the (*quære* last) for me. Yours truly, T. Evans." An attorney's letter was sent to the defendant, who replied as follows: "Sir,—Yours this morning to hand, in which you requested payment for cheese. I have to inform you that I have nothing at all to do with it. The cheese and candles were in a very bad condition, and the candles he consented to take back. So if the company signed for the cheese in good condition, it is very likely they will allow the damage without suing them; but I do not think they would sign for those in good condition as they seemed to have very old crushes; some of the openings were quite green. As for you to sue the company in my name, you may do so if you think proper, but you must bear in mind that I will not bear anything towards the cost, and if summoned for witness, I must have my expenses paid. Had they been sent per canal, as I ordered them, they would not have been damaged, that is, if they would receive them in good condition. I suspect that he has the cheese in his warehouse, for I never received any notice from the company. Yours truly, T. Evans."

The candles were received back, and the action brought for the price of the cheese.

The Under Sheriff nonsuited the plaintiff on the ground that there was no sufficient memorandum within the Statute of Frauds.

A rule was obtained calling on the defendant to shew cause why a verdict should not be entered for 7l. 1s. 3d., or why there should not be a new trial.

M'Intyre shewed cause.—The question is, whether there is a sufficient memorandum within the Statute of Frauds, and the cases of *Bailey v. Sweeting* (9 Com. B. Rep. N.S. 843; s. c. 30 Law J. Rep. (N.S.) C.P. 150) and *Jackson*

v. *Lowe* (1 Bing. 9) will, no doubt, be relied on. But what is required is a memorandum of the bargain; now, in *Bailey v. Sweeting* (9 Com. B. Rep. N.S. 843; s. c. 30 Law J. Rep. (N.S.) C.P. 150), the letter written by the defendant acknowledging the bargain and its terms, and in *Jackson v. Lowe* (1 Bing. 9), the same was the case, whereas, in the present case, there is nothing of the kind. For in the first place, the letter on the back of the invoice rejects the cheeses on the ground of their being crushed, and there is nothing to shew that there was not a condition, not expressed in the memorandum, that the cheeses were to be in good condition, and be returnable if not; and in the second place, the price being merely in an invoice, we have in writing the price charged, but not necessarily the price agreed on; for instance, suppose goods ordered without the price being fixed, so that the price ought to be the proper or reasonable price, that the goods are sent with an invoice charging an exorbitant price, and the goods are returned for another valid reason indorsed on the invoice, surely the buyer would not be estopped from disputing the propriety of the price; and if this be so, the memorandum does not contain the price which is to bind, but merely the price charged. The present case is like *Richards v. Porter* (6 B. & C. 437), where an invoice was sent and the defendant wrote back, saying the hops he had bought had not arrived, but the invoice had; that case is on all-fours with the present, and it was there held that there was not a sufficient memorandum. Again, in *Cooper v. Smith* (15 East, 103), a letter recognizing the bargain, but saying the goods were not delivered in time, was held insufficient. So, again, in *Smith v. Surman* (9 B. & C. 561), where in answer to a letter of the plaintiff, the defendant wrote back saying he had bought certain timber, but that he had bought it to be sound and it was not so, it was held there was not a sufficient memorandum; so here, the defendant says in effect, the cheese ought to be sound, and it is not. And in *Archer v. Baynes* (5 Exch. Rep. 625; s. c. 20 Law J. Rep. (N.S.) Exch. 54) where the correspondence of the parties clearly acknowledged that the goods were bought, and the dispute was merely whether they were equal to sample, it was held that there was no sufficient memorandum within the statute.

Morgan Lloyd, in support of the rule.—The invoice contains the terms of the contract, and if the defendant had put his simple signature at the bottom the case would have been beyond argument. The fact of the signature being on the back can make no difference; this would hold even if there were a simple signature, but there is more, for the letter says, "the cheese," clearly referring to that which is on the other side. Further, the words of the letter are the same as those used in *Bailey v. Sweeting* (9 Com. B. Rep. N.S. 843; s. c. 30 Law J. Rep. (N.S.) C.P. 150), and the cases therefore are identical.

ERLE, C.J.—I am of opinion that the rule should be made absolute for a new trial. As must always be the case where the parties meet and contract there was a contract by word of mouth; the contract was simply an order for goods and a contract of sale, and nothing more; and the question now is, whether there is a sufficient memorandum in writing of this contract to satisfy the Statute of Frauds. The invoice is in the usual form; it designates the buyer, the seller, the articles bought and their price, and on the back of the invoice is the following letter, signed by the defendant.—[His Lordship read the memorandum.]—I think that this is good evidence that the contract in the invoice contains all the stipulations, and that the objection in the letter is not as to the non-fulfilment of some term of the contract not contained in the invoice, but as to something which happened during the carriage of the goods. This view is confirmed by the letter of the defendant to the plaintiff's attorney, in which he says, "had they been sent per canal, as I ordered them, they would not have been damaged." The letters clearly recognized a contract at the price stated in the invoice. I think that the present case falls within the case of *Bailey v. Sweeting* (9 Com. B. Rep. N.S. 843; s. c. 30 Law J. Rep. (N.S.) C.P. 150). There the defendant agreed to buy specific looking-glasses at a specific price; the glasses were damaged during the carriage, and he wrote,

"The only parcel of goods selected for ready-money was the chimney-glasses, amounting to 38l. 10s. 6d., which goods I have never received, and have long since declined to have, for reasons made known to you." The only difference here is that specific goods were not ordered, but the plaintiff was ordered merely to send his cheeses and candles; as, however, no dispute arises on this it makes no difference. With respect to the cases which have been cited on behalf of the defendant, it will be found that in all of them the letter stated that there was a verbal contract, one term of which was not in writing. Thus, both in *Richards v. Porter* (6 B. & C. 437), and *Cooper v. Smith* (15 East, 103), the letters complain of the goods not being in time, and the defendants there said, there is another term which has not been fulfilled, so that there was clearly a term of the contract in dispute; and in both these cases there were two writings of two different contracts. So, again, in *Smith v. Surman* (9 B. & C. 561), the defendant alleged that there was another term in the contract, viz., that the trees should be sound and good; and in *Archer v. Baynes* (5 Exch. Rep. 625; s. c. 20 Law J. Rep. (n.s.) Exch. 54) that the flour ought to have been according to sample. So that in all these cases a necessity arose for oral testimony to determine the dispute. In order to satisfy the statute, there must be a writing which shews all the terms of the contract, and I think that this case is within *Bailey v. Sweeting* (9 Com. B. Rep. N.S. 843; s. c. 30 Law J. Rep. (n.s.) C.P. 150), and that there is such a memorandum, and that the cases which have been cited on behalf of the defendant were all cases where all the terms were not so expressed, but it was a matter of dispute as to whether a particular term was part of the contract or not.

BYLES, J.—I am of the same opinion, and think there ought to be a new trial. If at the bottom of the invoice the defendant had written, "I have bought the above goods at the above price," and appended his signature, there would not be a doubt that there would have been a proper memorandum, and the usual implied conditions that the goods should be merchantable and in proper condition would attach. The only doubt I had was, whether what was written on the back of the invoice was sufficiently identified and connected with what was written on its face. But the words are, "the cheeses," "the candles"; this I think sufficiently refers to the cheeses and candles on the other side; and the case, therefore, in my opinion, falls within *Bailey v. Sweeting* (9 Com. B. Rep. N.S. 843; s. c. 30 Law J. Rep. (n.s.) C.P. 150).

KEATING, J.—I am of the same opinion. I agree that it is necessary that all the terms of the contract should be in writing; but I cannot doubt that the document here does afford evidence of the complete contract. There is a contract sufficient to satisfy the Statute of Frauds, and there is no sound suggestion of a term being wanting.

MONTAGUE SMITH, J.—I am of the same opinion. The defendant's letter refers to the invoice, and recognizes its terms, and the case therefore falls within *Bailey v. Sweeting* (9 Com. B. Rep. N.S. 843; s. c. 30 Law J. Rep. (n.s.) C.P. 150). The defendant's letter does not alter or vary the terms expressed in the invoice. No doubt there are implied conditions that the goods shall be of a merchantable quality and in proper condition, but there is no complaint that the contract has been broken by non-compliance with such implied conditions. In *Cooper v. Smith* (15 East, 103) the letter which was relied on to bind the defendant, negatived the terms of the contract alleged by the plaintiff. The other cases cited for the defendant in the present case are also distinguishable in the way pointed out by my Lord; and I am of opinion that there should be a new trial.

Rule for a new trial.

[IN THE COMMON PLEAS.]

Feb. 5, April 27, 28, 1866.

VISCOUNT KYNNAIRD v. LESLIE.

35 L. J. C.P. 226; L. R. 1 C.P. 389; 14 L. T. 756; 14 W. R. 761.

Pedigree—Descendants of Children of a Person attainted before his Marriage.

ESTATE.—*The descendants of one child of an attainted person may trace a heritable descent to the descendants of another child of such attainted person, even though the marriage, of which such children were the issue, took place abroad after the attainder.*

This was an action of ejectment to recover a farm, called Amble Hope Farm, in the county of Northumberland, and thereby try the question, whether the plaintiff was entitled to large estates in the possession of the defendant.

The facts of the case (as far as they are material) were as follows: In the year 1716, Charles Ratcliffe, eldest surviving son of Edward Earl of Derwentwater, was convicted of high treason. After his conviction he escaped from England, and in the year 1724 married abroad, at Brussels, Charlotte Maria Countess of Newburgh, by whom he had five children, James Bartholomew, Mary, and three others to whom it is unnecessary to allude further, as they died unmarried, without issue. James Bartholomew married, and had a son, Anthony James, and a daughter who died unmarried. In the year 1799 His Majesty King George the Third granted to Anthony James, then Earl of Newburgh, and his heirs, certain estates in Northumberland, including the land referred to in the present action. Anthony James being seised of the said estates and also of estates in Gloucestershire and Sussex, died without issue, in the year 1814, leaving a will, and also a widow, Anne, him surviving. By this will he devised his estates in Northumberland, subject to various limitations, which all failed, to his own right heirs; and this will also contained a residuary clause, as to which (in consequence of the ultimate decision of the Court) it is only necessary to state that under it the said Anne, who died in the year 1861, claimed to have power to, and did devise the Northumberland estates to the plaintiff, whose claim rested on the two propositions: first, that there were no right heirs of the devisee, Anthony James; and, secondly, that in default thereof the residuary clause passed the estates in question to Anne, who devised to him.

The defendant held possession under the following title: He claimed that his wife, Dorothea Eyre, who died without issue in the year 1853, was, at the time of her will and death, right heir to Anthony James, and that he was entitled as her devisee. And the way in which he traced the heirship of his wife was this: he clearly traced the pedigree, by the proper exhaustion of stock, from Anthony James up to James Bartholomew, then to Mary, sister of James Bartholomew, and then down from the said Mary to his deceased wife Dorothea, who, claiming to be entitled as heir, had devised her interest to the defendant. And the question in dispute between the plaintiff and the defendant in respect of this tracing of pedigree was, whether it was necessary, in order to trace from James Bartholomew to Mary, to trace through their father Charles, in which case the corruption of his blood would be an impediment, or whether it was allowable to trace from James Bartholomew direct to Mary his sister, in which case no such impediment would exist.

At the trial a verdict was, by consent, taken for the defendant, with leave to the plaintiff to move to enter a verdict for himself, on the ground that no person could take the estate in question who claimed as heir to Anthony James Earl of Newburgh, being in lineal descent from Charles Ratcliffe, who had been attainted, and that Anthony James having, for the above reason, no heir who could take the estate, the estate passed under the residuary clause in his will.

A rule nisi having been obtained, pursuant to such leave,—

The Attorney General (Sir R. Palmer) (Manisty, Charles Hall of the Chancery bar, and Quain with him) shewed cause.—Where a descent must be traced through an attainted person, the tracing is prevented, and there is an escheat; but then the tracing must be through him; that is, he must be mentioned for the purpose of tracing, and not merely as to blood. The law never went further than this. The blood of an innocent child is just as pure as if his father had not been attainted; if it be necessary, in order to trace to him, to trace through his father, the tracing is stopped, but if it be not, then he and his issue are unaffected by the attainder. So, in what is called a collateral descent, the tracing may proceed up to whoever is pure; and, if it be not necessary for the tracing to go up higher, an attainer higher up in the pedigree is of no effect. And the defendant contends, that in tracing the pedigree by which he claims to be entitled, he is not affected by the attainder of Charles; because, having traced up to one of this person's innocent children, he need not trace higher up, but may pass immediately to the other innocent child, on the ground that by law one brother or sister is immediate heir to the other; and the fact that the children in the present case were born after the attainder makes no difference. It is true, in *Co. Litt.* 8 a, it is said, "But some have holden, that if a man after he be attainted of treason or felony have issue two sonnes, that the one of them cannot be heire to the other, because they could not be heire to the father, for that they never had any heritable blood in them." This, however, is merely mentioned, and evidently not intended to be indorsed by Sir E. Coke, and Mr. Hargrave disapproves of it, and points out that it rests on a proposition which was decided in *Collingwood v. Pace* (1 Sid. 193; s. c. 1 Vent. 413; Bridg. Rep. 448) to be erroneous. Again, in *Hobby's case* (of which the argument is reported in *Noy's Reports*, 158, under the title of *The King v. Boreston and Adams*, and the decision in 4 *Leonard*, 5, and *Palmer*, 19), this point was not even suggested by Stephens, who argued for the escheat; nor was the point dealt with by Fleming, the Queen's solicitor, on the other side. No mention of such a distinction is made in the account of the judgment given in *Leonard*; and though in that given in *Palmer* two reasons are given, one of which is, that the children were born before the attainder, still this point was not necessary for the decision; and if it had been intended as a decision, it would have been unnecessary to decide the second point. And in 3 *Cruise's Digest*, 325, the learned author, having quoted the above passage from *Co. Litt.*, says, "It is, however, now settled that the descent between brothers is immediate; therefore that the attainer of the father does not prevent his sons from inheriting from each other; for though the father is *medium differens sanguinis*, yet he is not *medium differens hereditatis*." In *Collingwood v. Pace* (of which an elaborate history will be found in 1 *Siderfin*, 193, and of which the judgment will be found in 1 *Ventris*, 413), it was decided that the sons of an alien could inherit *inter se*; and in *Siderfin* (pp. 200, 201), it is said, "Mes attainer de un lineal auncester ne impeder collateral discent come l'attainder del pier ne hinder le discent inter freres, et pur ceo le pier nest le meane per que discent inter freres est derive ou pluis pier nest que medium deferens sanguinis et le frere est medium deferens hereditat." In *Ventris* Lord Chief Baron Hale, after (p. 416) pointing out that descents are of two kinds, lineal and collateral, and that each of these again may be immediate or mediate, goes on to discuss collateral descents (p. 416), and says, "A. & B. brothers; A. is an alien or attainted, and hath C. a denizen born; B. purchaseth lands, and dies without issue; C. shall not inherit, for A. (which was the *medius* ancestor or *medium differens* of this descent) was incapable. . . A. and B. brothers; A. is an alien or person attainted, and hath issue C. and dies, and C. purchaseth lands, and dies without issue; B, his uncle, shall not inherit, for the reason before going, for A. is the *medius* ancestor which was disabled. This was *Courtney's case*. . . but in any descents the impediment of an ancestor that is not *medius* ancestor between the persons from whom and to whom will not impede the descent. The

grandfather and grandmother, both aliens or attaind of treason, have issue, the father a denizen, who hath issue the son a denizen; the son shall be heir to the father, notwithstanding the disability of the grandfather (for they are not *medii antecessores* between the father and the son, but paramount), and yet all the blood the father hath he derived from his disabled parents. And this observation states, in effect, the case. For if the descent between brothers be an immediate descent, and the father be not *medius antecessor* between them, then the disability in Robert the father will not impede the descent from John the Earl to George his brother, or to John his brother's son. But if it be a mediate descent, and the father be a *medius antecessor* between them, then the disability in Robert the father may and must in this case impeach the descent." He then (p. 422) alludes to the statement found in *Sir E. Coke*, that the sons of an alien cannot inherit *inter se* as being bad law, and says (p. 423), "The reasons that satisfy are these three, in order as they are propounded. My first reason is, because the descent from brother to brother, though it be a collateral descent, yet it is an immediate descent, and consequently upon what has been premised at first, unless we can find a disability or impediment in them, no impediment in another ancestor will hinder the descent between them,"—a reason which he supports on the grounds that, in pleading, brother derives from brother without mentioning the ancestor, that brother to brother makes one degree, and that in the descent from brother to brother the half-blood does not inherit. He then goes on, (p. 425), "My second principal reason is to prove that the disability of the father doth not at all hinder the descent between the brothers immediate is this: If the father, in case of a descent between brothers, were such an ancestor as the law looks upon as the *medium* that derives the one descent from the other, then the attainder of the father would hinder the descent between brothers. But the attainder of the father doth not hinder the descent between brothers. Therefore the father is not such a *medium* or *nexus* as is looked upon by the law as the *medium deferens*, or means deriving such descent between the two brothers." He then shews how this is supported by *Grave's case* (10 Eliz. Dyer, 274), *Courtney's case* (Cro. Car. 241), and *Hobby's case* (Noy's Rep. 158; s. c. 4 Leon. 5; Palmer 19), and in discussing *Courtney's case* (Cro. Car. 241) actually puts the very case which is now under discussion, for he says, "But suppose that the grandfather of Edward was attaind and not Henry" (Edward's father), "*this could not have hindered the descent from Edward to to his aunts, because the attainder had been paramount that consanguinity which was between Henry and his sisters, as brothers and sisters,*" as he shews is proved by *Hobby's case* (Noy's Rep. 158; s. c. 4 Leon. 5; Palmer 19). He then notices the two objections taken at the bar, that the father is the *vinculum*, and that all the blood of the children comes from their parents, and if their parents' be stained so must be theirs, and answers the one, by saying that the very point was decided in *Hobby's case* (Noy's Rep. 158; s. c. 4 Leon. 5; Palmer 19), that though both father's and mother's blood is necessary, yet if one be a denizen the children inherit at least from that parent, and that it is the law which is the *vinculum*; and he answers the other by saying, that though the parents are the natural, the law is the civil fountain which, finding them natural legitimate brothers with civil rights, closes up the consanguinity. And, lastly, as his third reason, he points out that our law is tender of such disabilities. A clearer exposition of the law as to the effect of attainder and the reasons on which it is founded is impossible. And it is made manifest that in tracing a pedigree by our law, you may trace from one brother or sister to another, without tracing through their father, that their own blood is pure and unaffected by the corruption of blood existing in their father, whether arising before or after his marriage; that this rests on a broad and general principle of our law, and not on any absurd and frivolous distinction based on pleading, and applicable merely to the simple case of descent from brother to brother, but that it equally applies when you are tracing from the descendant of one brother to the descendant of another. And although 3 & 4 Will. 4. c. 106.

does not apply to the present case, inasmuch as here the descent took place in 1814, whereas that act applies only to a descent on or after the 1st of January, 1834, it may be referred to as shewing what was accepted by the legislature as the previous law on this point; and by section 5, which was to alter the law, we find it enacted, "that no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent." And a further difficulty seems to be presented to the other side by section 10, which enacts, "that when the person from whom the descent of any land is to be traced shall have any relative who having been attainted shall have died before such descent shall have taken place, then such attainer shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated, in consequence of such attainer, before the 1st of January, 1834.—(He also previously to arguing this point, argued at great length the question of whether, in default of heirs, the estate would pass under the residuary clause; but inasmuch as the Court, after hearing the other side on the question of corruption of blood, were of opinion that there was none which affected the tracing of the pedigree, and intimated that it was useless to argue the other point, it becomes unnecessary to allude to the argument as to the residuary clause.)

Rolt and Mellish (Fleming, of the Chancery bar, *Kemplay and Trevelyan* with them), in support of the rule.—The general rule of the corruption of all heritable blood by attainer is founded on the nature of the offence of high treason, and has no exception, or if it has any exception, the only exception is one arbitrarily limited, and the present case does not fall within the exception. The statute 7 Ann. c. 21. modified the law as to corruption of blood after the death of the Pretender, but that statute was repealed by the 39 Geo. 3. c. 93. The effects of attainer on hereditary blood are stated in 2 *Black. Com.* 16th edit. pp. 251 to 253, and at p. 253 Sir W. Blackstone says, "There is yet a further consequence of the corruption and extinction of hereditary blood, which is this, that the person attainted shall not only be incapable himself of inheriting or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity in all cases where they are obliged to derive their title through him from any remoter ancestor." And in 1 *Hale, P.C.* 356, it is said, "In cases of collateral descent of lands in fee simple, if there be father and two sons, and the eldest is attainted in the life of the father and dies without issue in the life of the father, the younger son shall inherit from the father, for he need not mention his elder brother in the conveying of his title; but if the elder son attain survive the father but a day, and die without issue, the second cannot inherit, but the land shall escheat *pro defectu hæredis*, for the corruption of blood in the elder son surviving the father, impedes the descent—31 Edw. 1. Barr. 315." According to *Foster's P.C.* 63, to kill a person who is attainted without warrant of law is murder, for which the murderer is liable "to an appeal at the suit of the widow. For though his heir is barred by the attainer, which corrupteth his blood, and dissolveth all relations grounded on consanguinity, yet the relation grounded on the matrimonial contract continueth till death." Now the general rule as to tracing a descent is, that you must trace from the *terminus a quo* to the *terminus ad quem*; be it mediate or immediate; whatever be the method of pleading in the particular case, and whatever be the pedigree to be traced, the rule is exactly the same. This subject is treated of in 3 *Cruise's Digest*, 319, and it is clear that in tracing merely from father to son you must prove the marriage of the father and birth of the son; and it is exactly the same if you are tracing from brother to brother, whether the descent be mediate or not. That is the substance. The question now to be decided may be thus stated: If there be two first cousins, and one die seised as purchaser, can the other claim as his heir notwithstanding the attainer of the grandfather? On the specific question there is no decision, but there are three or four decisions which bear on it, from

which the Court must draw an inference. The other side contend that, although the attainder of the father of the one cousin or the uncle of the other would corrupt the blood, yet that of the grandfather will not have the same effect. Whether this be correct is the question now to be decided. The plaintiff contends that the attainder of any one who must be named in tracing a pedigree causes a corruption of blood, which prevents the tracing of the pedigree; and that in tracing between cousins you must go up to a common ancestor, and then down. Now, two things are quite clear, from the authorities already cited, and indeed admitted on the other side: first, that the attainder of a person through whom you have to trace stops the tracing; secondly, that as a general rule you have to go up to a common ancestor; but the other side say that there is an exception to this, viz., that wherever in your pedigree you trace up to two brothers you may trace from the one to the other, ignoring the father. Now, *Hobby's case* (Noy's Rep. 158; s. c. 4 Leon. 5; Palmer 19) is the only authority which at all supports the case of the defendant, but that case has always been considered to be an exception to the general rule, and does not govern the present, even supposing it to be good in law, which is not admitted, for even, apart from the reasons to be presently given, it appears from the judgment of Chief Justice Sir Orlando Bridgman in *Collingwood v. Pace* (in *Bridgman's Reports*, 448), in which *Hobby's case* (Noy's Rep. 158; s. c. 4 Leon. 5; Palmer 19) is examined, that the Crown did not proceed in the writ of error which had been brought on the judgment in the Exchequer, because the Queen had recovered, in the mean time, the lands by another title.

[*The Attorney General* referred to *Foster v. Ramsay* (2 Sid. 25, 51, 148, 151); where *Hobby's case* (Noy's Rep. 158; s. c. 4 Leon. 5; Palmer 19) is cited as an authority.]

Assuming *Hobby's case* (Noy's Rep. 158; s. c. 4 Leon. 5; Palmer 19) to be law, it has always been treated as an exception, and it only applies to the case where there has been a brother who has died seised of land, leaving a brother or sister who had been born before the attainder of the father. There was a technical rule of pleading, that in case of brothers you might say "brother and heir"—see *Clere v. Brooke* (2 Plowd. 442); a cousin or an uncle must shew how he is heir. In *Hobby's case* (Noy's Rep. 158; s. c. 4 Leon. 5; Palmer 19), Stephenson, in argument says, "Also the brother, in making his descent, shall not make mention of the father, nor shew as he his brother as cozen shall make;" and the Solicitor General says (p. 164), on the other side, "I will first answer, then reason, and, after the cases that in form of pleading a descent between brothers, it sufficeth to say that one brother is dead without issue, but that the other is his heir, without mentioning how they are brothers. I willingly grant that if the father and mother be mentioned the pleading is not evil, . . . so then this reason consisteth in formality of pleading and not upon the substance of the matter;" and Mr. Justice Dodderidge, upon the argument of *Godfrey and Dixon's case* (Godbolt, 275), said, "That if a man claim as cousin and heir, he must shew how he is cousin and heir; but not when he claims as brother or son and heir." So in *York's Treatise on the Law of Forfeiture*, 4th edit. p. 83, though the corruption of blood prevents one inheriting through the party attainted, it is said, "As between two sons of attainted father, nothing prevents one brother from inheriting to the other, since, agreeably to the rule of law, the descent is immediate, he can make himself heir to the person last seised without the mention of the father." 1 *Stephens's Com.* 4th edit. p. 437, shews that why the brother may inherit is because the descent from one brother to the other may be considered "as immediate and without regard to the *commune vinculum*." And Vice Chancellor Kindersley—*In re Don's Estate* (27 Law J. Rep. (n.s.) Chanc. 98),—also states the rule of law to have been, "That between brothers the descent was immediate, but as between other collateral relations you traced up to the common ancestor and down again." It being clear law that an attainder of a father prevented the tracing through him, and would have prevented brothers

from inheriting *inter se*, but there happening to be a rule of pleading which allowed brothers to claim as heirs without naming him, in *Collingwood v. Pace* (1 Sid. 193; s. c. 1 Vent. 413; Bridg. Rep. 448) advantage was taken of this by the Judges to favour certain Scotch descents. The absurdity of this was insisted on over and over again by Sir Orlando Bridgman (whose judgment will be found in *Bridgman's Reports*), it being admitted that the mere circumstance of the attainted person being one who could not take makes no difference. In this judgment the different reasons on which Lord Chief Baron Hale relied are most conclusively answered, and it is further pointed out that there is a difference between the father being an alien and attainted; a distinction which, apart from all other considerations, makes the case of *Collingwood v. Pace* (1 Sid. 193; s. c. 1 Vent. 413; Bridg. Rep. 448) no authority in the present case. With respect to the argument which has been drawn from 3 & 4 Will. 4. c. 106, it is clear that the act merely alludes to the case of a direct descent between brothers and sisters. Thus, then, it appears that there is a general rule that in tracing a pedigree you must trace from the *terminus a quo* to the *terminus ad quem*, and that you must trace up to a common ancestor; and that in the one particular case of a brother claiming from a brother, where an exception has been engrafted, is one only based on a technicality and absurdity; the Court therefore will not extend this exception further, but will in this case apply the general rule. But there is a further fact in this case, the marriage took place and the children were born after the attainder, and it is submitted that there was therefore no heritable blood for the father to impart, and that the marriage was nugatory at all events as far as relates to heritage in this country. In *Co. Litt.* 8 a. the law is thus stated, "If a man hath issue two sons, and after is attainted of treason or felony, and one of the sons purchase land and dieth without issue, the other brother shall be his heir, for the attainder of the father corrupteth the lineal blood only, and not the collateral blood between the brethren, which was vested in them before the attainder, and each of them by possibility might have been heir to the father. But some," he says, "have holden that if a man after he be attainted of treason or felony have issue two sons, that the one of them cannot be heir to the other because they could not be heir to the father, for that they never had any inheritable blood in them," citing *Bract.* lib. 3, fol. 130 and *Brit.* fol. 15. To the same effect is *Ratcliffe's case* (3 Rep. 41, a, b.). The attainted person is *civilliter mortuus*—*Co. Litt.* 133, a. b. Also, according to *Code Napoléon Civil*, lib. 1, tit. 1, s. 25, in the case of civil death, "il est incapable de contracter un mariage qui produise aucun effet civil."

[WILLES, J.—*Perkins's Profitable Book*, s. 28, shews that an attainted person may grant and convey before offence found. There must be offence found to vest the property in the Crown.]

ERLE, C.J.—We do not think it necessary to trouble you, Mr. Attorney General. We have been very much impressed with the learning, research and powerful arguments which have been brought before us on behalf of the plaintiff, and have applied our minds very carefully to their consideration, but in the result we have come to the conclusion that they are not sufficient to entitle the plaintiff to have this rule made absolute. The action is an action of ejectment, and the plaintiff claims to take the land of which Anthony James Earl of Newburgh died seised; and I need not go further into the plaintiff's title than to say that I take it to be admitted between these parties that the defendant is entitled as heir to the property, unless his apparent title be defeated by the objections which have been relied on in the argument of this case. According to the pedigree which lies before me he is naturally collateral heir, and he would, ordinarily speaking, be entitled to take. The reason why he is said not to be so entitled is because he is connected in consanguinity with Anthony James, from whom the inheritance is claimed through the common ancestor, Charles Ratcliffe, which common ancestor was attainted before he was married; and the contention on the part of the plaintiff is, that the defendant, as the consanguineus of Anthony

James cannot take this land, it being a clear rule of law that no one can claim an inheritance by descent if he is bound to claim through an attainted person. The main contention then is, that in tracing through the common ancestor he has been compelled by law to name the common ancestor as a person through whom the inheritance has descended to him. That is one main ground. The other ground is, that the marriage of the common ancestor took place after he was attainted, that it was, therefore, no marriage, and the children not legitimate, and so there is no consanguinity between them. Now, the first point is almost answered in the statement of the rule of law. I admit the rule of law to be, that the inheritance cannot pass through an attainted person; but I say the inheritance is collateral consanguinity passes directly from brother to brother, and that it passes directly from brother to brother whether the claim is made on behalf of one brother to succeed to a deceased brother, or whether it is made on behalf of a descendant from one brother claiming as of right from the descendant of another brother. I therefore am of opinion that the common ancestor is named only for the purpose of proving consanguinity, and is not named as a person through whom the inheritance passes. The rule of law that the inheritance passes from brother to brother, has been the subject of most remarkable legal disputes, and Lord Hale, and Sir Orlando Bridgman and the other Judges of that day, seem to have put forth all their powers of research and argument upon the matter, and they came to the conclusion that the inheritance passes directly from brother to brother; and from the date of *Collingwood v. Pace* (1 Sid. 193; s. c. 1 Vent. 413; Bridg. Rep. 448), so far as I have gathered from the argument, the law has been taken to be so, and the law is expressed in direct terms to be so by Blackstone, whose authority in many respects is great, especially upon matters as to real property. In the 2nd book of his *Commentaries*, p. 226, after explaining that the common ancestor is the root of the inheritance, and the consanguinity must be traced through him, he goes on to say—"But though the common ancestor be thus the root of the inheritance, yet, with us, it is not necessary to name him in making out the pedigree or descent. For the descent between two brothers is held to be an *immediate* descent; and therefore title may be made by one brother, or his representatives, *to or through* another, without mentioning the common father." He lays down the law distinctly that the claim is good from brother to brother; and he also lays down the law that this claim is good for the representative of a brother claiming land from the representative of another brother, that the representative of a deceased brother would have all the rights of the party he represents, and that the claim is in effect a claim from brother to brother. And *Collingwood v. Pace* (1 Sid. 193; s. c. 1 Vent. 413; Bridg. Rep. 448), and the cases there cited, shew most distinctly that the inheritance passes direct from brother to brother. Now, that decision was given by persons very well acquainted with the law and its origin, and most particularly acquainted with the phrases and words used in respect of shewing what the law is; and it has been argued that, on referring to Lord Hale's words maintaining that this is the rule of law, it appears that this was an exception, brought in by some casualty or chance in the course of pleading, and that those Judges who were desirous of favouring the claimants to some Scotch inheritance, turned aside from the law which has come down from our ancestors, and brought in an anomalous exception. I think the extreme gravity of the minds of those learned men who entered upon this discussion does away with the notion that there was any superficial adoption of a chance idea, and that such a proceeding would hardly have been in character with them; and, in reference to the form of pleading, Lord Hale says, in very clear language, this is the rule of law, and one evidence of its being the rule of law is, that the course of pleading is so. Our law has come down through many generations, and that is, no doubt, the uniform course of pleading. I have no doubt that the very best that could be done for the argument was done for it by the learned counsel for the plaintiff on this occasion; but, after giving it all due consideration, I think that the learned Judges intended to lay down that the rule of law

was such as I have laid it down, and that they did not mean it to be a rule of law merely depending on the casual finding of a phrase that suited them in some of the precedents. The reason of it is apparent, because, at the time that this rule prevailed, the brother might, but the father could not, take the land; it passed directly from brother to brother. And counsel, in argument, could not but admit that it was an absurd thing that land should not pass from cousin to cousin, tracing it through the brother, whilst by an anomalous exception, introduced by means of a rule of pleading, it might from brother to brother. In my view there has been a course of authority recognized, and preponderating in favour of our present decision, and if it is to be altered it must be altered by a higher tribunal.

With respect to the other point, that the marriage was a null marriage, I cannot find any authority in our law for it; and it certainly would be a most revolting conclusion to come to, that because a person, who had actual physical capacity in the land where he was abiding, after he had been attainted in England, had the actual capacity to marry in Brussels, and to be the father of the children through whom these parties claim, that, because he had been attainted before the time when he went abroad, the wife whom he might have taken in a foreign country should be affected with nullity of the marriage and the children with the illegitimacy consequent thereupon. If the law here was so, if the man who was *civiliter mortuus* was by our law perfectly incapable of marriage, I should be the last person to think of interfering with the rule of law. I think in France he is held to be civilly dead and incapable of marriage; but I do not find that there is such a rule in our law, and I therefore think that the marriage at Brussels did make the children legitimate, and did give them a capacity for transmitting the inheritance from one to the other down to their descendants. I think, therefore, that the rule should be discharged.

WILLES, J.—I am of the same opinion. This case certainly presents some very remarkable aspects, because the person who is alleged to be disabled from taking by reason of the attainder of her ancestor is in this position, that the claim is made here, not on the part of the superior lord of the fee, but on the part of some heir who, in the ordinary course of events, could not succeed, living the defendant. If it could be made out that the present defendant is incapacitated, I am far from being satisfied by the argument that the result would follow that the present plaintiff would be entitled. The case appears to have been argued before us as if for this purpose attainder and alienage stood on the same footing; and it seems to have been assumed that, inasmuch as, if the person next in succession be an alien, the law takes no notice of the existence of such person, and the person next in turn to inherit obtains the inheritance; so, in like manner, if the person next in turn to inherit is disabled by reason of the act of attainder of an ancestor, the inheritance passes on to the person next in succession. Without at all deciding this matter, (which I am not prepared to do without further consideration), I think it right to say, that I am not satisfied that any such conclusion would follow as that contended for, or that the distinction between alienage and attainder, pointed out in the 2nd book of *Blackstone's Commentaries*, p. 254, would not be applicable to this case; and that what would happen would be not a transmission of the inheritance to the person next to take, but an escheat. I think so, for obvious reasons connected with the origin of the law of attainder. That law is, of course, quite distinct from the law by which a person convicted either of treason or felony forfeits his present property absolutely. The law of attainder corrupting his blood was introduced with reference to the law of escheat, which was founded upon the condition in the feudal compact that the land should continue to descend so long as he did not take any step in violation of it, of which the attainder was an absolute proof. The consequence was, that whenever a state of things arose in which, if the attainted person was alive, he would be the person designated to take the inheritance, those who claimed under him were rendered incapable of taking. The land did not pass on to some other heir, but was escheated to the lord. But, however this may be, I am clearly of opinion that the corruption

of blood in this case was paramount to the pedigree from which it is necessary that the defendant should derive a title. I apprehend that the corruption of blood, so far as it affects the person himself attainted, may be accurately described as an incapacity either to take an inheritance, or to transmit an inheritance; and I apprehend that the effect of the corruption of blood there ceases. With respect to the persons who have to claim from the attainted person, the effect it has upon them is a simple incapacity to take an inheritance which the attainted person could not transmit; or, as it has been put in another way, an incapacity to take by means of a pedigree in which the attainted person is what has been called the lineal ancestor,—the person through whom the descent has arrived, the medium of descent of the inheritance. In order to affect the transmission of the property it is not sufficient to shew that the person attainted was the common stock of the relationship between the person last seised and the person who claims; it is necessary further to shew that you must trace through the attainted person. Now suppose that, instead of the land having been granted to Anthony James, it had been granted to James Bartholomew, and that instead of the claimant being the grandson of Mary, the sister of James Bartholomew Ratcliffe, the claimant had been Mary. In that case it is admitted to be perfectly clear that Mary could have made out her title as heir to James Bartholomew without claiming through the attainted person her father, and that she could have established a title as heir to her brother. Therefore one starts with what Mr. Mellish was compelled to admit to be an absurdity, that the further you go away from the attainted person, the further the parties are removed by this distance of relationship, the greater the reason there is for saying that the inheritance shall not prevail by reason of the attainder. That is an absurdity which is not only shocking to a man who applies his common sense to it, or to any person who deals with it as a matter of rational legislation, but it is an absurdity (in the only way in which we ought to allow our minds to be swayed by an absurdity) with reference to the origin I have already stated of the law as to corruption of blood in respect to escheat. Then, speaking of it as a feudal question: for whose benefit is this forfeiture to take place? For the benefit of the superior lord of the fee granted to Anthony James, when there would be no forfeiture, or for the benefit of the superior lord of the fee granted to James Bartholomew, neither of whom was the superior lord of Charles Ratcliffe, or in any way affected by his treason? Therefore, it would be admitting a clear absurdity. The only question is, whether there is positive law to be advanced in its favour by which we are bound. We have not been informed of any decision from which we might arrive at such a conclusion. The best ground upon which Lord Hale and his companions could found their judgment in *Collingwood v. Pace* (1 Sid. 193; s. c. 1 Vent. 413; Bridg. Rep. 448) was that, as between brothers, the descent was immediate, and that they claimed respectively under the description of brother and heir. Whereas Sir Orlando Bridgman adds, if a cousin has to claim, he must shew how he is a cousin. I have listened, with all that attention which it deserves to everything which fell from the learned counsel who argued for the plaintiff, and to the authorities which they brought before the Court. I have also endeavoured by research to find out for myself whether there was any rule for putting the descendants from a brother in a worse position as to pleading than the brother himself. Neither in the authorities cited, nor in my own research, do I find any such law in the books. The authorities which have been cited are a proof that they could plead as the brothers could. It appears to be a rule of the law of inheritance that the descendants are in the same condition as their ancestor would be if he were alive. I see no reason whatever for saying that they do not represent him in a matter of pleading as in other rights, if those rights affect the title to property. The reason given why brothers in relation to one another claim as brother and heir is simply this (I am speaking still with reference to the feudal law). At first it would seem, it was held that if a brother purchased a fee and died, leaving his father and a brother alive, that such brother could not inherit,

because it was a rule of the law of inheritance that the descent must be through a person having the blood of the first taker; no doubt that was the original law. The lawyers got over that by a reason even more technical, certainly more ingenious, than that with respect to the pleadings in *Collingwood v. Pace* (1 Sid. 193; s. c. 1 Vent. 413; Bridg. Rep. 448), because they said that, though it was shewn to be in feudom, the law would assume (and it might be pleaded) on the death of the brother who purchased, that it had descended from a common ancestor, so that the other brother could take, because he would have the blood of that ancestor in him. That was the reasoning upon which the lawyers arrived at the conclusion that the brother could take. But, now, suppose the father was attainted, or the father was an alien, what follows? In the first case that happened after that state of the law was recognized the ancestor was an alien. Then, said the objectors to the descendant from the brother, assume this to have been pleaded, it is impossible that the brother could succeed because the brother was an alien or attainted, and therefore the course of descent was stopped. This reasoning, it appears, was at first acceded to, and it was held that the brother could not inherit under such circumstances. Afterwards a new subtlety was invented, that as the law assumed an ancestor from whom the property descended, it might as well assume that the ancestor was a capable ancestor, and in consequence of the imaginary ancestor being introduced by a fiction of law the brother succeeded. All that reasoning, from beginning to end, is equally applicable to the descendants of respective brothers. Assuming there were no ground for departing from the ordinary rule of inheritance, that descendants are to be taken as standing in the place of their ancestors, then (as respects what the pleadings should be in a case of this kind, if it were necessary to set out the title) the pleadings would be that Anthony James died seised, whose issue failed, who was the only son of James Bartholomew who had no other child (passing over the daughter), all whose brothers and sisters, with the exception of Mary, the grandmother of Dorothea, died without issue, and then trace the descent from Mary. Why is the description of Mary, as succeeding to James Bartholomew in the line of descent, worse in the pleadings than if it was a claim direct from James Bartholomew? I must own that some things are difficult and do not appear plain because one does not thoroughly understand them. This appears to be a perfectly plain point, and the difficulty in dealing with it is by reason of being unable to get hold of what there is in it, and I cannot say that I entertain any doubt on this part of the case. Then, with respect to the other point, that involves a very serious question,—a question entirely new, and which does not seem to have been suggested in any book on the law of this country, with reference to the validity of a marriage. This question may be divided into two heads: first, assuming the marriage to be valid, were the children who were born after the attainder in any worse position than the children born before the attainder? secondly, was the marriage void altogether by reason of the husband being an attainted person? With respect to the first head, no doubt in the early history of the law it was a point of considerable importance. I have looked at the passage in *Bracton* referred to by Mr. Rolt, and though I doubted at the time whether the passage was to the effect he relied on, I now think he was correct. The other passage referred to in *Britton* rather indicates that it had reference to escheat, and it was laid down that the forfeiture should be strictly enforced in favour of the Crown, not for the benefit of third persons who might inherit on the failure of heirs. That is also laid down in *Co. Lit.* and in other eminent works, in which the authorities are collected which shew that to be the law. Again in the 2nd book of *Black. Com.* p. 255, the writer points out that Coke makes the distinction between issues born before and issue born after attainder; and he says that notion was in his time exploded, and treats it as clear that the children born after the attainder stand in the same position, as to inheriting from each other, as children born before the attainder. And I observe in Mr. Williams's note to *Watkins on Descent*, at page 3, refers to these authorities, and shews that children born after the father's attainder

may inherit from one another in the same way as those who were born before. The corruption of blood does not personally affect the descendants, but only affects the power to transmit the inheritance. Now comes the only other question that was raised, viz., whether an attainted man may contract marriage. I cannot help thinking that my Lord entirely swept away the objections on this point when he referred to the circumstance that this marriage was contracted abroad. Whatever might have been the case, if it had been contracted in this country, I apprehend there is no doubt at all that, with reference to a marriage contracted by an innocent woman, who knew nothing whatever of the attainder of the man whom she was marrying, the law of the place where the marriage contract was performed governs the validity of that contract and must prevail. And I would go further and say, it is a mistake to suppose that an attainted man, though for certain purposes he is said to be dead in law, can be considered as other than a human being in existence. Independently of the late Divorce Act, which stands alone, upon what grounds could a marriage of persons who were capable of contracting a marriage be dissolved in this country? The answer of every lawyer is simply, by death or by divorce. There is no divorce in this case. The law of this country does not, like the law of the *Code Napoléon*, referred to by Mr. Rolt, declare that existing marriages should be void. There is no death in the sense in which death is used in the law of marriage; that refers to natural death, not civil death. One need not cast about for the purpose of finding instances of persons who have been attainted, who have returned to their wives and to their country. Then the capacity for the matrimonial state is not destroyed. An attainted person cannot pray in aid the assistance of the Queen's Courts for the purpose of establishing any rights which he may have acquired. But he has the ordinary capacities of all men: those persons with whom he contracts may acquire rights from him, even in respect of an inheritance which is forfeited to the Crown, and such inheritance may pass by his grant and be vested in the grantees until the contrary is found. Furthermore, any such contracts may be the subject of suits against him in Her Majesty's Courts, and he cannot set up the disability of his own attainder. I apprehend, therefore, that he was capable of contracting marriage. I find it nowhere laid down that attainder prevents a man from marrying, still more that it does so from marrying out of this country. In the *Code Napoléon* there is also an express enactment that the marriage of such a person shall not imply any civil rights, that is to say, that he may marry; but although there are no civil rights, that will not affect the marriage. This enactment applies to a marriage out of France as well as to a marriage in France, according to a decision of the Court of Cassation, and no doubt is a very remarkable law. A law not only not found in our own country, but wholly foreign to the law of marriage in this country, with the exception of a few traces in the books of what is called *legitima concubina*, which no one will say are authorities in this day. There are no two sorts of marriage in England. It is either a marriage or no marriage. There is no such thing as a marriage without civil rights, such as is mentioned in the *Code Napoléon*. The only other analogy to be found is the sort of marriage which took place under the Roman law between two slaves, which was a marriage for decency's sake, not for imposing any civil rights. The only remaining instance to be found in modern times is the singular compromise between a man and his wife for decency's sake, called in Germany a left-handed marriage; and any one who has the curiosity to look into that will find that, as regards such a marriage, although the wife cannot claim her husband's family rights, nor the children, yet they are legitimate *inter se*, and capable of inheriting from one another. This is a most interesting case, and one that is certainly calculated to attract a very considerable share of attention; but I must own that the conclusion at which I have arrived is, that it is a perfectly plain case, and the rule ought to be discharged.

KEATING, J.—I concur in the opinion that this rule ought to be discharged. The learned counsel who argued so ably on the part of the plaintiff did not for a moment conceal the difficulties they had to encounter in arguing the principal

point that has been discussed, viz., that whereas a brother can inherit direct from a brother without naming the attainted father, they were obliged to contend that, nevertheless, the children of the brothers could not claim the one from the other without naming the attainted grandfather. The learned counsel, Mr. Mellish, characterized that as a consequence which would be almost an absurdity. Without exactly adopting that phrase, still it would be most difficult to sustain that proposition. Even if it were an absurdity, still, if it was a matter of positive law, of course we should be bound to give effect to the positive law. Mr. Mellish, however, on that point was driven to admit that there was no decision in favour of the proposition for which he contended, and he was driven further to admit that there was no express dictum in favour of that proposition. I confess that in the absence of either decision or dictum in its favour, the very ingenious analogies drawn in the various arguments that have been used and elaborated by the learned counsel for the plaintiff have not convinced me that we should come to the conclusion to which they seek to bring us. The reasons on which our judgment is founded have been already so fully adverted to by my Lord and my Brother Willes, that I do not propose to add anything, either on this first point or the second question that has been raised, as to the effect of the marriage after the attainder, with respect to which also I entirely agree with them.

MONTAGUE SMITH, J.—I am of the same opinion. I think the weight of reason and authority is on the side of the defendant. It is an established rule of inheritance that the descent between brother and brother is immediate; and the result of the cases that have been referred to in argument is, that the attainder of the father does not interfere with the descent. Certainly it seemed to me the logical and natural consequence of that canon of inheritance, that the descendants of the brothers might claim through them just as the brothers might claim from each other. There was the same reason for the brothers going up to the common ancestor as for their descendants—the same reason for the descendants stopping at the line of the brothers as for the brothers themselves claiming from each other. Probably the origin of the rule may have been that it was not necessary to go to the father, inasmuch as he could never have been in the line of inheritance: the inheritance could not have descended through him. Whatever may have been the foundation of that canon, there is no doubt of its existence; and the consequence follows so clearly and logically that Mr. Mellish is driven to argue that it was a mere technical rule, and that it was founded and had its origin in the rules of pleading. I cannot help thinking that the rule of pleading must have followed the rule of inheritance, and that it would not have been a good pleading unless it had so followed it. It is very difficult to say that the rule of pleading can be regarded otherwise than as evidence of what the law was. And when it is argued that in the case of *Collingwood v. Pace* (1 Sid. 193; s. c. 1 Vent. 418; Bridg. Rep. 448) the learned Judges strained for reasons for establishing that which Mr. Mellish treats as an anomaly, I think one can hardly so treat their decision. The Judges were not making the law; they were only declaring it; and we must take that case as declaring not what the law was then for the first time, but what the law of the country had always been. It seems to me, therefore, that the reason of the law is entirely on the side of the defendant; and that it follows from that canon of inheritance to which I have adverted that the descendants may avail themselves of it in the same way that the brothers would do. And the fourth rule or canon of descent which is to be found in *Blackstone* states that the lineal descendants of any person should represent their ancestor, and that they should stand in the same place as that person would have done had he been living. The descendants of the brother stand in the same position as he did, and may claim in the same manner as he did.

With regard to the other question, I agree with the rest of the Court, and do not think it necessary to add anything to the reasons which have been so fully expressed.

Rule discharged.

[IN THE COMMON PLEAS.]

April 20, 1866.

BARTLETT v. STINTON.

35 L. J. C.P. 238; L. R. 1 C.P. 483; 14 L. T. 287; 14 W. R. 614;
12 Jur. N.S. 342.

Practice—Setting aside Execution—Power to impose Terms of Bringing no Action.

EXECUTION. PRACTICE.—Where, execution has been issued prematurely, and the defendant has applied to a Judge at chambers to set the execution aside with costs, the Judge has power on granting such application to impose the terms that no action be brought, and the Court will not afterwards review the exercise of such power.

Kenealy moved to rescind that portion of an order made by Willes, J., on the 12th of March last, which prevented the defendant from bringing any action.

It appeared that the defendant had been served, on the 28th of February last, with a writ, specially indorsed according to the Common Law Procedure Act, 1852; and that the defendant not appearing thereto the plaintiff duly signed judgment on the 9th of March for the sum indorsed on the writ. The plaintiff, though not entitled by the statute to issue execution on such judgment before the 16th of March, levied the amount of such judgment upon the defendant's goods on the 12th of March. Immediately after such levy, the defendant took out a summons before Willes, J., at chambers, to shew cause "why the writ of *fi. fa.* and all subsequent proceedings thereon should not be set aside, with costs of and incidental to such application," on the ground of the execution having been prematurely issued. On the hearing of such summons, that learned Judge made an order, but on the terms of bringing no action, and, accordingly, indorsed on the summons "Order—no action," notwithstanding that the defendant's advocate urged that it was a case in which no such terms should be imposed; but it did not appear that any offer was then made by the defendant to waive the costs. The debt and costs in the action were paid by the defendant on the 16th of March, and the sheriff withdrew from execution; but the defendant stated in his affidavit that he had not drawn up, nor in any way proceeded to act on the Judge's order.

It is submitted that the learned Judge ought not to have imposed those terms. The defendant had a right *ex debito justitiæ* to set aside the execution which had been issued before the time limited by the 27th section of the Common Law Procedure Act, 1852. It was held, in *Cash v. Wells* (1 B. & Ad. 375), that the application for setting aside a judgment as against good faith was *ex debito justitiæ*, and that the Court would not impose on the defendant, as a condition for setting it aside, that he bring no action.

ERLE, C.J.—We are all of opinion that there should be no rule in this case, as it was entirely within the discretion of the learned Judge to impose the terms of bringing no action. The summons asked for costs, and the order was made on that principle.

Rule refused.

[IN THE COMMON PLEAS.]

April 25, 26, May 3, 1866.

Ex parte PEPPERCORN.35 L. J. C.P. 239; 1 H. & R. 487; L. R. 1 C.P. 473; 14 L. T. 252; 14 W. R. 693;
12 Jur. N.S. 761.See *Ex parte Greville*, [1874] E. R. A.; 43 L. J. C.P. 58; L. R. 9 C.P. 13; 29
L. T. 542; 22 W. R. 160 (C.P.).*Attorney—Articled Clerk—Admission—23 & 24 Vict. c. 127. s. 10—Holding
Office during Clerkship—Steward of a Manor.*

SOLICITOR.—During the term of service under articles of clerkship to an attorney, the clerk was appointed to succeed his father as steward of a manor. The inheritance of the manor devolved on the mother and family of the clerk, and he held the appointment at their desire and to protect the property, in which he and they were all interested. The duties were discharged by a deputy, but the clerk had gone and held courts on three days during a year and a half of his clerkship, with the consent of the attorneys to whom he was articled. Under these peculiar circumstances, the Court ordered the examiners, who had examined the clerk *de bene esse*, to grant him a certificate of admission, notwithstanding the 23 & 24 Vict. c. 127. s. 10. prohibits any articled clerk, during the term of service, from holding any office or employment other than that of clerk to the attorney to whom he is articled.

R. E. Turner applied, on behalf of Walter Peppercorn, for an order to the examiners appointed to examine candidates to be admitted attorneys, to grant a certificate pursuant to Reg. Hilary Term, 1853, of the applicant's fitness to act as attorney. It appeared from the affidavit of the applicant that he was articled in February, 1861, and that he had served his term of five years, and had, *de bene esse*, passed his examination, but that the examiners had refused to grant the certificate without the order of the Court, on the ground of his having during the term of service held an office or employment other than that of clerk to the attorneys he served under his articles.

With respect to this, the affidavit of the applicant stated that his father was steward of the manor of Headington, in the county of Oxford, up to the time of his death, which happened in July, 1864, and upon his death it became necessary to appoint a steward in his place. That, upon the death of the applicant's mother, the manor would become divisible amongst himself and his brothers and sisters, in equal shares; that his father always expressed a desire that after his death the applicant should be appointed steward of the said manor in his place, and upon such death the applicant's brother-in-law, who was lord of the manor, accordingly, and also by desire of the applicant's family, appointed him such steward, and in which capacity he first acted in December, 1864. That the applicant appointed a solicitor to act as his deputy, and that the general business of the manor had been transacted by him; that the only way in which the applicant acted in the business of the said manor has been to be present at the courts to admit the tenants and take the surrenders, and as the conduct of the manor would be left to him when he should be admitted, he considered it his duty to become as much acquainted with the customs of the manor and duties of a steward as possible. The applicant stated that he had been absent during his articles on three occasions of one day each, for the purpose of being present at the courts as aforesaid, with his principals' consent, and that the fees of the courts had, by agreement, been divided between himself and his deputy steward. He stated that he was aware that an articled clerk could not legally take fees as a solicitor during his clerkship, but that as the appointment of steward of a manor does not necessarily fall on a solicitor, he never for an instant imagined that he was doing

wrong in taking the appointment, and that he did so more with the view of looking after his own and his relations' interests than with any idea of emolument, and that the money he had received had been hardly sufficient to defray his expenses out of pocket, and that the whole control of the manor having been with his family for so long, he looked upon his appointment more in the light of private property than otherwise. An application for such certificate had been made upon a similar affidavit to the Court of Queen's Bench, and had been refused, that Court considering that the applicant had held an office within section 10. of the 23 & 24 Vict. c. 127, and that the Court had no discretionary power in the matter.

That section enacts that, "no person hereafter bound by articles of clerkship to any attorney or solicitor shall, during the term of such service mentioned in such articles, hold any office or engage in any employment whatsoever other than the employment of clerk to such attorney or solicitor and his partner or partners (if any) in the business, practice or employment of an attorney or solicitor, save as by the 6 & 7 Vict. c. 73. or this act otherwise provided; and every person bound as aforesaid shall, before being admitted an attorney or solicitor, prove by the affidavit required under section 14. of the 6 & 7 Vict. c. 73, that he has not held any office or engaged in any employment contrary to this enactment, and the form of such affidavit as aforesaid shall be varied by such addition thereto as may be necessary for this purpose."

It must be admitted that the office which the applicant held was within the letter of the statute, and that his case does not come within those expressly excepted by the 6 & 7 Vict. c. 73, or by the 23 & 24 Vict. c. 127; still, it is submitted that the applicant has not held an office within the fair spirit and meaning of the statute. The applicant only acted as steward during three days, when he went and held courts, with the consent of the attornies with whom he was serving his articles.

[BYLES, J.—In *In re Taylor* (4 B. & C. 341) the Court considered that a clerk who had been surveyor of taxes during the term of his clerkship had not served his whole time in the proper business of an attorney as required by the 22 Geo. 2. c. 46.]

The Court of Queen's Bench has held that a clerk discharging the duties of auditor of a poor-law union after the usual office hours of his master, did not render the service insufficient—*Ex parte Llewellyn* (2 Dowl. P.C. N.S. 701; s. c. 12 Law J. Rep. (N.S.) Q.B. 138). That, however, was before the statute 23 & 24 Vict. c. 127.

[ERLE, C.J.—Have the Judges made any rule as to the form of affidavit required under section 14. of the 6 & 7 Vict. c. 73?]

No. The form in use states that the clerk did not during the period of his service hold any office, or was engaged in any employment, other than that of clerk to the attornies he served under the articles of clerkship. The form is, however, by section 10. of the 23 & 24 Vict. c. 127, to be varied by such addition as may be necessary.

Cur. adv. vult.

The opinion of the Court (Erle, C.J., Byles, J., Keating, J. and Montague Smith, J.) was now (May 3) delivered by—

ERLE, C.J.—We are of opinion that the service of the applicant under his articles has been sufficient within the meaning of the statutes, and that his affidavit explains the very peculiar circumstances under which he became for a time steward of the manor of Headington, so as to entitle him to his certificate. It appears thereby that the inheritance of the manor itself devolved on his family on the death of his father, and with it the office of steward in a manor devolved on him as the legal member of the family, holding it at the request of his mother, brothers and sisters, performing the duties by deputy, and having consumed only two or three days in two or three years in visits

to the manor court, with the leave of his employers, acquiring thereby professional knowledge and at the same time protecting a property in which he has an interest. We have conferred with the Judges of the Court of Queen's Bench.

Order for a certificate.

[IN THE COMMON PLEAS.]

April 16, 1866.

SHEARS v. JACOBS.

35 L. J. C.P. 241; 1 H. & R. 492; 14 L. T. 286; 14 W. R. 609; 12 Jur. N.S. 785.

See, *Deffell v. White*, [1867] E. R. A.; L. R. 2 C.P. 144; 15 L. T. 211; 15 W. R. 68 (C.P.). Referred to, *Great Northern Railway v. Coal Co-operative Society*, [1896] E. R. A.; 65 L. J. Ch. 214; [1896] 1 Ch. 187; 73 L. T. 443; 44 W. R. 252 (Ch. D.).

Bill of Sale—Stat. 17 & 18 Vict. c. 36. s. 1.—*Trading Company giving Bill*—*Description of Occupation of Company*—*Attesting Witness to Seal*—*Directors*.

BILLS OF SALE.—*A trading company may give a bill of sale of its effects as a security for a debt due from the company, in respect of goods supplied for the purpose of its trade.*

The company who gave the bill of sale was called "The Glucose Sugar and Colouring Company":—Held, that its name was a sufficient description of its trade or occupation to satisfy the requisites of the Bills of Sale Act (17 & 18 Vict. c. 36. s. 1), as to stating the occupation of the persons giving the bill of sale.

A bill of sale given by a company had the seal of the company affixed to it, and opposite such seal were the signatures of two directors, with the word "directors" after such signatures, and also the signature of the secretary, with the word "secretary" after it. It was proved to be the practice of the company to affix the seal in the presence of the board and for two directors to attest the sealing, and also for the secretary to attest, and that the articles of association of the company authorized the directors to make regulations for the use of the company's seal:—Held, that the two directors did not sign as attesting witnesses, and that therefore their residence and occupation was not required to be stated in the affidavit of verification.

Interpleader issue tried, before Erle, C.J., at the Middlesex Sittings after last Hilary Term, to determine whether certain machinery and effects, seized in execution by the defendant under a judgment obtained by him against the "Glucose Sugar and Colouring Company, Limited," were the property of the plaintiff as against the defendant. The plaintiff was a shareholder of the company, and had supplied the machinery and effects, the subject of this suit, and which had been required by the company in their manufactory; and on the 17th of August, 1865, the company had executed a bill of sale in favour of the plaintiff of such machinery to secure the payment of the balance then due from them to the plaintiff, and it was under this bill of sale the plaintiff now claimed the property which had been so seized in execution. The bill of sale had the seal of the company affixed to it, and opposite such seal were the signatures of two directors, countersigned by the secretary, thus:

Edmund Vansittart Neale, }
B. Price, } Directors.

J. E. B. Curtis, Secretary

The evidence given at the trial by the company's secretary was, that the

company carried on the manufacture of Glucose sugar only; that there was no resolution with respect to the way in which the seal should be affixed, but that it was the practice to affix the seal in the presence of the board, and for two directors to attest the sealing, and also for the secretary to attest.

The bill of sale was registered under the 17 & 18 Vict. c. 36, and the affidavit filed for the purpose of such registration was made by the secretary of the said company, and stated that he saw the said bill of sale sealed with the seal of the said Glucose Sugar and Colouring Company, "and countersigned by Edward Vansittart Neale and Bonamy Price, who are two of the directors of the said company, and whose signatures appear subscribed thereto," and "that the said company has its principal office at No. 9, Booth Street, Spitalfields, in the county of Middlesex." In the articles of association under which the company was formed, the object for which the company was established was stated to be, "first, the manufacture of Glucose sugar, starch and gum; secondly, the manufacture of colouring matter from glucose sugar; thirdly, the purchase of the patents granted to Alexandre Mombré for such manufactures; and, fourthly, the doing of all such matters and things as shall be incidental or auxiliary to the attainment of the above objects or any or either of them, or that may appear to the company to be conducive thereto or expedient to be done, or carried on in connexion therewith." The articles also contained the following clauses, viz.: Clause 38.—"The directors may, from time to time, as in their judgment they may deem expedient, borrow for the purposes of the company, without any further authority than a resolution passed at a meeting of the board, any sum or sums of money, but so that the sum so raised shall not exceed in the aggregate at any one time the sum of 10,000*l.*, and the directors may, with the sanction of a general meeting, borrow any further sum or sums of money in such manner, upon such terms, and upon such security, as such meeting shall determine." Clause 39.—"Any bond, mortgage, debenture or security bearing the common seal of the company, and issued for valuable consideration, shall be binding and obligatory on the company, notwithstanding any irregularity touching the authority of the directors to issue the same." Clause 78.—"The directors may make such regulations for the use and for the safe custody of the seal of the company as they may from time to time think fit."

A verdict having been found for the plaintiff, with leave to the defendant to move to enter a nonsuit on points reserved.

Huddleston (J. O. Griffiths with him) now moved accordingly.—In the first place it is submitted that the company had no power to give the bill of sale under which the plaintiff claimed. Clause 38 of the articles of association merely authorizes the directors to borrow money; but this bill of sale was given for a previous debt, and not to raise money, and the plaintiff being a shareholder must be taken to have known the limited powers of the company. Next, the affidavit of verification of the bill of sale is defective; it does not state the trade or occupation of the company, which, in this case, must be taken to be the person giving the same. The 17 & 18 Vict. c. 36. s. 1. says the bill is to be filed, "together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same." The affidavit ought to have said for what the company was formed, according to its articles of association. Thirdly, the affidavit is also defective in not stating the occupation and residence of the attesting witnesses to the bill of sale, which the 1st section of the act expressly requires to be done. Here, it appears, that opposite to the company's seal to the bill of sale are the signatures of two directors, and the evidence shews that it was the practice to attest the affixing the seal by two directors. The occupation and residence, therefore, of Mr. Neale and Mr. Price, whose names appear as attesting witnesses, ought to have been given in the affidavit.

[ERLE, C.J.—This point would be a good point if those gentlemen signed as attesting witnesses. The affidavit states only that the bill of sale was

countersigned by them. MONTAGUE SMITH, J.—Did they not rather sign as parties than as attesting witnesses?]

In either case the affidavit would have to state their residence. It is submitted, however, that they signed as witnesses. It would be proper that the company should have witnesses to see that the seal was rightly affixed.

ERLE, C.J.—I am of opinion that there should be no rule in this case. The first point which has been raised is, whether the giving of the bill of sale was *ultra vires*. The company being a trading company, it seems to me that they had power to buy and sell things necessary for their business, and therefore to give this bill of sale as a security for what was due in respect of the things they had so bought. Then the act of parliament requires the affidavit to give a description of the occupation of the person giving the bill of sale. I think as the company giving this bill of sale had a known place of residence, the description "Glucose Sugar and Colouring Company" is a sufficient description of the business and occupation of the company, and any person wishing to know more about it, might go and ascertain the same at the place where the company's articles of association are registered. With respect to the last point, if these two directors signed as attesting witnesses, the point would be a good one; but I think they put their names to the bill of sale according to the customary practice of the company, and that they did so in their capacity of directors, and that the secretary countersigned as the secretary according to the known practice by which corporations put their seals to instruments.

BYLES, J.—As to the last point, I had at first some doubt; but on looking at the 78th clause of the articles, it is, I see, provided that the directors may make such regulations for the use of the seal as they may think fit, and the description of these two as signing opposite the seal as directors is consistent with that clause.

KEATING, J.—It is clear, I think, that these parties did not sign as attesting witnesses, but as directors only.

MONTAGUE SMITH, J.—I concur on all points.

Rule refused.

[IN THE COMMON PLEAS.]

April 27, 1866.

LANE AND ANOTHER v. NIXON.

35 L. J. C.P. 243; L. R. 1 C.P. 412; 14 W. R. 641; 12 Jur. N.S. 392.

Shipping—Marine Insurance—Warranty of Seaworthiness—Lighters for Discharge of Cargo.

MARINE INSURANCE.—*On an insurance of goods on a voyage policy, until the same be safely landed at the port of discharge, "including all risks to and from the ship," there is no implied warranty that the lighter used at the end of the voyage to convey the goods from the ship to the shore shall be seaworthy for that purpose.*

Declaration upon a policy of insurance, subscribed by the defendant, as insurer of 100l. upon goods and merchandises on board the ship called the *Queen of Beauty*, on a voyage "from Liverpool to Melbourne, including all risk to and from the ship," "beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship at Liverpool," and so continuing "until the said ship, with all the ordnance," &c., "and goods and merchandises whatsoever, shall be arrived at Melbourne," "and upon the said goods and merchandises until the same be there discharged and safely

landed." There was a warranty of said goods, &c. free from particular average, unless stranded, sunk or burnt. Averments of shipment of goods on board the said ship, and of plaintiffs' interest therein, and that the said ship, with the said goods on board, departed from Liverpool on her said voyage; and that, during the continuance of the said risk, the said goods were, by the said perils insured against, and by being sunk, within the meaning of the exception in the said warranty from particular average, injured and damaged. The claim was for such average loss.

Sixth plea—That the said injury or damage happened after the said goods had been discharged from the said ship, the *Queen of Beauty*, and while they were in a certain ship or lighter,¹ intended to convey them from the said ship, the *Queen of Beauty*, to the shore; and, further, that the said other ship or lighter was not seaworthy for the purpose on which she was so employed.

Demurrer and joinder in demurrer.²

W. Williams, in support of the demurrer.—The question raised by the sixth plea is, whether, on a voyage policy, there is an implied warranty that the lighter used for the discharge of the cargo at the end of the voyage shall be seaworthy. It is entirely novel, and there is no decision on the point. In the first place, it is submitted that the discharge by lighters is part of, and the final stage of the voyage; and therefore it is not the case of two voyages and two risks, where there may be an implied warranty that the ship should be fit for the purpose at the commencement of each—*Biccard v. Sheppard* (14 Moo. P.C. 471). The practice of landing goods by lighters is a very ancient practice, and the boat used for that purpose has been regarded as part of the ship, so far as the insurance is concerned. In *Pelly v. the Royal Exchange Assurance Company* (1 Burr. 348), Lord Mansfield says, "Therefore, when goods are insured 'till landed,' without express words, the insurance extends to the boat the usual method of landing goods out of a ship upon the shore." *Rucker v. the London Assurance Company* (2 Bos. & P. 432, note a) and *Hurry v. the Royal Exchange Assurance Company* (2 Bos. & P. 430) furnish instances of landing goods by lighters, and shew that a loss when they are in such lighters is covered by a policy insuring the goods until safely landed. There is a distinction between using lighters for the purpose of taking goods on shore, and where, in effect, a new voyage is begun—*Emerigon*, '*Traité des Assurances*,' c. 13. s. 2. It is also stated in 1 *Phillips on Insurance*, 537, s. 970, that "the risk on a cargo insured, 'till safely landed,' will continue in lighters, where that is the usual mode of landing similar goods, or goods from vessels of like size." *Stewart v. Bell* (5 B. & Ald. 238) also supports the contention, on the part of the plaintiffs, that the discharge by lighters formed part of the voyage. Next, the implied warranty of seaworthiness does not extend to the lighters employed in so landing the goods. If there be such warranty, when does it attach? Does it attach when the lighter leaves the shore or when the goods are put into it? There is nothing in the plea to fix the warranty to any particular time. The authorities shew that the implied warranty of seaworthiness is founded on custom, and on the presumption that the owner has the means of knowing the condition of the vessel at the time it is given which the underwriter does not possess. Taking the meaning of "seaworthiness" to be as stated by Chief Justice Erle in *Thompson v. Hopper* (6 El. & B. 181; s. c. 25 Law J. Rep. (N.S.) Q.B. 240), "that the ship is fit for its duty in the ordinary degree," it is a relative term depending on the nature of the ship, as whether it be a river steamer, as well as of the voyage insured—*Burges v. Wickham* (3 Best & S. 669; s. c. 33 Law J. Rep. (N.S.) Q.B. 17), *Knill v. Hooper* (2 Hurl. & N. 277; s. c. 26 Law J. Rep.

(1) During the argument the plea was amended by alleging that the lighter was a Melbourne boat, and did not belong to the *Queen of Beauty*.

(2) There was also a seventh plea demurred to. That plea alleged that the damage and injury complained of occurred from the acts and defaults of the plaintiffs and their servants and agents; but the Court, during the argument, considered it an ambiguous plea, and ordered it to stand over until after the trial, with a recommendation to the plaintiffs to apply at chambers to strike it out as embarrassing.

(n.s.) Exch. 377) and *Clapham v. Atkinson* (34 Law J. Rep. (n.s.) Q.B. 49). It is true that Alderson, B., in giving his opinion in *Gibson v. Small* (4 H.L. Cas. 390), says, that "if the policy on that adventure, on the face of it, states different stages in which the perils are different, then the implied warranty follows each stage, and requires that as each occurs the ship shall be seaworthy for that stage." It is submitted that that is not correct, and that what that learned Judge meant to say was that the warranty is satisfied if the vessel at each stage is fit for each stage, like the case of *Bouillon v. Lupton* (15 Com. B. Rep. N.S. 113; s. c. 33 Law J. Rep. (n.s.) C.P. 37). In that last case, the voyage insured being from Lyons to Galatz, the Court held that the vessel whilst descending the Rhone must be fit for the river navigation, and whilst proceeding from Marseilles to Galatz must be fit for the sea portion of the voyage, but that case does not decide that there was an implied warranty that the vessel when it left Marseilles should be seaworthy for the sea voyage, only that the warranty would be satisfied if the vessel was then fit for the sea voyage; but it is submitted that the warranty would have been also satisfied if the vessel in that case had left Lyons fit for the sea voyage as well as for the river navigation. *Phillips v. Headlam* (2 B. & Ad. 380) and *Dixon v. Saddler* (5 Mee. & W. 405; s. c. 9 Law J. Rep. (n.s.) Exch. 48) shew that there is no warranty that the vessel shall continue seaworthy.

Sir George Honyman, in support of the plea.—The underwriter insures against the perils of the sea, but he does not insure against any accident arising from any vice in the thing which is to be carried, or where the loss arises from the vessel in which it is carried not being fit for the purpose. It is, perhaps, not easy to say on what principle the warranty of seaworthiness exists in a voyage policy; but it is not because the assured has a better opportunity than the underwriter of seeing that the vessel when she starts on her voyage is fit for the same, because, if that were the case, it would not extend, as it does, to an insurance on goods. In *Burgess v. Wickham* (3 Best & S. 669; s. c. 33 Law J. Rep. (n.s.) Q.B. 17), Chief Justice Cockburn thus considers the ground on which the doctrine of implied warranty of seaworthiness rests: "The insurer is entitled to expect that the shipowner will do all that it behoves a careful and conscientious man to do to secure the safety of the crew who are to navigate the vessel, and of the merchant's goods which are to be conveyed in it, so that the risk covered by the insurance shall be limited to those perils incidental to navigation against which the care and skill of man cannot provide." It is said, on behalf of the plaintiffs, that the ordinary risk covered by the insurance extends from the ship to the shore; and it is admitted that the ship's boats used for the purpose of conveying to the shore should be fit for that purpose, and that the underwriters would not be liable if the vessel had started on her voyage with boats which were not fit in this respect. The plea alleges that the lighter used in conveying the goods in question from the ship to the shore was not seaworthy for that purpose; and it is now to be considered that the plea has been altered, and that such lighter was no boat which had come out with the vessel, but was a boat belonging to Melbourne, and had come off from the shore to the vessel. Under these circumstances, it is submitted that there is an obligation on the part of the assured that such lighter should be seaworthy, that is, fit for the purpose for which she was so employed. That "seaworthy" has such a flexible meaning is well pointed out by Lord Wensleydale, in delivering the judgment of the Court of Exchequer Chamber in *Small v. Gibson* (16 Q.B. Rep. 128; s. c. 20 Law J. Rep. (n.s.) Q.B. 152). What is contended for on behalf of the defendant is—there were here various stages of the insured voyage, to each of which the warranty of seaworthiness extended, as put by Chief Justice Erle in *Thompson v. Hopper* (6 El. & B. 181; s. c. 25 Law J. Rep. (n.s.) Q.B. 240), where that learned Judge says, "It is also clear that when once fulfilled, so that the policy has attached, it is not always at an end. The case of a policy on a ship at and from London on a whaling voyage to the North is almost too trite to be quoted; the warranty is for four gradations: fit for dock in London, fit for

river to Gravesend, fit for sea to Shetland, then fit for whaling. The policy attaches if the ship is fit for dock, but the warranty is broken if the other stages of fitness are not completed." It would be altogether illusory to suppose that the assured has satisfied the warranty when he has put the goods in a vessel fit only for half the insured voyage. If, for example, the *Queen of Beauty* went only to the Cape of Good Hope, and the goods were to be transhipped there into another vessel, it would surely not be contended that there was not an implied warranty on the part of the assured that each of the vessels should be fit to encounter the ordinary risks each would be exposed to in performing the purposes for which each was so employed. That is the rule which was followed in *Biccard v. Sheppard* (14 Moo. P.C. 471), and it is therefore submitted that there is an undertaking by the assured that the boat used for taking the goods to the shore shall be reasonably fit for doing so when the goods are put therein.

W. Williams, in reply, cited 2 *Duer's Marine Insurance*, 670.

ERLE, C.J.—I am of opinion that our judgment should be for the plaintiffs. The action is on a policy upon goods on a voyage from Liverpool to Melbourne, until the same should be there safely landed. The vessel arrived at Melbourne, and the goods were put in a lighter to be conveyed to the shore, and the plea is, that such lighter was not seaworthy, and the question is, if that is a good defence. There can be no doubt that the warranty was not complied with in this case, if there be any such warranty. This practice of using lighters has been in use for more than 100 years, and no instance has occurred in which the question has been before raised. Two cases have come before the Court respecting a loss on a policy where the goods have been put in lighters; in one the owner of the goods took his own lighter, and in the other he dispensed with using the ship's boats. Whatever may be said of the merchant taking the goods in his own lighter (and when the time comes that may be reconsidered), there is certainly no authority that this plea is a good defence; there was here no warranty that the ship should not only set out seaworthy, but that at Melbourne she should continue to be there seaworthy. Then the defendant in this case undertook to insure the goods until they were safely landed at Melbourne, and one of the usual incidents, and which is covered by the policy, is the employment of local lighters to take the goods to the shore.

BYLES, J.—I am of the same opinion. Mr. Williams has cited many cases to shew that the insurance covers the risk attending the transit of the goods from the vessel to the shore. In addition to the authority of *Emerigon*, there is, as I collect, the case of *Rucker v. the London Assurance Company* (2 Bos. & P. 432, note a.) and the case of *Hurry v. the Royal Exchange Assurance Company* (2 Bos. & P. 430). There is also the American case of *Parsons v. the Massachusetts Fire and Marine Insurance Company* (6 Mass. 197), and further, there is the case of *Stewart v. Bell* (5 B. & Ald. 238). It therefore seems to me to be plain that the insurance ordinarily extends until the goods have been landed; and if such a case as this be an exception to the rule, it is strange that no case to that effect can be found to be cited in support of it, and I think it only reasonable to suppose that no such case exists. I rather agree with Mr. Williams as to the foundation of the warranty of seaworthiness. If a shipowner insures his vessel, the condition of seaworthiness is one which he can perform; and even if the owner of the cargo insures it, he can see the vessel in which he puts it, or, at all events, he has his remedy against the shipowner; but how different is the case of lighters used at the end of the voyage? What does the owner of the cargo know as to what lighters may be employed to land the goods, and what means has he of seeing that they are fit? He has no means of ascertaining this, and he has no control over the matter. Besides, if he is to be responsible for the fitness of the lighter, the same would apply to the use of rafts or of catamarans off the coast of Madras, so of elephants or of coolies, wherever these might be employed. I therefore think that this insurance extends to the case in question upon this demurrer, and if any doubt were to be entertained on the subject, we should create alarm amongst persons who effect insurances especially on cargoes.

KEATING, J.—I am of the same opinion. In this case the doctrine of implied warranty of seaworthiness is sought to be extended to what it has never before been extended to. If this were the case in which the voyage consisted of several stages, there might have been such undertaking that there should be seaworthiness for each stage in the way that has been pointed out; but this, in truth, was nothing but the usual mode of landing the goods, and we should, I think, be taking a very dangerous step if we were to extend the warranty to the lighter so employed, as we are asked to do by this plea.

MONTAGUE SMITH, J.—The warranty of seaworthiness is one which the law has grafted on the express contract of insurance, and I think we ought not to carry it any further than the law has already carried it. If we were to decide this case in favour of the underwriter, I think we should be so extending it. It has been argued that a voyage may consist of several stages; if this case had been fairly one of several stages, it might have come within that principle, but I think this was rather an accessory to or an incident of the voyage than forming a separate stage. Here, by the contract, the owner of the goods has most distinctly insured against loss from the ship, so that the parties have in the policy distinctly contemplated this risk and provided expressly for it. To extend the warranty of seaworthiness to the lighter at the end of the voyage would be attended with considerable inconvenience. The goods may often be taken from the vessel to the shore when off a dangerous coast, and if the master was to inquire as to whether the lighter sent was seaworthy, it might increase the risk by the delay it would occasion, and moreover the master might be altogether unable to ascertain the seaworthiness or not of the lighter. I think, therefore, that the implied warranty of seaworthiness does not attach to the lighter, and that the plea is bad.

Judgment for the plaintiffs.

[IN THE COMMON PLEAS.]

May 2, 1866.

MACRAE v. CLARKE.

35 L. J. C.P. 247; 1 H. & R. 479; L. R. 1 C.P. 408; 14 L. T. 408;
14 W. R. 655; 12 Jur. N.S. 708.

Sheriff—Action for Escape of Execution Debtor—Measure of Damages—Value of Custody of Debtor.

SHERIFF.—*In an action against the sheriff for the escape of an execution debtor, the measure of damages is the value of the custody of the debtor at the time of the escape; but in estimating such value the jury are not limited to the consideration of the actual available means of the debtor, but they may consider, according to the evidence of the case, the value of the chances of the creditor obtaining payment by continuing such imprisonment.*

Action against the sheriff of Gloucestershire, for the escape of an execution debtor.

The declaration stated that the plaintiff had recovered a judgment in this court, against Thomas Hartland, for 1,157l. 1s. 9d., and had sued out a *ca. sa.* upon the said judgment, directed to the Sheriff of Gloucestershire, and that the writ was duly indorsed, with a direction to the said sheriff to satisfy 1,157l. 1s. 9d. and interest at the rate of 5l. per cent. from April, 1865, and was delivered to the defendant, then being such sheriff, to be executed, and that by virtue thereof, the defendant took the said T. Hartland. Breach,

E. R. A. [1866]—VOL. 2

11

that the defendant, against the will of the plaintiff, voluntarily suffered the said T. Hartland to escape out of the custody of the defendant, as such sheriff, by reason of which the plaintiff had lost the said sum and interest so indorsed on the said writ.

Plea, not guilty, and issue thereon.

The cause was tried, before Byles, J., at the Middlesex Sittings, after Hilary Term last, when the escape of the execution debtor, through the negligence of the sheriff, was admitted, and the only question was the amount of damages which the plaintiff was entitled to recover.

Hartland was arrested on the *ca. sa.* at the suit of the plaintiff on the 25th of September, 1865, and he made his escape from the sheriff's custody on the 3rd of October following, and evidence was given on the part of the defendant, that at the time of Hartland's escape he was altogether insolvent, and had no property or means of his own wherewith to pay any part of the plaintiff's debt. It appeared, however, that the judgment which the plaintiff had recovered against Hartland was founded on bills of exchange which had been indorsed by Hartland as surety for the other parties to such bills, and that, after judgment had been signed, and within a fortnight of the arrest, Hartland's attorney, Mr. Edmonds, had, on behalf of his client, offered to pay a composition of 6s. in the pound on the plaintiff's debt, provided the bills on which the judgment had been obtained were given up, in order that Hartland might recover thereon what he could from the other parties. The offer was not accepted. At the trial, Mr. Edmonds stated that this offer was made by him, nominally, in his client's name, but really with the view of applying what monies he might recover from the other parties to the bills in reduction of a debt of 800*l.* which was owing to him from Hartland. There were, however, only two persons whose names were on the bills from whom Mr. Edmonds stated he expected to recover, and one of these had been released previously to such offer, having compromised his liability to the plaintiff for 500*l.* This 500*l.* had been paid since the escape, so that the balance due to the plaintiff was reduced to 657*l.* 1*s.* 9*d.* It further appeared from the cross-examination of one of the defendant's witnesses, that Hartland had a father living, who was a man of wealth and of a very advanced age, being in his 100th year. The learned Judge left it to the jury to say to what extent the plaintiff had been prejudiced by the escape, telling them that the true measure of damages was, what was the value of the chances that if the imprisonment had been continued the remaining debt, or any part of it, would by that imprisonment have been extorted.

The jury found a verdict for the plaintiff for 197*l.*

A rule *nisi* was subsequently obtained to set aside such verdict and for a new trial (unless the plaintiff would consent to reduce the verdict to nominal damages), on the ground that the above direction was a misdirection, and that the Judge also misdirected the jury in not telling them to consider only the means or resources of the execution debtor himself, and that the damages on the evidence should be nominal; and also on the ground that the jury found a verdict for substantial damages against the evidence.

Karslake and *Henry James* now shewed cause.—The question arises on the 5 & 6 Vict. c. 98. s. 31, which has limited the remedy against a sheriff for an escape on final process to an action on the case for such damages as the execution creditor may have sustained by reason of such escape. The case of *Clifton v. Hooper* (6 Q.B. Rep. 468; s.c. 14 Law J. Rep. (N.S.) Q.B. 1), which was referred to by the counsel for the defendant at the trial, does not really touch this case; and the only case in which the question of assessing the damages in such an action as this has been considered is that of *Arden v. Goodacre* (11 Com. B. Rep. 371; s.c. 20 Law J. Rep. (N.S.) C.P. 184). There it was decided that the true measure of damages, in an action against the sheriff for an escape, is the value of the custody of the debtor at the moment of the escape. This case is referred to by Mr. Sedgwick

in his *Treatise on the Measure of Damages*, 2nd edit. p. 512, who, remarking on it, says, "It is plain that this leaves the whole subject at very loose ends. What is meant by the value of the security of the body of a debtor who cannot pay? Are his physical and mental qualifications to be gone into, and the chance of his subsequently acquiring property to be estimated? Are the chances of his friends being induced or coerced by reason of his imprisonment into paying the debt to be inquired of?"—"It is plain that the whole subject in England is in a state of perplexing uncertainty." It is submitted that the direction of the learned Judge was right, and that the true mode of ascertaining what the value of the custody of the debtor is to the execution creditor is, not as suggested by the defendant, by considering only what means the debtor himself has of satisfying the debt, but by seeing whether the custody was not likely to result in the debt, or some part of it, being paid. A man may have no money, but he may have credit or friends, by which the money may be borrowed or got. In the present case there was an offer of a composition in the pound made on behalf of the debtor shortly before the arrest; and there was also the circumstance that the debtor was the son of a very wealthy man; and all these were matters well worthy the consideration of the jury in determining the value of the debtor's custody at the time of his escape. The cases of *Duckworth v. Johnson* (4 Hurl. & N. 653; s. c. 29 Law J. Rep. (N.S.) Exch. 25) and *Pym v. the Great Northern Railway Company* (31 Law J. Rep. (N.S.) Q.B. 249) were decisions as to the damages recoverable under Lord Campbell's Act, 9 & 10 Vict. c. 93, in case of death by negligence.

Macnamara, in support of the rule.—It is submitted that in estimating the damages recoverable against a sheriff for an escape, the jury ought not to look beyond the means and resources of the debtor at the time of his escape; that is the only way of ascertaining the value at that time of the custody of the debtor to the creditor, which, according to *Arden v. Goodacre* (11 Com. B. Rep. 371; s. c. 20 Law J. Rep. (N.S.) C.P. 184), is the true measure of the damages in such an action as this. It may be that it is not limited to only such means of the debtor as were actually available at the time of the escape; but they ought to be such as the debtor then had such a possessory interest in, or title to, as would enable him then to realize and make available. Least of all, the jury had no right to look at the circumstances of any of the relations of the debtor. If once the rule now suggested be departed from, and the inquiry extended to the means of friends and relatives, there would be nothing but great uncertainty and confusion. The cases under Lord Campbell's Act are not parallel cases with the present. There the question is, what compensation shall be awarded to the children of one who has been killed by negligence? But here the only question is, what is requisite in order to put the execution creditor in the condition he was in before the debtor escaped?

[KEATING, J.—What if the debtor was the heir-at-law to an estate?]

There would be then something tangible for estimating the value. That is very different from this case. The debtor here was hopelessly insolvent at the time of the escape, and he had nothing from which he could raise the means of paying anything. The case of *Arden v. Goodacre* (11 Com. B. Rep. 371; s. c. 20 Law J. Rep. (N.S.) C.P. 184) is in favour of the defendant's proposition; it shows that the damages are confined to the value of the custody of the debtor at the time of the escape, "if the execution debtor," says Chief Justice Jervis in delivering the judgment of the Court in that case, "had not the means of satisfying the judgment at the moment of the escape, the plaintiff will have lost only the security of the debtor's body, and the damages may be small." With respect to the offer of 6s. in the pound made by Edmonds, that was made by him as a speculation of his own, and on the condition only that the bills were given up with power for him to sue the other parties whose names were on those bills. Besides, there was nothing to shew that there was any probability of that offer being renewed. According

to the American authorities, the burden of proof is thrown on the officer; but if it shew that the execution creditor has lost nothing by the escape, and that the debtor is insolvent, the damages will be only nominal—*Sedgwick on Damages*, 2nd edit. pp. 509 to 517.

KEATING, J.—I am of opinion that this rule should be discharged. The rule was moved for on the ground that the learned Judge misdirected the jury in telling them to consider the value of the chances, that if the imprisonment had been continued the debt would have been thereby extorted. Now, this was an action against the sheriff for the escape of an execution debtor, and it has been suggested on the part of the defendant that the learned Judge at the trial should have confined the attention of the jury to what were the actual resources of the debtor at the time of his escape. I am of opinion that that would have been a misdirection, because in an action of this kind the means of the execution debtor would not be the true measure of the damages. The detention in custody of the debtor's body is valuable only to the creditor as a means of pressure to obtain payment of the debt. The rule as to the measure of damages in these actions is stated to be the value of the custody of the debtor at the time of the escape. That seems to me to be a correct rule, but then comes the question, how is that value to be ascertained? I think it can only be ascertained by seeing what is the value of the pressure. It is extremely difficult to draw the line, and still more difficult to express it in terms. I therefore look at the circumstances of the present case. Here it appears that the execution debtor was insolvent, that is to say, he had no actual existing resources available to obtain his discharge. But there were certain facts on which the jury might act; first, there was the offer by the attorney of the execution debtor to pay 6s. in the pound. It is true he explained what induced him to make that offer, but the jury might or might not be satisfied with such explanation. Secondly, there was the evidence that the execution debtor was the son of a man of property who was of an advanced age. I think it was clearly within the rule, that the jury might look at the offer of 6s. in the pound, coupled with the position of the debtor, with reference to his being connected with a family of wealth, and consider how far the latter circumstance might be a solution of the reason of the offer having been made. Therefore they might consider the chance of any part of the debt being so paid, and thus they might find what the value of the result of pressure might reasonably be expected to be. If this be so, I think there is no ground for disturbing the verdict, because if the jury took that view of the matter the damages would be extremely moderate. There is no ground for saying that the damages should be only nominal, and they seem to me to be most reasonable.

MONTAGUE SMITH, J.—I am of the same opinion. The only guide which the learned Judge had was the rule laid down in *Arden v. Goodacre* (11 Com. B. Rep. 371; s. c. 20 Law J. Rep. (N.S.) C.P. 184), that the measure of damages is the value of the custody of the debtor at the moment of escape. The question is, how that value is to be ascertained? It is said by the learned counsel for the defendant, that there is no value in the custody of the debtor except from the actual resources of the debtor available at that time. I think that is too narrow a construction, for I think the value is made up of the possibilities of the debt being paid by reason of the duress. In all cases it must be entirely problematical whether anything will be paid, and, therefore, the chances of payment must be considered with reference to the surrounding circumstances, and the decision in this case can form no ground for the measure of damages in any other class of cases. This action is a peculiar one. Originally the sheriff was liable for the whole amount of the debt; but the legislature, considering that a hardship, has relieved him from the payment of the entire debt, but left him open to an action on the case for the damages sustained by the person at whose suit the debtor was

imprisoned, without giving any rule for assessing such damages. Consequently, the question is, what is the value of the custody of the debtor at the time of the escape? And I think my Brother Byles was right in asking the jury to consider what in their opinion was the value of the chances of payment by continuing the imprisonment. It appears that there was evidence of an offer having been made of 6s. in the pound, and the jury might have thought that that offer would be repeated. Then there was the other fact, that the debtor was the son of a wealthy man, who was nearly 100 years old. Supposing the father's wealth consisted of land, and the debtor was the heir-at-law, it would be difficult to say that the jury should not estimate the probability of his inheriting the land; and so, if the wealth consisted of personalty, and the debtor was the next-of-kin, there equally seems to be no reason why this should not be considered by the jury. On the whole, it seems to me that my Brother Byles did right in asking the jury to consider what was the value of the chances (according to the evidence in the case) of the creditor obtaining payment from the imprisonment if the debtor had not escaped.

BYLES, J.—I have nothing to add to what has been said by the other members of the Court, except that I think that the damages given by the jury were both moderate and reasonable.

Rule discharged.

[IN THE COMMON PLEAS.]

Jan. 29, 30, May 8, 1866.

KIDSTON AND OTHERS v. THE EMPIRE MARINE INSURANCE COMPANY (LIMITED).

35 L. J. C.P. 250; L. R. 1 C.P. 535; 15 L. T. 12; 15 W. R. 63; 12 Jur. N.S. 665: affirmed, [1867] E. R. A.; 36 L. J. C.P. 156; L. R. 2 C.P. 357; 16 L. T. 119; 15 W. R. 769 (Ex. Ch.).

Ship and Shipping—Insurance—Chartered Freight—Expenses in conveying Cargo to save Loss of Freight—Suing and Labouring Clause—Particular Average—Usage.

MARINE INSURANCE. SHIPPING.—*The plaintiffs, whose vessel was chartered to bring a cargo of guano to the United Kingdom for certain freight, payable after arrival at the port of discharge, effected an insurance with the defendants on the chartered freight by a policy containing the usual suing and labouring clause, and also the exception, "warranted free from particular average, also from jettison, unless the ship be stranded, sunk or burnt." In the course of the voyage the ship was driven by weather to put into Rio, where she became a total loss, without being "stranded, sunk or burnt"; but the cargo was safely landed at Rio, and, without notice of abandonment by the plaintiffs, was sent on in another vessel to the port of discharge, and the plaintiffs afterwards received the chartered freight.—Held, that the expenses of conveying the cargo from Rio to the port of discharge, having been incurred to save the subject-matter of insurance from a loss, could be recovered under the suing and labouring clause, notwithstanding there had been no abandonment; since such clause is not limited to cases where the assured abandons.*

Held, also, that the right to recover such expenses under that clause was not excluded by the warranty against particular average, as there was a danger of the total loss of freight by reason of the loss of the ship by perils insured against and the expenses were incurred for the benefit of the defendants in averting loss for which they would have been liable.

Semble—That evidence that by the usage, in the business of marine

insurance, the term "particular average" does not include expenses of recovering or preserving the subject-matter of the insurance, would be admissible, since it would not contradict the express terms of the policy.

Action to recover 1,145*l.* 3*s.* 6*d.* upon a policy of insurance for 2,000*l.*, effected by the plaintiffs with the defendants, on chartered freight, valued at 5,000*l.*

The declaration contained a count on the policy, and the common money counts.

The only claims in the declaration which are material for the purpose of this case are, first, a claim of the sum of 2,000*l.*, insured on the ground of the total loss of the chartered freight; secondly, a claim, under the suing and labouring clause of the aforesaid policy, for the charges and expenses incurred by the plaintiffs, by reason of the plaintiffs, their factors, servants and assigns, suing, labouring and travelling in and about the defence, safeguard and recovery of the subject-matter of the insurance; and, thirdly, a claim for money paid to the defendant's use.

The defendants pleaded to the first of the above-mentioned claims, in substance, that the ship was not stranded, sunk or burnt, and that the loss was a particular average loss. And, to the second of the above-mentioned claims, their pleas were, in substance, first, that the charges and expenses so incurred as aforesaid constituted and were only particular average losses, from which the subject-matter of the insurance was warranted free; secondly, that a loss or misfortune did not arise within the true intent and meaning of the policy; and, thirdly, that there was no suing, labouring or travelling in and about the defence, safeguard and recovery of the subject-matter of the insurance, within the true intent and meaning of the policy.

To the common counts they pleaded never indebted.

Upon these pleas issues were joined; and the plaintiffs also demurred to the plea, setting up that the charges were particular average losses.

The cause was tried, before Erle, C.J., at the London Sittings after Michaelmas Term, 1865, when the following facts appeared in evidence:

The plaintiffs, who were owners of the ship *Sebastopol*, chartered that vessel to Messrs. Thomson & Co., by a charter-party, according to which the ship was to proceed to the Chincha Islands, there to load a cargo of guano, and thence to proceed with the said cargo to the United Kingdom for the stipulated freight of 75*s.* sterling in full per ton of 20 cwt., net weight, of guano at the Queen's beam, such freight to be paid as follows: viz., 1,000*l.* in cash on arrival at port of discharge; three months' interest, at the rate of 5*l.* per cent., being deducted; and the balance forty-eight hours after the delivery of the whole cargo.

On the 18th of August, 1863, the plaintiffs effected with the defendants the policy of insurance, on which this action was brought, on a chartered freight, valued at 5,000*l.*, in respect of goods laden on board the *Sebastopol*, warranted free from particular average, also from jettison, unless the ship should be stranded, sunk or burnt. The voyage insured by the said policy covered the aforesaid chartered voyage to the Chincha Islands, and thence to the United Kingdom. The policy also contained the usual suing and labouring clauses.

The *Sebastopol* loaded a cargo of guano at the Chincha Islands, and sailed therewith for Cork; but in the course of the voyage she was compelled, by heavy storms and the damage she sustained, to put into Rio Janeiro, where the cargo of guano was discharged and warehoused. The ship, being found to be so damaged by the perils of the seas as not to be worth repairing, was sold by the master at Rio, on the 31st of March, 1864, and it was admitted that she was then a total loss.

On the 12th of March, 1864, the master of the *Sebastopol* chartered the ship *Caprice*, at a freight of 1*l.* 17*s.* 6*d.* per ton, for the purpose of bringing

the said cargo of guano from Rio to the United Kingdom, and afterwards the cargo was accordingly loaded on board the *Caprice*, and conveyed by that ship to Bristol, and there duly delivered to the owners of such cargo, Messrs. Thomson & Co., who then paid the chartered freight of 5,000*l.* in full to the plaintiffs, no part of which, however, was received by the defendants. The plaintiffs did not give any notice of abandonment to the defendants.

All the expenses incurred at Rio in discharging, warehousing and transshipping the goods did not, together with the freight payable to the owners of the *Caprice*, exceed 3,000*l.*

It was contended at the trial, on behalf of the plaintiffs, that they were entitled to recover the expenses incurred by them in conveying the aforesaid cargo of guano to the *Caprice* from the warehouses at Rio, which expenses were less than 100*l.*, and also the sum of 2,467*l.* 11*s.* 10*d.*, which they had paid to the owners of the *Caprice* for carrying the said cargo from Rio to the United Kingdom. The plaintiffs claimed, therefore, in this action the defendants' proportion of these sums according to the amount insured by the said policy, and which came to 1,145*l.* 3*s.* 6*d.* The defendants, on the other hand, contended that they were not liable on the said policy to repay to the plaintiffs any part of the said expenses, nor any part of the said sum of 2,467*l.* 11*s.* 10*d.*

At the trial, several average adjusters and other witnesses were called to prove the meaning of the term "particular average" in the business of marine insurance, and the jury found that up to the time of the policy in question there had been in the business of marine insurance a well-known and definite meaning, affixed by long usage between the assured and the underwriters, to the term "particular average," as contradistinguished from the term "particular charges" in the manner described by the witnesses, viz., that particular average denotes actual damage done to or loss of part of the subject-matter of insurance; but that it does not include any expenses or charges incurred in recovering or preserving the subject-matter of insurance, and that expenses incurred in warehousing and forwarding goods are not particular average, but are termed "particular charges."

Upon this finding of the jury a verdict was, by the consent of the parties and by the direction of the learned Judge, entered for the plaintiffs, leave being reserved to the defendants to move to set aside the verdict, and to enter a verdict for the defendants or a nonsuit.

In Hilary Term last a rule was accordingly obtained by the defendants, calling upon the plaintiffs to shew cause why the verdict should not be set aside, and instead thereof a verdict be entered for the defendants, or a nonsuit pursuant to the leave reserved, on the grounds, first, that the charges in question were not within the clause in the policy respecting suing and labouring, and that no other part of the policy was applicable to the case; secondly, that the custom alleged was a universal custom, and not a custom of any particular place or trade; thirdly, that there was no evidence that the alleged custom prevailed in Liverpool, where the policy was made, at the time the policy was so made.¹

It was agreed that the demurrer should abide the result of the rule.

E. James and *Sir G. Honyman* shewed cause against the rule.—These charges are recoverable under the suing and labouring clause in the policy. That clause is for the benefit of the underwriters, and to remove what might otherwise be a temptation to the assured not to endeavour to save the subject-matter of the assurance. The defendants will rely on *The Great Indian Peninsular Railway Company v. Saunders* (1 Best & S. 41; s. c. 2 Ibid. 266; 30 Law J. Rep. (N.S.) Q.B. 218; 13 Law J. Rep. (N.S.) Q.B. 206) and *Booth v. Gair* (15 Com. B. Rep. N.S. 291; s. c. 33 Law J. Rep. (N.S.) C.P. 99); but in those cases the money sought to be recovered had not been paid to

(1) The above statement of facts has been taken from the case settled for appeal to the Exchequer Chamber.

avert a total loss, and therefore the principle of those cases do not apply to this case. The shipowner was not bound to have sent the goods on after the loss of the vessel, and if he had not done so the defendants in this case would have been liable on the policy for a total loss of freight—*Shipton v. Thornton* (9 Ad. & El. 314; s. c. 8 Law J. Rep. (n.s.) Q.B. 73), *Farnworth v. Hyde* (18 Com. B. Rep. N.S. 835; s. c. 34 Law J. Rep. (n.s.) C.P. 207), *Vlierboom v. Chapman* (13 Mee. & W. 230; s. c. 13 Law J. Rep. (n.s.) Exch. 384) and *Cuadra v. Swann* (16 Com. B. Rep. N.S. 772), in which last case all the authorities are to be found collected. Further, the evidence was properly admitted to shew that the term "particular average" is a term of art and has acquired a meaning very different from the charges incurred here in forwarding the cargo. What is "particular average" is very fully explained in a learned note by Mr. Maclachlan, in his edition of *Arnould on Insurance*, 3rd edit. p. 739; and *Taylor on Evidence*, 4th edit. ss. 1059, 1060, 1062 and 1063. *Clayton v. Gregson* (5 Ad. & E. 302) and *Gorriessen v. Perrin* (2 Com. B. Rep. N.S. 681; s. c. 27 Law J. Rep. (n.s.) C.P. 29) shew how evidence of usage may be resorted to in explaining the meaning of words in written instruments. Then, if the policy here be read with the meaning which according to the finding of the jury ought to be given to "particular average," the charges which the plaintiffs seek to recover are not particular average charges excepted by the warranty.

Mellish and Cohen, in support of the rule.—There was no actual total loss of freight, neither, it is submitted, was there a constructive total loss. If the goods were in such a state that they could be carried to their port of destination, and the master was not prevented from earning the freight, there would be no total loss of the freight—*Michael v. Gillespy* (2 Com. B. Rep. N.S. 627; s. c. 26 Law J. Rep. (n.s.) C.P. 306) and *Philpot v. Suann* (30 Law J. Rep. (n.s.) C.P. 358). As long as the goods remained and there was no notice of abandonment, there was always a prospect of earning the freight, and therefore no total loss, but only a partial loss. The master merely abstaining to send the goods on by another ship would not necessarily constitute a total loss—*Phillips on Insurance*, s. 1632, where it is said, "If the ship is rendered innavigable and cannot be repaired for the prosecution of the voyage, and another can be procured within a reasonable time and distance, and the master has means to procure such other at an expense materially less than the amount of the freight for the voyage, the underwriter on freight or profits is not liable to be prejudiced by the master's neglect to tranship any more than the underwriter upon the cargo, and the loss will be adjusted as if the cargo had been transhipped and forwarded, and will be partial or total according to the amount of the loss." The policy in this case being with a warranty of free from particular average, the suing and labouring clause, the origin of which is given by *Emerigon*, c. 17, s. 7, cannot apply unless the expense has been incurred to avoid a total loss. There being here only a partial loss and not a total loss, the expense incurred was a particular average which, being within the warranty, could not be recovered from the underwriters. The case is not distinguishable from that of *The Great Indian Peninsular Railway Company v. Saunders* (1 Best & S. 41; s. c. 2 Ibid. 266; 30 Law J. Rep. (n.s.) Q.B. 218; 31 Law J. Rep. (n.s.) Q.B. 206). Then, as to the evidence of the meaning given by usage to the term "particular average," all the authorities shew that that term applies to and includes the expenses incurred in relation to the property insured—*Emerigon*, c. 12, s. 39, *Benecke's Practice of Indemnity*, 165, 166, *Droit Mar.* 481, *Code de Commerce*, lib. 2, tit. 11, art. 403, 2 *Arnould on Marine Insurance*, 3rd edit. p. 826, *Phillips on Insurance*, s. 1422; and *Blackburn, J.*, in delivering the judgment of the Court in *The Great Indian Peninsular Railway Company v. Saunders* (1 Best & S. 41; s. c. 2 Ibid. 266; 30 Law J. Rep. (n.s.) Q.B. 218; 31 Law J. Rep. (n.s.) Q.B. 206), adopts what is said by *Phillips on Insurance*, s. 1767, where he says that an insurance against total loss only and an

insurance with the exception of particular average are equivalent forms. The usage set up and relied on by the plaintiffs would contradict the written policy, for it would alter the meaning of the term "particular average" as known in the law, and that cannot be done—*Hall v. Janson* (4 El. & B. 500; s. c. 24 Law J. Rep. (N.S.) Q.B. 97).

Cur. adv. vult.

WILLES, J., now (May 8) delivered the judgment of the Court (Erle, C.J., Willes, J., Keating, J., and Montague Smith, J.).—Many points were made upon the argument of this rule, upon one of which only is it necessary to pronounce an opinion. That turned upon the construction of the suing and labouring clause in the policy, and it may be considered under the following heads: first, whether the expenses incurred were of a character to be within the clause; secondly, whether the occasion upon which they were incurred was such as to be within it; thirdly, whether, if it was such, the application of the clause is excluded by the warranty against particular average. As to the first question, it was hardly disputed that the expenses incurred were of a character to be within the clause. Without incurring them, the subject-matter of the insurance would never have had any complete existence. They were incurred in order to earn it, and they represented so much labour beyond and besides the ordinary labour of the voyage rendered necessary for the salvation of the subject-matter of insurance by reason of a damage and loss within the scope of the policy, the immediate effect of which was, that the subject-matter insured would also be lost, or rather would never come into existence, unless such labour was bestowed. As the goods lay at Rio, no part of the chartered freight had accrued due, and no freight, even *pro rata itineris*, could have been claimed by the shipowner. His only right in respect of chartered freight was to detain the goods for a reasonable time in order to send them on in another vessel to their destination, and then claim an amount equal to that of the chartered freight. In order to do so labour must be used and expenses incurred. It can make no difference whether the shipowner happens to have at the port of distress a vessel of his own which he can employ in this service, in which case the labour of forwarding would be strictly that of himself or his servants, or whether he forwards in the vessel of another upon paying for his labour and that of his servants. Nor can it make any difference in the application of the clause, whether, as here, the goods are in a port of large resort, or where, by reason of the rate of freight, a forwarding vessel is easily procured, or whether the vessel becomes a wreck in an out-of-the-way place, and by unusual enterprise and skill the master is enabled to communicate with a vessel, either of his owner or of some other person, by which he forwards the cargo to its destination. The amount of labour is different in degree in the two cases, but in each it is a consequence of a peril insured against; it is incurred in preventing the destruction of nonentity of the subject-matter for which, in the event of its loss, the underwriters must be answerable; there is in each case a loss or misfortune threatening the safety of the subject-matter of the insurance, and by the operation of which, unless averted by labour, that subject-matter will be imperilled and the underwriters may become liable.

As to the second head, whether the occasion upon which the expenses were incurred was such as to be within the suing and labouring clause, this depends upon the true answer to the question, so thoroughly discussed in the course of the argument, namely, whether the clause ought to be limited in construction to a case where the assured abandons, or may perchance abandon, so that the expense incurred is not only in respect of a subject-matter in which the underwriters are interested, but upon property which by the abandonment actually becomes or may become theirs; or whether it extends to every case in which the subject of insurance is exposed to loss or danger for the consequence of which the underwriters would be answerable, and in

warding off which labour is expended. In the former construction the clause is inapplicable to the present case; in the latter it is applicable, and the assured is entitled to contribution. The question manifestly depends upon the construction of the language of the clause; and quite apart from the proved usage, we think the latter is the true construction. The words of the ordinary suing and labouring clause (to which in this policy is superadded an express provision as to abandonment, upon which one need only say in passing that it does not alter the question in favour of the underwriters) are used in the same form as must have been in common use before 1783, when Emerigon published his great work on Insurance, in which, amongst the various forms of the clause used at different ports, that of the London policy then used is given.² The words are quite general, and ought to be so construed, unless some good reason is given for restraining them, that "in case of any loss or misfortune it shall be lawful" to "sue, labour and travail for, in and about the defence, safeguard and recovery of the aforesaid subject-matter," "without prejudice to this insurance" (not "abandonment," as in the French *ordonnance* hereinafter cited), "the charges whereof the said company will bear in proportion to the sum hereby insured" (not "the amount saved," as in the French *ordonnance*). Up to this point there is not a word about abandonment, and that is the whole of the usual clause. The meaning is obvious, that if an occasion should occur where, by reason of a peril insured against, unusual labour or expense is rendered necessary to prevent a loss for which the underwriters would be answerable, and such labour or expense is incurred accordingly, the underwriters will contribute thereto, not as part of the sum insured in case of loss or damage, because it may be that loss or damage for which they would be liable is averted by the labour bestowed, but as a contribution on their part, as persons who have avoided detriment by the result, in proportion to what they would have had to pay if such detriment had come to a head for want of timely care. Take, for instance, the case of a policy on goods warranted free of average under 5l. per cent. wetted in a storm which drives the ship into a port of distress, when by drying, at an expense of less than 5l. per cent., the goods might be saved, or only damaged under 5l. per cent.; whilst if not dried they would decay and become damaged over 5l. per cent., they existing in specie, so that freight would be payable. In this case there is no abandonment, and, may be, no prospect of one, and yet it is the duty of the master to use all reasonable means to preserve the goods, and obviously for the interest of the underwriters to encourage him in the performance of that duty by contributing to the expense incurred. Not only the generality of the words, but also the subject-matter to which they relate, therefore, point to the application of the clause to all cases in which the underwriter is saved from liability to loss, whether partial or total, and whether an abandonment does or may possibly take place or not.

There remains to be considered, thirdly, whether the application of the suing and labouring clause is excluded in this particular case by the warranty against particular average—"warranted free from particular average, also from jettison, unless the ship be stranded, sunk or burnt;" and this depends upon whether the expression "particular average" in the context, and construed, according to the golden rule, by what goes before and what follows in the policy, includes expenses which fall within the suing and labouring clause, so that in effect the suing and labouring clause is expunged by the warranty. This is a question the answer to which involves most important consequences, because, if the warranty against particular average, or, to use a more accurate expression with the same meaning, the insurance against total loss only, excludes the operation of the suing and labouring clause, even where an impending total loss is averted by extraordinary exertion and expense, it must be because the word "average" has some fixed and definite meaning, so rigid and inelastic that it cannot be modified or limited so as to apply to

(2) 2 Emerigon, by Boulay-Paty, 289.

loss of or damage to the thing insured (the sense in which it has been hitherto understood by average staters), but that it must needs also include contribution to any labour incurred in the defence and safeguard of the thing insured, so that even an express clause left standing in the policy, with reference to such labour (the suing and labouring clause) must be rejected as inconsistent with the warranty. If that be so, it must equally be true of all memorandum goods which are warranted free from average under a certain percentage, and the operation of this would be so general, is not universal that the suing and labouring clause would be confined to the cases excepted in the memorandum alone. Two results would follow, both novel in practice, and one at least very remarkable. The first would be unfavourable to the underwriters in a novel way, because the memorandum was framed to protect them from frivolous demands in respect of small losses, which are most likely to have arisen from natural deterioration or wear and tear. The exception of stranding tends to shew that this was the scope of the memorandum, for it is the exception of such a loss as makes it probable that the deterioration of the goods, though under the given per-centage, was, nevertheless, not to be attributed to the perishable nature of the goods themselves. Accordingly, the rule has been to pay for damage to memorandum articles only when it exceeded the specified per-centage, and not to allow this per-centage to be eked out by expenses falling within the suing and labouring clause. Thus, in the case already put, of goods wetted by a storm, the amount of expense reasonably incurred in preserving the goods is according to the present practice contributed to under the suing and labouring clause, however small in the result the loss or damage to the goods, whilst the loss or damage of the goods is paid if it amounts to the stipulated per-centage, but not otherwise, and the amount of expenses is not added in order to make up that per-centage. Thus take the agreed per-centage at 5*l.* per cent., if the expense amount to 2*l.* per cent., and the loss or damage to 3*l.* per cent., only the expenses are paid, and not the average. But if we hold that the warranty excludes the application of the suing and labouring clause, the whole must be paid, and the underwriters will be exposed to the very inconvenience which the memorandum has been supposed to obviate. Upon the other hand, if the expenses should be less than the per-centage and a loss is thereby prevented, altogether, or reduced to an extent less than the per-centage, as if in the case put the expenses were 3*l.* per cent. and the damage only 1*l.* per cent., according to the present practice, the underwriters would pay the expenses; but if we decide for the present defendants, the underwriters, although saved from loss, would be altogether exempt from contribution. In our view, however, we are not compelled to adopt so inconvenient and impracticable a conclusion. The word "average," far from being a term of art (except in so far as, according to the evidence, usage may have limited its meaning to loss or damage to the goods themselves), or a word with a rigid or unchanging signification, necessarily including expenses in the defence or safeguard of the subject-matter insured, is a word used in a great variety of phrases, as applicable to different subject-matters, and not with any fixed or settled application. It would be tedious to go through the various uses to which it is applied, and we need do no more than refer to the instances cited in argument, and more especially to the very learned note of Mr. Maclachlan in 2 *Arnould on Insurance*, 3rd edit. p. 739. Amongst the various uses to which the word has been applied, no doubt that of "small expenses" is one, as in the usual clause of a charter-party. So in the case of insurance itself, expenses must often be taken into account in determining whether there has been a loss or not, but only because a thing is lost in insurance law, which cannot be got back except at an expense equal to its value when recovered. The question, here, however, is not as to the extension of which the term "average" is capable, but of the sense in which it ought to be understood in the particular context with which it is, if possible, to be reconciled, and read

so that effect may be given to every provision in the instrument. Nor is it to be forgotten that the suing and labouring clause, which, for the reasons already stated, specially provides for those cases, has been allowed to remain a part of the policy, and that a special provision as to a particular subject-matter is to be preferred to general language, which might have governed in the absence of such special provision. *Generalia specialibus non derogant, specialia generalibus derogant*. In our opinion, quite apart from usage, the true construction of the policy, as reconciling and giving effect to all its provisions is, that the warranty against particular average does no more than limit the insurance to total loss of the freight by the perils insured against, without reference to extraordinary labour or expense which may be incurred by the assured in preserving the freight from loss, or rather from never becoming due by reason of the operation of perils insured against; and that the latter expenses are specially provided for by the suing and labouring clause, and may be recovered thereunder.

Much reliance was placed for the defendants upon two recent decisions, which were said to have determined that there could be no liability under the suing and labouring clause when there was none under the policy—*The Great Indian Peninsular Railway Company v. Saunders* (1 Best & S. 41; s. c. 2 Ibid. 266; 30 Law J. Rep. (N.S.) Q.B. 218; 31 Law J. Rep. (N.S.) Q.B. 206) and *Booth v. Gair* (13 Mee. & W. 230; s. c. 13 Law J. Rep. (N.S.) Exch. 384). Before those decisions the liability of the underwriters appears to have been universally admitted and acted upon, even in the cases where the expenses were incurred to forward goods existing in specie at the port of distress, and warranted free from particular average, so that no liability could accrue to the underwriters by their not being forwarded. Probably the underwriters, up to the time of the first of those decisions, thought it so important to encourage honest efforts to preserve and forward the cargo, or otherwise to preserve the subject-matter of insurance, that they preferred paying in all unsuspicious cases, without nice inquiries as to whether the expenses had in the particular instance averted liability. In doing so they not only acted with liberality, but no doubt also best studied their own interest, and whilst they calculated the premium so as to include a remuneration for the extra liability which they were satisfied to bear, they, probably, at the same time found that the encouragement to fair dealing thereby afforded was their best security against the more serious losses that might arise from neglect of precautions of which the expense was to be thrown upon the assured. This practice, however, could not prevail to alter or enlarge the application of the suing and labouring clause, because although usage may impose a meaning upon a word such as "average" it cannot alter the rules of construction, and in the cases referred to the decision and the sole decision was, that freight and other expenses of forwarding from a port of distress to the port of destination goods warranted free of particular average, under circumstances in which the underwriter could not have been liable if the expenses were not incurred, was not within the true intent and meaning of the suing and labouring clause, which, in the contract of insurance, could only extend to suing and labouring by means of which the underwriters might obtain a benefit. In *The Great Indian Peninsular Railway Company v. Saunders* (1 Best & S. 41; s. c. 2 Ibid. 266; 30 Law J. Rep. (N.S.) Q.B. 218; 31 Law J. Rep. (N.S.) Q.B. 206) the goods were iron rails from Bombay, shipped to be paid for lost or not lost. They were insured with a warranty free of particular average, unless the ship should be stranded, sunk or burnt. The vessel on her way put into Plymouth, where she was a total loss, but she was not stranded, sunk or burnt. The rails were saved and sent on in other vessels, and for the freight paid upon such forwarding the underwriters were held not to be liable: and Mr. Justice Blackburn, in delivering the judgment of the Court, carefully abstained from deciding the question now before us, for he said, "It is not necessary to decide whether an underwriter on a policy against total loss only is under this clause liable for expenses incurred by the assured for the purpose of rescuing the subject-matter of an insurance from a state of peril which might

have resulted in a total loss, but did not. There are reasons both for and against this stated by Mr. Phillips in his *Treatise on Insurance*, section 1777, and the question seems never to have been actually decided. But in the present case it does not arise. The expenses here were incurred for the purpose of forwarding the subject-matter of insurance to its destination at a time when the iron was not in any peril of total loss either actual or constructive. Had the insured chosen, instead of paying this extra freight, to sell the rails in England, as he might have done if he pleased, he could have made no claim on the underwriters, for it would not have been a constructive total loss, according to *Rosetto v. Gurney* (11 Com. B. Rep. 176; s. c. 20 Law J. Rep. (N.S.) C.P. 257), unless the amount of the extra freight exceeded the value of the goods when forwarded, which is not the case here; and an actual total loss is out of the question." That judgment was affirmed in the Exchequer Chamber (2 Best & S. 266; s. c. 31 Law J. Rep. (N.S.) Q.B. 206), where Chief Justice Erle in like manner, delivering the judgment of the Court, said, "The expenses that can be recovered under the suing, labouring and travelling clauses, are expenses incurred to prevent impending loss within the meaning of the policy. Now, here, the goods were given up to the plaintiffs in perfect safety, and the question is, were those expenses incurred to prevent a total loss? Had the owners a right when the goods were given into their possession to turn the transaction into a total loss? Certainly not, for they had the goods in specie, and consequently that 82*l.* 11*s.* 7*d.* had no reference to suing, labouring or travelling to prevent such a loss." That case was followed by *Booth v. Gair* (15 Com. B. Rep. N.S. 291; s. c. 33 Law J. Rep. (N.S.) C.P. 99), in which bacon was insured upon a voyage from Liverpool to New York "free from average, unless general or the ship was stranded, sunk or burnt." The vessel on her way by perils of the sea, but without being stranded, sunk or burnt, became disabled and put into Bermuda, where she was constructively totally lost. The bacon was landed in specie, and was not totally lost, either constructively or otherwise. No expenses appear to have been incurred in saving the goods from a total loss, which was negatived, for certain expenses were incurred in the way of extra freight, transhipment, warehousing, surveying and cooperage, all of which were treated as expenses of forwarding the goods. It was further proved that it was the practice of underwriters on goods to pay such expenses, under like circumstances, under the name of particular charges. The judgment was for the underwriters, upon the ground stated by Chief Justice Erle, namely, that "what the master did was in discharge of his duty in ordinary course, and there was no peril creating a risk of a total loss from which the underwriter was saved by the expenses in question. There were no other perils than such as are always attendant on the transit of goods by the voyage in question." No notice appears to have been taken of the practice of underwriters, probably for the reason already mentioned, that although usage might give to the words "average" or "particular average," or "average unless general," a conventional meaning, so as to make them include partial loss or damage of the subject-matter only, and not what are known as "particular charges" which fall within the suing and labouring clause, yet such usage could not control the construction of the policy, by which that clause must be limited in application to cases in which the underwriter might incur liability, and therefore might derive a benefit from the extraordinary exertion. These decisions, therefore, are inapplicable to the present case, and when examined prove to be anything but authority for the defendants. Passages from *Emerigon* were cited by the defendants' counsel, and much relied upon, in which a contrary opinion is supposed to have been expressed to that upon which we found our judgment. In the first volume, page 600, of Boulay-Paty's edition, treating of general and particular average as between the owner of ship, freight and goods, he says: "Les frais faits pour sauver la marchandise, sont avaries simples pour le compte des propriétaires." He refers to the 17th chapter, section 7, for a discussion of the question of liability as between the insurer and the assured, either with or without a suing and labouring clause, and in that which is the

part of the work applicable to the present subject, he throughout treats the question as one depending upon the very words of the suing and labouring clause. Nothing can make this more clear than a reference to his treatment of the question, "Si les frais de sauvetage excèdent la valeur des effets sauvés, cet excédant est-il à la charge des assureurs?" To which he answers: "Suivant les clauses insérées dans les formules de diverses places de commerce, les assureurs, indépendamment des sommes par eux assurées, sont tenus de payer l'excédant des frais de sauvetage." He then sets out the forms of the suing and labouring clause used at Antwerp, Rouen, Nantes and Bordeaux, and refers to a similar one (Loccenius, page 981,) by which the underwriters undertake for expenses incurred in the safeguard of the goods, even although no benefit should follow; and he remarks thereupon, "Par ces formules les pouvoirs les plus libres sont donnés à l'assuré et à ses représentans, afin de les inviter à travailler au sauvetage, sans être arrêtés par la crainte d'en supporter eux-mêmes les frais; mais les assureurs, en souscrivant pareils pactes, contractent à l'aveugle un engagement dont les conséquences sont indéfinies." He then gives the London form of suing and labouring clause as still used, and he proceeds to say that the Marseilles policy (with which he was so familiar) contained nothing of the sort, and that an express authority to sue and labour was necessary in order to charge the Marseilles underwriters with the expenses. This view, so far as it bears upon the present argument, is in accordance with the view of the London average staters, and favours a distinction between loss and damage to the thing assured, and expenses incurred in its protection, and a separate provision for the latter. In fact, the key to the French authorities is to be found in the positive law of France upon the subject, by which, in the absence of express contract, contribution on the part of the underwriters was enforced in the case of the greater peril of shipwreck or stranding, and then only to the value of the property saved for the underwriter. Thus, by the *Ordonnance de la Marine*, of 1681, lib. 3, tit. 6, art. 45, "En cas de naufrage ou échouement, l'assuré pourra travailler au recouvrement des effets naufragés, sans préjudice du délaissement qu'il pourra faire en temps et lieu, et du remboursement de ses frais dont il sera cru sur son affirmation jusqu'à concurrence de la valeur des effets recouvrés." This is followed closely, though not exactly, by the *Code de Commerce*, art. 381, with the difference that the latter, by using the word "doit" instead of "pourra," makes such exertions the duty, and not merely the privilege of the assured. Read by the light of this text of the *Ordonnance* the views of Emerigon, so far from being opposed to, are in favour of the construction which we adopt.

Hitherto we have only adverted in passing to the evidence and the finding of the jury, upon the understood meaning in the business of marine insurance of the phrase "particular average." If necessary, we should have been prepared to hold that the evidence established such an understood meaning, according to which "particular average" does not include "particular charges," and to act upon such usage as equally sound with the express part of the contract. It is needless, however, to enlarge upon this part of the case, because, upon the facts proved and the true construction of the policy itself, we have, for the reasons already given, come to the conclusion, that there was a danger of the total loss of the freight by reason of the loss of the ship by perils insured against; that the measures taken by the plaintiff to avert that loss, and the expenses incurred therein, were taken and incurred to the benefit of the underwriters in averting loss for which they would have been liable, and so that they were within the suing and labouring clause, and that the underwriters are liable to contribute thereto. It is satisfactory, however, to think that in arriving at this conclusion upon the meaning of the contract into which the defendants have entered, we are deciding also in accordance with the approved usage of commerce.

The verdict for the plaintiff was, therefore, right, and the rule to enter the verdict for the defendants is discharged.

Rule discharged.

[IN THE COMMON PLEAS.]

April 23, 1866.

ENGLAND v. MARSDEN.

35 L. J. C.P. 259; L. R. 1 C.P. 529; 14 L. T. 405; 14 W. R. 650;
12 Jur. N.S. 706.

Referred to, *In re Fox; Ex parte Bishop*, [1881] E. R. A.; 50 L. J. Ch. 18; 15 Ch. D. 400; 43 L. T. 165; 29 W. R. 144 (C. A.). Not followed, *Edmunds v. Wallingford*, [1885] E. R. A.; 54 L. J. Q.B. 305; 14 Q.B. D. 811; 52 L. T. 720; 33 W. R. 647 (C. A.).

Money paid to Defendant's Use—Implied Request.

MONEY COUNTS.—*The plaintiff, to whom the defendant had given a bill of sale of his goods as a security for a debt, with the usual power of sale, having upon default taken possession of the goods under the bill of sale, voluntarily and without being requested to do so by the defendant, allowed the goods to remain on the defendant's premises for three months, until rent had accrued due to the defendant's landlord, who then distrained for such rent, and the plaintiff paid the same to free the goods from the distress:—Held, that this was not such a payment by compulsion as would entitle the plaintiff to recover it from the defendant as money paid to his use, without an express request by the defendant to make it.*

The declaration contained the common money counts for money lent, for money paid for the defendant's use, and for money due on accounts stated.

Plea, inter alia, never indebted.

The case was tried, before Montague Smith, J., at the Middlesex Sittings, after Michaelmas Term, 1865, when the jury found a verdict for the plaintiff for 8*l.* 4*s.* 6*d.* They also found that the plaintiff had paid certain sums, amounting altogether to 42*l.* 9*s.*, and the question was as to the plaintiff's right to recover in this action the sums he had so paid, the jury having found that he had paid them to protect his own interest under a bill of sale, and not at defendant's request. The facts, so far as they relate to this point, were as follows: The defendant, who had formerly kept the Gospel Oak Tavern, Circus Road, Kentish Town, gave the plaintiff, on the 2nd of June, 1860, a bill of sale of all the furniture and effects, stock-in-trade and fittings, at that tavern, for securing to the plaintiff the sum of 180*l.* by weekly payments of 3*l.* The bill of sale was by way of mortgage, and contained the usual power of sale in case of default in the weekly payments.

On the 9th of July, 1860, the defendant was arrested, and he shortly afterwards petitioned for relief under the Insolvent Act. The plaintiff took possession of the effects under the bill of sale on the 10th of July, 1860, but instead of realizing thereunder he continued in possession until the 23rd of October following, the defendant's wife and family residing on the premises and carrying on the business of the tavern in the absence of the defendant, who still remained in prison; and on the said 23rd of October the landlord distrained for the quarter's rent which had accrued due on the 29th of September. The plaintiff paid the broker who so distrained 5*l.* 5*s.*, and 1*l.* 4*s.* for holding over and keeping a man in possession, and ultimately, on the 26th of October, he paid the landlord 36*l.* the rent due, and so released the property secured by the bill of sale from the distress. These three sums, amounting to the sum of 42*l.* 9*s.*, the plaintiff now claimed to be repaid by the defendant.

Montagu Chambers having, pursuant to leave reserved at the trial, obtained a rule *nisi* to increase the verdict by this sum of 42*l.* 9*s.*, on the ground that there was an implied authority or request of the defendant to make such payment, citing *Exall v. Partridge* (8 Term Rep. 318),—

H. T. Cole now shewed cause.—There was no express request to make this

payment, and the law will not imply one. The case of *Exall v. Partridge* (8 Term Rep. 318) is very distinguishable. There the plaintiff had placed his carriage under the care of the defendant Partridge, who was a coachmaker, and the carriage having been seized for rent by the landlord, the plaintiff paid the rent under the pressure of such distress. That was a compulsory payment for the benefit of another who was liable to have paid it. That is very different from such a case as the present, where a man having taken as a security the goods of another instead of realizing, chooses to allow the goods to remain on the premises for several months, and so incur the risk of being seized for rent. The moment he acted on the bill of sale he should have sold the goods, or, at all events, have removed them, unless there was an agreement between him and the defendant for payment of the landlord's rent in case the goods were allowed to remain; but here there was no such agreement, and as the plaintiff voluntarily exposed the goods to the risk he must take the consequences.

Montagu Chambers and *C. P. Butt*, in support of the rule.—By the bill of sale the property in the goods had become vested in the plaintiff, and the goods having been seized for rent, which the defendant was liable to pay, the payment by the plaintiff was a payment which he was compelled to make in order to redeem his own goods, and, therefore, according to *Exall v. Partridge* (8 Term Rep. 318), the law will under those circumstances imply a request. The case of *Exall v. Partridge* (8 Term Rep. 318) is recognised as an authority in *Rodgers v. Maw* (15 Mee. & W. 444; s. c. 16 Law J. Rep. (N.S.) Exch. 137). The defendant's wife and family were on the premises, and the business of the tavern was really being carried on for the defendant's benefit, and for that purpose the goods were left by the plaintiff on the premises.

[*BYLES, J.*—The bill of sale was a security for a debt, and therefore it was to the interest of both parties that the most money should be got for the goods. *MONTAGUE SMITH, J.*—Had the jury been asked, they would have found that the defendant never meant the rent to be paid by any one.]

The defendant continued in the house and got the benefit of the payment.

ERLE, C.J.—I am of opinion that this rule should be discharged. The facts are these: the plaintiff having taken possession of goods under a bill of sale on the 10th of July, let them remain on the defendant's premises until after the 29th of September following, when rent accrued due, and afterwards the landlord distrained the goods for the rent which had so accrued. The plaintiff then freed the goods from such distress by a payment which he seeks now to recover from the defendant. It is said that whenever the owner of goods places them on the premises of another, and the goods are distrained on by the landlord for rent, and the owner of the goods frees them from such distress, the payment is a payment by compulsion, which he has a right to recover from the person whose rent has been so paid, and the case of *Exall v. Partridge* (8 Term Rep. 318) has been relied on in support of this. I think that case is different from the present one. There the defendant Partridge was a coachmaker, and it was for his benefit and at his request that the plaintiff in that case left his carriage with him and the rent having been paid by the plaintiff in order to clear the carriage from a distress, the action was held to lie. Here, however, the goods were left on the defendant's premises for the benefit of the plaintiff, and without any request of the defendant: they had by the bill of sale become the absolute property of the plaintiff, and he had a right to take them away; and, indeed, it was his duty to have done so. It may be that his reason for allowing them to remain on the premises was, that he thought by so doing he should sell them for a larger sum. However, be that as it may, it was the same thing as that of a person having goods, and, not knowing where to warehouse them, put them on the defendant's premises without his leave, and they were afterwards distrained for rent by the defendant's landlord.

BYLES, J.—I am of the same opinion. As I collect the facts the payment of the rent was exclusively for the plaintiff's advantage. There is not the slightest evidence that the payment was made at the defendant's request, and,

I think, under the circumstances, there is nothing to shew that the law would imply a request.

KEATING, J.—I also am of the same opinion. The case of *Exall v. Partridge* (8 Term Rep. 318) illustrates the rule of law, that where one person is compelled to pay a debt which another is legally liable to pay, the law will imply a promise by the latter to repay what has been so paid. The distinction between that case and the present is, that here the plaintiff was not compelled to pay the rent within the meaning of that rule of law, because it was voluntary and for his own advantage that he allowed the goods to remain on the premises whilst the rent was accruing until it became due. In making this distinction we do not, I think, infringe the rule of law.

MONTAGUE SMITH, J.—The plaintiff, by his own voluntary act, and without any request to do so by the defendant, allowed the goods to remain on the premises. Probably, the plaintiff thought it better to wait until a fresh tenant took the house, when he should get more for the goods; but it was for his own benefit that the plaintiff left them to remain with a full knowledge of the liability he was incurring. According to the finding of the jury, there was no express authority on the part of the defendant to allow the goods to remain; and, considering the insolvency of the defendant and his want of money, I do not believe he would have given such an authority had he been asked to do so. The claim, moreover, is a very stale one.

Rule discharged.

[IN THE COMMON PLEAS.]

April 29, 1866.

In re THE NORTH BRITISH RAILWAY COMPANY AND TROWSDALE
AND OTHERS.

35 L. J. C.P. 262; L. R. 1 C.P. 401.

Arbitration—Time for moving to set aside Award—Agreement.

ARBITRATION, REFERENCE AND AWARD.—Where two terms have elapsed after the publication of an award, it is too late to move to set the award aside, notwithstanding that both parties to the reference may have agreed to the motion being then made.

C. Pollock moved to set aside two awards made on the 31st of October, 1865, by Mr. Tone, who had been the principal engineer of the Wansbeck Railway Company before its amalgamation with the North British Railway Company. By a memorandum of arrangement made on the 15th of January last, between the last-mentioned railway company and Messrs. Trowsdale & Boulton, the following was agreed to by both parties: "The company to make Mr. Tone's two awards of the 31st of October last rules or a rule of the Court of Common Pleas forthwith. Messrs. Trowsdale to move the Court to set aside those awards, on the ground of want of jurisdiction in the arbitrator. The company in any event to pay the costs of Messrs. Trowsdale of the motion or motions, to be taxed (if required) as between attorney and client. If the Court decide that Mr. Tone had jurisdiction, Messrs. Trowsdale to be at liberty to move to set aside the awards on any grounds that they may be advised. If both applications are decided against Messrs. Trowsdale, or if the first be decided against them, and the second be not made, the cases are to be heard again before Mr. Tone. The reference made by Messrs. Trowsdale to Mr. Stephenson not to be further proceeded with till after the 31st of January inst." According to the above agreement, an application was made, last Hilary Term, to set aside the awards, on the ground that Mr. Tone had no jurisdiction to act as arbitrator in the matter, and the objection to the awards was limited to that

ground. The Court, on the last day of that term, disposed of the case by discharging the rule, as it was of opinion that Mr. Tone had jurisdiction.¹ As by the terms of the above arrangement, Messrs. Trowsdale were to be at liberty to move afterwards to set aside the awards on any other ground, a rule *nisi* to that effect is now asked for, as, besides the question of jurisdiction, there are other objections to the awards.

[BYLES, J.—Is not the application now too late? ERLE, C.J.—How does it appear that the arrangement between the parties which has been referred to was made with the sanction of the Court?]

The arrangement was made at the request of and for the benefit of the railway company, who, moreover, undertook to pay the costs of the motion in any event. This they would not have done had not the motion been then confined to the objection of want of jurisdiction. But this was not to prejudice Messrs. Trowsdale taking afterwards any other objection they might have to the awards.

[KEATING, J.—Suppose both parties to a cause were to agree that either side might move for a new trial after the first four days of the term succeeding the trial, would the Court allow such agreement to be carried out?]

Where the reference is not under the statute, a party has been sometimes allowed to apply to the Court to set aside the award after the term next after the award has been made, on shewing sufficient reason for the delay.

[BYLES, J.—Here Messrs. Trowsdale had the whole of Michaelmas Term to move in.]

The delay has arisen from what has taken place respecting the question of jurisdiction, and the fact that the rule for setting aside the awards on that ground, was not disposed of until the last day of last term.

ERLE, C.J.—No instance can be given of an exception like the present to the general rule, that the application to set aside an award must be made during the first term after the award has been made. There are some precedents of exceptions to that rule, but this case does not fall within those precedents, and we cannot, therefore, grant this application.

Rule refused.

[IN THE COMMON PLEAS.]

April 18, May 7, 1866.

In re EDGE.

35 L. J. 263; L. R. 1 C. P. 533; 12 Jur. N.S. 741.

Acknowledgment by Married Woman—3 & 4 Will. 4. c. 74. s. 89.—*Reg.*

(1) The case is noticed in the *Notes of Cases*, p. 39. The question as to the power of Mr. Tone to arbitrate arose out of the terms of the contract made by Messrs. Trowsdale with the Wansbeck Railway Company, by which it was stipulated, that in case of difference touching anything to be done under such contract the same should be referred to John Furness Tone, "if and so long as he shall continue to be the company's principal engineer." The company was afterwards, by an act of parliament, merged in the North British Railway Company, but the act provided that all contracts should be valid notwithstanding. Mr. Tone still continued to act as engineer of the Wansbeck portion of the line, and disputes having arisen respecting the contract, the company claimed to refer them to Mr. Tone, who, accordingly, proceeded with the reference, notwithstanding protest on behalf of Messrs. Trowsdale. *Mellish* and *J. A. Russell* shewed cause against the rule to set aside the awards, on the ground that Mr. Tone had no jurisdiction; and *C. Pollock* argued in support of the rule.—The Court discharged the rule, on the ground that, according to the construction of the act of parliament and the intention of the parties, the stipulation referring disputes to Mr. Tone was to continue unchanged, notwithstanding the Wansbeck Railway Company had by such act become merged in the North British Railway Company.

Gen. Hil. Term—Filing Certificate after more than One Month from the Time of Acknowledgment.

FINES AND RECOVERIES.—Where several years had elapsed between the making the acknowledgment and the taking the certificate thereof to the office for enrolment, the Court allowed the same to be received by the officer for that purpose, on the delay being accounted for and shewn to have been unintentional, and on the Court being satisfied as to how the property had been dealt with, and the purpose for which the certificate was now wanted to be enrolled.

C. Pollock moved that a certificate of acknowledgment by Timeson Edge, and the affidavit verifying the same, might be received by the proper officer and enrolled, notwithstanding the lapse of time since the acknowledgment was taken. The acknowledgment was made by Mrs. Edge, on the 13th of March, 1860, but the affidavit verifying the same, though engrossed at the time, was not sworn until the 15th of November last.

By Reg. Gen. Hil. Term, 4 Will. 4, it is ordered "that the certificates and affidavits verifying the same shall, within one month from the making the acknowledgment, be delivered to the proper officer appointed under the said act, and that the officer shall not after that time receive the same without the direction of a Court or a Judge;" a similar application to the present has been made to Mr. Justice Keating at chambers, but that learned Judge declined making an order. The delay is thus accounted for by the solicitor who prepared the deed of settlement and certificate of acknowledgment: he states in his affidavit that, at the time such acknowledgment was taken, he was having his papers removed into new offices, and that the certificate and affidavit verifying it were by some means mixed with and put away with other papers in such new offices; that in consequence of this, and of his managing clerk, who had the management of this business, leaving him about that time, and not having occasion for an office copy of such certificate until October last, he was not until then aware that the certificate had not been duly enrolled; and he further states that the delay was quite unintentional. It appears also from the affidavit that the indenture acknowledged by the married woman, and which is dated the 13th of March, 1860, is a post-nuptial settlement, made pursuant to an agreement before marriage, by which certain property was settled to the sole use of the said Timeson Edge during her life, and after her decease to the use of Elizabeth Stamway and Josephus Pickford, children of the said T. Edge by a former marriage. The only dealing with this property since then is a mortgage of it on the 17th of March, 1860, and a subsequent transfer of such mortgage to Messrs. Edmund and Alfred Tennant, to whom, on the 5th of October last, Josephus Pickford conveyed his equity of redemption.

In a case of *In re Walker*, not reported, an acknowledgment was taken in 1836, and the application to file the certificate was not made until June, 1862; the delay there arose from the certificate having accidentally been put away with the title-deeds, and the omission to file it was only discovered when, the property being sold, it was wanted for the title.

BYLES, J.—It ought to be shewn that nothing has occurred by which any one interested in the property has been prejudiced. This should be shewn, as well as the object for which the filing of the certificate is now wanted, otherwise the rule of Court will be entirely useless.

On a subsequent day in this term,

C. Pollock (May 7) renewed the application on affidavit, shewing that the property had not been dealt with otherwise than as above mentioned, and that the only purpose for which the filing of the certificate was wanted was, to enable J. Pickford to complete the sale of his equity of redemption.

Per Curiam.—The certificate may be enrolled.

Order made.

[IN THE COMMON PLEAS.]

April 23, 1866.

HARRISON v. SEYMOUR.

35 L. J. C.P. 264; L. R. 1 C.P. 518; 12 Jur. N.S. 924.

See *Croydon Commercial Gas and Coke Co. v. Dickinson*, [1876] E. R. A.; 45 L. J. C.P. 869; 1 C.P. D. 707; 35 L. T. 943; 24 W. R. 825 (C.P. D.): on appeal, [1877] E. R. A.; 46 L. J. C.P. 157; 2 C.P. D. 46; 36 L. T. 135; 25 W. R. 157 (C. A.).

Principal and Surety—Divisibility of Bond.

DEED AND BOND. PRINCIPAL AND SURETY.—*By an agreement between the plaintiff and one S, the plaintiff agreed to purchase of S. a ship called the Devonport, the price of such purchase being the payment of a sum of money and the transfer to S. of the plaintiff's ship called the Lord Dalhousie; and upon the delivery of the Devonport the plaintiff agreed to lend S. 6,000l. on mortgage of the Lord Dalhousie, and S. agreed to repair the Lord Dalhousie so as to class her eight years A 1 at Lloyd's, and anything remaining to be done to the Devonport was to be done by S. within two weeks after the ship's arrival in London. The defendant, as surety for S, gave a bond to the plaintiff, which, after reciting the above agreement, was conditioned to be void if S. forthwith repaired the Lord Dalhousie, and if that vessel should within three months be classed eight years A 1 at Lloyd's, and if S. should within two weeks after the arrival of the Devonport in the port of London do all that remained to be done to that vessel. The plaintiff and S. afterwards, without the consent of the defendant, made another agreement, by which the time for the completion of the Devonport was accelerated, and more things were required to be done to complete that vessel than remained to be done according to the original agreement:—Held, that the stipulations in the condition to the bond as to the Lord Dalhousie were so separate from those as to the Devonport, that the defendant was liable on the bond for a breach of the condition as to the Lord Dalhousie, notwithstanding his liability under the bond, so far as related to the Devonport, was discharged by the alteration which the second agreement made in the terms of the first.*

Action on a bond.

The declaration stated, that the defendant, by his bond, sealed with his seal, and bearing date the 29th of March, 1865, became bound to the plaintiff in the sum of 6,000l., to be paid by the defendant to the plaintiff, subject to a condition thereunder written, whereby, after reciting that by agreement between the plaintiff of the one part, and John Smurthwaite of the other part, the plaintiff agreed to purchase a ship called the *Devonport* from the said J. Smurthwaite, and the price for such ship was the transfer, by the plaintiff, to the said J. Smurthwaite of a ship of the plaintiff's called the *Lord Dalhousie*, and the payment to the said J. Smurthwaite of a sum of money; and that by the said agreement the plaintiff agreed, upon the delivery to him of the said ship *Devonport*, to lend to the said J. Smurthwaite 6,000l. on mortgage of the said ship *Lord Dalhousie*, and the said J. Smurthwaite agreed that he would at his own expense repair and restore the said ship *Lord Dalhousie* so as to class her eight years A 1 at Lloyd's; and the said J. Smurthwaite also agreed, as an additional security that he would forthwith so repair and restore the said ship, to give a satisfactory security to the plaintiff by the defendant; and that it was thereby further agreed that the plaintiff should have the option of settling for the said ship *Devonport*, whether complete or not, at any time after a week from the date of the said agreement, and that anything then remaining to be done and supplied to the said ship according to the said contract and the specification thereafter mentioned should be done and supplied in London by and at the expense of the said J. Smurthwaite within two weeks after the

ship's arrival in London; and that the said J. Smurthwaite thereby agreed to give the plaintiff a satisfactory guarantie by the defendant to that effect. And after further reciting that the defendant had agreed to enter into the said bond with such defeasance as thereafter contained, it was conditioned and provided, that if the said J. Smurthwaite would forthwith, at his own expense, restore and repair the said ship *Lord Dalhousie*, so that she should be entitled, according to the rules of Lloyd's registry, to be classed eight years A 1, and if the said ship should within three calendar months from the date of the said bond be classed eight years A 1 at Lloyd's, and if the said J. Smurthwaite should at his own expense, within two weeks after the arrival of the said ship *Devonport* in the port of London, do and supply all such matters and things as, according to the said recited contract and the specification therein mentioned, should remain to be done and supplied upon the settlement for the said ship *Devonport* as above mentioned, then the said bond should be void, but should otherwise be and remain in full force and virtue.

And the plaintiff, for assigning a breach of the condition of the said bond, says that the said J. Smurthwaite did not forthwith at his own expense restore and repair the said ship *Lord Dalhousie*, so that she should be or was entitled, according to the rules of Lloyd's registry, to be classed eight years A 1; but therein made default, contrary to the terms of the said condition.

And for assigning a further breach of the said condition, the plaintiff says that the said ship *Lord Dalhousie* was not within three calendar months from the date of the said bond, which period had elapsed before action brought, classed A 1 at Lloyd's.

And for assigning a further breach of the said condition, the plaintiff says that although the said ship *Devonport* arrived in the port of London, and although upon the settlement for the said ship as aforesaid there remained, according to the said contract and the specification therein mentioned, divers matters and articles to be done and supplied by the said J. Smurthwaite, yet the said J. Smurthwaite did not at his own expense, within two weeks after the arrival of the said ship *Devonport* in the port of London, which period had elapsed before action brought, do and supply all such matters and things as aforesaid, or any of them, but therein failed and made default, contrary to the terms of the said condition.

The defendant traversed the breaches; and also pleaded (fourthly) for defence on equitable grounds, that he entered into the said bond and condition in the declaration mentioned as surety only for the said J. Smurthwaite, and that afterwards and before the arrival of the ship *Devonport* in the port of London, and before the expiration of the said three calendar months in the said condition mentioned, the plaintiff and the said J. Smurthwaite, together with one William Joseph Young, entered into a certain other agreement, dated the 20th of April, 1865, without the knowledge, privity or consent of the defendant, which last-mentioned agreement the plaintiff then, without the knowledge, privity or consent of the defendant, accepted and received from the said J. Smurthwaite, in lieu of and substitution for, and in accord and satisfaction of so much of the agreement dated the 22nd of March, 1865, in the said condition mentioned as relates to the said ship *Devonport*.

The plaintiff took issue on such plea, and also demurred thereto.

The cause was heard, before Erle, C.J., at the London Sittings after Trinity Term, 1865, when the bond was proved to have been given in the terms set out in the declaration. After making the agreement between the plaintiff and J. Smurthwaite, referred to in the said bond, and which was made on the 22nd of March, 1865, and after giving the bond, some negotiation took place between the plaintiff and Smurthwaite with reference to a settlement, although the ship *Devonport* was not finished; and on the 10th of April, 1865, the defendant, who traded under the firm of "Seymour, Peacock & Co.," signed the following letter, addressed to the plaintiff:—

"Dear Sir,—With reference to the contract for the purchase by you of

the ship *Devonport*, we understand it is proposed to make a settlement with you in the mean time by leaving a small sum in your hands until the ship is finally finished; and in the event of your so making a settlement in account we hereby undertake that our guarantie shall remain in force, notwithstanding such a mode of settlement.

(Signed)

“Seymour, Peacock & Co.”

On the 20th of April, 1865, an agreement was made between Smurthwaite of the first part, the plaintiff of the second part, and one William Joseph Young of the third part; which,—after reciting the agreement of the 22nd of March, 1865, and that Smurthwaite had not completed the ship *Devonport*, and that he had requested the plaintiff to pay him 19,500*l.* on account of the amount agreed to be paid under the said agreement, and that the plaintiff had agreed to do so on certain terms; and after reciting also that 180*l.* was to be deducted for short tonnage, and 129*l.* 7*s.* 6*d.* for discount; and reciting that after payment of the 19,500*l.* and the deduction of 180*l.* and 129*l.* 7*s.* 6*d.*, there still remained in the hands of the plaintiff the sum of 940*l.* 12*s.* 6*d.*, and that it had been agreed that that sum should be paid over on completion to the said W. J. Young,—stated that Smurthwaite agreed to complete the said vessel and her outfit, according to contract, on or before the 27th of April then next, and that it was agreed that the plaintiff should retain the said sum of 940*l.* 12*s.* 6*d.* and pay it on such completion of the said ship. The agreement also stated that the plaintiff was to be paid by Smurthwaite interest at 5*l.* per cent. per annum on the said 19,500*l.*, until the said ship should be fully completed; and it contained a power to the plaintiff to do what was necessary to complete the vessel, and to apply any part of the said 940*l.* 12*s.* 6*d.* for that purpose, and also a stipulation that the articles specified in a list annexed, several of which were not in the agreement of the 22nd of March, 1865, should be deemed to be necessary to the due completion of the ship.

With the exception of the letter of the 10th of April, 1865, the defendant had not sanctioned this second agreement.

In the May following Smurthwaite became bankrupt.

At the trial, the defendant relied on the agreement of the 20th of April as discharging him from liability as surety altogether, on the ground that his liability *qua* the *Lord Dalhousie* could not be severed from his liability *qua* the *Devonport*.

The plaintiff, however, obtained a verdict for 1,800*l.* damages on the first and second breaches, and for 1*s.* damages on the third breach. Afterwards, pursuant to leave reserved at the trial,

J. Brown obtained a rule *nisi* to set aside the verdict, and to enter it for the defendant, on the fourth plea, on the ground that that plea was sustained by the evidence, and that the defendant was discharged from his liability on the bond by the agreement of the 20th of April, 1865, and that, at least, the defendant was so discharged so far as related to the ship *Devonport*.

Sir G. Honyman (*E. James* with him) now shewed cause against the rule, and also appeared in support of the demurrer.—As only nominal damages have been found in respect of the *Devonport*, the substantial question between the parties is confined to the *Lord Dalhousie*. The fourth plea is bad. It, moreover, was not proved. The plea, though pleaded to the whole declaration, shews no answer to the breaches assigned as to the *Lord Dalhousie*. There were two separate transactions, one relating to the vessel the *Lord Dalhousie*, and the other relating to the vessel the *Devonport*, and although both were included in the same bond, the condition was clearly divisible, and, therefore, any answer as to the breach relating to one vessel is no answer as to the breach relating to the other vessel. The recent case of *Skillett v. Fletcher* (35 L. J. Ch. 154; s. c. 1 Law Rep. C.P. 217) is directly in point.

J. Brown (*Hannen* with him), contra.—The case of *Skillett v. Fletcher* (35 L. J. C.P. 154; s. c. 1 Law Rep. C.P. 217) is distinguishable from the present

case. There the alteration which affected the liability of the surety was by statute, and not, as here, by an agreement and act done by the creditor.

[BYLES, J.—That is not the ground on which the Court gave their decision in that case. MONTAGUE SMITH, J.—The Court there considered it the same as if there had been two bonds.]

In the present case there is one entire transaction in which the rights as to the two ships are so completely mixed together (the taking of one ship being part of the consideration for the other) that it is impossible to separate them. Perhaps the fourth plea is not strictly right in form, and it would have been better had it referred to the original agreement of the 22nd of March, 1865, and shewn the alterations in it so far as they relate to the *Devonport*. However, the plea, if necessary, might be amended in conformity with the facts. Perhaps the reference in the declaration to the original agreement and the recitals in the declaration sufficiently shew, without amending the plea, that the transaction is an entire one, and so raise the same questions as are raised by the facts.

[MONTAGUE SMITH, J.—Clearly the original agreement was not put an end to, or satisfied by the second agreement, so that the plea as pleaded could not be proved.]

The second agreement required things to be done for completing the *Devonport* which were not required by the first agreement, and it also altered the time within which that vessel was to be completed, and instead of its being within two weeks after the ship's arrival in London, it fixed the 27th of April, 1865, as the date for completion, which was necessarily a shortening of the time, and so in both respects the liability of the surety was increased. This affects the contract as to the *Dalhousie*, for only on the completion of the *Devonport* was the plaintiff to lend Smurthwaite 6,000*l.* on mortgage of the *Dalhousie*, so that what alters the circumstances under which the *Devonport* was to be completed affects this loan, which formed part of the consideration for repairing and restoring the *Dalhousie* so as to class her A 1.

[ERLE, C.J.—Does not the 19,500*l.* include the 600*l.*, with the exception of the sum retained?]

It is impossible to separate and distinguish the monies; both parties have so treated it as one transaction as to mix up all the monies; and then there is an agreement to pay interest on the whole 19,500*l.* The terms of the original agreement are altered by the second agreement, and, according to *Whitcher v. Hall* (5 B. & C. 269), the surety is therefore discharged.

Sir G. Honyman, in reply, was stopped by the Court.

ERLE, C.J.—I am of opinion that the plaintiff is entitled to our judgment. The action is against the defendant as surety for John Smurthwaite, and no doubt if the liability of the principal has been afterwards altered without the consent of the surety, the surety is discharged. The bond which is the subject of this action is the contract of the surety, and by that bond the defendant, as surety, bound himself for the performance by Smurthwaite of two distinct matters, just as much as if he had done so as such surety by one bond for the performance of one of those matters, and had done so as such surety by another bond for the performance of the other of those matters, in which case any alteration as to the subject-matter of one bond would not affect his liability under the other bond. The transactions which have given rise to the present question are complicated. Smurthwaite was forthwith to repair the ship *Lord Dalhousie*, and was also within three calendar months to class her eight years A 1 at Lloyd's; those form together one separate matter. Then, as to the ship *Devonport*, Smurthwaite was to complete all required to be done for that ship within two weeks after her arrival in the port of London. Such being the contract, for the performance of which the defendant was surety, the plaintiff and Smurthwaite afterwards altered it so far as relates to the ship *Devonport*, and by that alteration the time for the completion of that ship was shortened, and the vessel was also to be finished in a more expensive manner than

contracted for by the original contract. It is clear therefore, that the defendant is released from his liability as to the stipulation in the bond relating to the completion of the *Devonport*. That, however, I think, leaves him liable as to the stipulation relating to the *Lord Dalhousie*, and in respect of which the jury have given 1,800*l.* damages. The sum of 19,500*l.*, which was paid under the agreement of the 20th of April, 1865, and the 6,000*l.* which was to be lent on mortgage are so mixed up together as to be almost past unravelling; but as the whole was then paid except 940*l.* 12*s.* 6*d.*, there was no alteration made then as to the money which would prejudice the surety or increase his risk; for I think the 940*l.* 12*s.* 6*d.* was kept back with the licence of the defendant.

BYLES, J.—After some doubt, which I at one time entertained, I now agree with the rest of the Court, that the plaintiff is entitled to our judgment. I think the retainer of the 940*l.* 12*s.* 6*d.* was fully justified by the defendant's letter of the 10th of April, and I also think that the postponement of such money until the *Devonport* was fully completed was also justified by the same letter. With regard to the interest, that is a mere compensation for the prepayment made by the plaintiff. The contracts as to the two ships are so far distinct that the damages which the jury have found with respect to the *Lord Dalhousie* must, I think, stand.

MONTAGUE SMITH, J.—I also think that our judgment should be for the plaintiff. Smurthwaite is by the condition to the bond forthwith to repair the *Lord Dalhousie*; and, secondly, he is in three months to get the ship classed A 1 at Lloyd's. Those two matters are, I think, separate in their nature from the contract relating to the *Devonport*, and the alteration which was made does not affect the surety's liability on the bond in respect to the *Lord Dalhousie*. It is admitted that the fourth plea as framed is scarcely a good answer to the breaches founded on those two specific matters relating to the *Lord Dalhousie*; but the case is decided on the facts and not on the pleadings, and I only make this observation to shew that the demurrer must be determined in favour of the plaintiff.

Rule discharged, and judgment for the plaintiff on demurrer.

[IN THE COMMON PLEAS.]

April 25, 26, 27, 1866.

HENRY JORDAN AND GEORGE JORDAN v. MOORE.*

35 L. J. C.P. 268; L. R. 1 C.P. 624; 14 W. R. 769; 12 Jur. N.S. 766.

Referred to, *Arnold v. Bradbury*, 1871, L. R. 6 Ch. 706 (L.C.).

Patent—Infringement—Novelty—Subject-Matter of Patent.

PATENT.—Letters patent were granted for an alleged invention of "certain improvements in the construction of ships and other vessels navigating on water." The first claim in the specification was "for the combination of an iron frame, with an external covering of timber planking for the sides, bilges, and bottoms," and this was so described that, according to the construction put on it by the Court, it comprehended whatever might, according to the ordinary use of language, be called "an iron frame" for a ship, and was in fact a claim for planking with timber any iron frame of a ship:—Held, that inasmuch as before the date of these letters patent composite ships, partly of wood and partly of iron, had been constructed, and iron frames of more or less strength had been coated with iron, and wooden frames with wooden planking,

* *Coram*, Erle, C.J., Byles, J., Keating, J. and Montague Smith, J.

the application of wooden planking to the iron frame of a vessel could not, without any peculiarity in the nature of that planking, be the subject of a patent, on the principles laid down in Harwood v. the Great Northern Railway Company (35 L. J. Q.B. 27).

Action for infringement of a patent.

The declaration alleged that John Jordan was the true and first inventor of a certain new manufacture, viz., "certain improvements in the construction of ships and other vessels navigating on water," for which letters patent were granted to him for fourteen years, from the 2nd of November, 1849, subject to a condition that he should within six months enrol in the Court of Chancery an instrument in writing, "particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be and might be performed"; that J. Jordan did within the time prescribed fulfil the said condition, and that the letters patent were afterwards assigned to the plaintiffs, and that an extension of them for seven years more, with further letters patent, from the 3rd of November, 1863, was granted to the plaintiffs, and that the defendant, after the said last date, infringed the same.

The declaration claimed a writ of injunction to restrain the defendant from all infringement, and an account of the profits, &c.

Pleas—First, not guilty; secondly, that J. Jordan was not the true and first inventor; thirdly, that the invention was not an invention of any manner of new manufacture as alleged; fourthly, that the manufacture was not any manner of manufacture for which letters patent could by law be granted; fifthly, that Her Majesty did not by letters patent grant to J. Jordan such privilege as alleged; sixthly, that J. Jordan did not within the time prescribed fulfil the said condition as alleged. The seventh and eighth pleas denied, respectively, the assignment to the plaintiffs, and the grant of the further patent to the plaintiffs. The plaintiffs joined issue on all the pleas.

In his specification, J. Jordan declared "that the nature of his said invention, and the manner in which the same is to be performed, are fully described and ascertained in and by the following description thereof, reference being had to the drawings hereunto annexed, and to the figures and letters marked thereon (that is to say),

"My invention consists of improvements in the construction of ships and other vessels navigating on water.

"First, for the combination of an iron frame, with an external covering of timber planking for the sides, bilges, and bottoms.

"Secondly, for the peculiar manner of making the butt joints of the external covering of timber planking. Thirdly, for the construction of an iron frame with a timber keel. Fourthly, for the combination of an iron frame with a timber stern. Fifthly, for the combination of an iron frame with a timber stern-post.

"Sixthly, for the peculiar manner of constructing an iron frame, adapted to a covering of wood for the sides, bilges, and bottoms, and combining, with the frame, a timber stern, a timber keel, and a timber stern-post.

"Seventhly, for the peculiar manner of constructing the keel-plate, the stem-plate and the stern-plate. Eighthly, for the peculiar manner of constructing the keelson or keelsons. Ninthly, for the peculiar manner of constructing the vertical and horizontal stringers. Tenthly, for the application of rolled iron, of a bridge form, similar to a 'bridge rail,' as ribs, in the construction of the iron frame of vessels navigating on water, built of iron, or iron and timber combined. Eleventhly, for coating the bottoms of vessels navigating on water with a mixture of gutta-percha and black-lead, and also such parts as are made of iron.

"In order that my invention may be fully understood and readily carried into effect, I will proceed to describe the means to be pursued in carrying out any of my improvements, reference being made, when required, to the accompanying drawings.

"For carrying out my first improvement a suitable iron frame is to be constructed, to which an external covering of timber planking for the sides, bilges, and bottom, will be fastened, by means of rivets, bolts, or any known or suitable fastening. I make no claim to the shape of the iron used in the frame, as it may be constructed of angle iron, T iron, flat or bar iron, or iron of any suitable shape. The vessel may have one or more thicknesses of timber planking, and may be sheathed with copper and felt, or zinc and felt, or galvanized metal and felt, for the purpose of keeping the bottom of the vessel from fouling; for which sheathing I make no claim.

"For carrying out my second improvement, I make the butt ends of the timber planking with an iron plate placed inside to cover the vertical joints, the iron plate being of sufficient length and thickness to be fastened to the ends of the abutting planks; and between the timber planking and the iron plate I place a thickness or layer of felt, gutta-percha or india-rubber. In this manner I add strength to the planking, and at the same time make a watertight joint. (The horizontal joints or seams between the planks will be caulked in the usual manner in which the planks of timber-built vessels are usually caulked, viz., with oakum, for which I make no claim.)

"For the carrying out my third improvement, I make an iron plate, of any suitable form, run the whole length of the bottom of the vessel, to which I fasten a keel made of timber, with bolts or rivets, or any other suitable fastening.

"And for carrying out my fourth and fifth improvements, I cause the iron plate forming the keel-plate to be continued up the bow of the vessel, and also up the stern of the vessel, to which I fasten a stem made of timber at the bow, and at the stern I fasten a stern-post made of timber, by means of bolts, rivets, or any suitable fastening.

"For the carrying out of my sixth improvement, to construct an iron frame, adapted to an external covering of timber planking for the sides, bilges, and bottoms, for a timber keel, timber stem and timber stern-post, I make an iron plate form the keel-plate, laid the whole length of the bottom of the vessel, and continued up the stem and stern. To this plate I fasten the keel, stem and stern-post, made of timber, as just described. The plate is to be bent, so as to form an apron or holding for the ends of the external planking of the sides, bilges, and bottom. Across the keel-plate iron ribs are to be fastened, and floorings of iron are to be fastened to the iron ribs. On the top of the floorings I place the keelson, made with plate and angle iron or rolled iron, and fastened to each floor at each extremity of the vessel. The keelson is made to assume a curvilinear form, or portion of an inverted arch, to keep the ends of the vessel from drooping. The deck beams, both upper and lower, will be placed and fastened in the manner usually adopted in iron-built vessels, that is to say, fastened to the sides, and, if necessary, where convenient, to the ribs. In the wake of the upper and lower deck beams I place on the outside of the ribs stringers of plate iron, or plate iron binding-strakes, all round the vessel, and fasten the same to each rib, and also to the stem-plate or apron forward, and to the stern-plate aft the vessel: the ends of the deck beams are fastened to these stringers. There will also be stringers on the top of the ends of the beams, lying horizontally, fastened to each rib, to each beam, and, if necessary, to the stringers outside the ribs. For the horizontal stringers on the top of the ends of the deck beams, I make no claim. There may be also other stringers introduced inside the ribs, if necessary, for which I make no claim.

"The keelson or keelsons may also be constructed in the following manner, in carrying out my seventh and eighth improvements: On the top of the keel-plate before described the keelson will be placed, and the ribs will abut and be fastened to the keelson and also to the keel-plate; the floorings will abut and be fastened to the keelson, and, in the usual manner, to the ribs. Drawings on sheet No. 2. will shew this method of construction—see figures 5. and 6. The

other method of constructing the keelson on the top of the floorings has been described before.

"For carrying out my ninth improvement, I place vertical stringers outside the ribs, fastened to each rib and to the ends of the beams, and also, if necessary, to the horizontal stringers, as before described in the description of the frame.

"My tenth improvement is for the application of rolled iron of the bridge form, similar to a bridge rail in the construction of the iron frame of vessels navigating on water, built of iron, or iron and timber combined. The iron plates or timber planking may be fastened by any known means to the flanges of the bridge rib, or the bridge rib may be reversed, and the iron plates or timber planking fastened by any known means to the top of the bridge rib, and the ceiling or linings fastened to the two flanges of the bridge rib. By this mode of construction the whole of the iron-work will form a complete frame, to which the wood-work will be attached.

"My eleventh improvement is for the application of a mixture of gutta-percha and black lead for coating the bottoms of vessels either of wood or iron, to prevent fouling, and also for coating such other parts as are made of iron, to prevent corrosion. The gutta-percha is to be dissolved in spirits of turpentine, naphtha, or any other solvent, for which I make no claim, and the black lead is to be mixed with the solution to any consistency required, and applied hot.

"Having now described the nature of my invention, and the manner in which the same may be performed and carried into effect, I would have it understood that I make no claim for any of the parts separately, but only when in combination to carry out my said invention; but what I do claim as of my invention are: firstly, for the construction of ships and other vessels that navigate on water with an iron frame, combined with an external covering of timber planking for the sides, bilges, and bottoms.

"Secondly, for the making of the butt joints of the external covering of wood as described. Thirdly, for the combination of an iron frame with a timber keel. Fourthly, for the combination of an iron frame with a timber stem. Fifthly, for the combination of an iron frame with a timber stern-post.

"Sixthly, for the construction of iron frames for ships or other vessels navigating on water, adapted to an external covering of timber planking for the sides, bilges, and bottoms as described.

"Seventhly, for an iron keel-plate continued up at each end of the vessel to form the stem and stern plates, to which the timber keel, the timber stem and the timber stern-post are fastened. Eighthly, for two methods of constructing the keelson. The first as described on the top of the floorings, with the extremities of a curvilinear form, and fastened to the stem and stern plate to keep the ends of the vessel from drooping; for the second method of putting the keelson down upon the keel-plate abutting the ribs, so as to fasten the keelson to the keel-plate, also abutting the floorings so as to fasten the keelson to the ribs, as shewn in Figures 5 and 6, sheet No. 2. Ninthly, for the external vertical stringers or binding strakes fastened to the ribs, beams, stem and stern plates, and also to the horizontal stringers on the top of the ends of the beams, as described and shewn. Tenthly, for the application of rolled iron of a bridge form in the construction of the iron frame of ships or other vessels navigating on water. Eleventhly, for the application of a mixture of gutta-percha and black lead to the coating of the bottoms of vessels navigating on water, and such other parts as are made of iron."—[Here followed the reference to the drawing and figures, of which we do not give plans, because from the view taken by the Court they are immaterial to this report.¹]

(1) The particulars of objections delivered by the defendant were (*inter alia*) that the alleged inventor was not the true and first inventor; that the alleged invention was not an invention of any manner of new manufacture; that the specification did not particularly describe and ascertain the nature of the invention, and in what manner the same was to be and might be performed; that the alleged inventor did not sufficiently distinguish and point out in his specification which things he claims to have invented, and which he does not claim to have invented, or admits to be old; that the alleged invention was not the proper subject of letters

At the trial, at Westminster, before Byles, J. and a special jury, on the 2nd, 4th, and 5th of December, the plaintiffs' counsel proved the formal parts of their case; and, producing a model of a ship built upon J. Jordan's specification called several scientific witnesses and practical ship-builders to explain the parts, and to prove that his complete, rigid, independent iron frame, as shewn by the model, combined as it was with external wooden planking, was a new invention. This was disputed by the other side. The undisputed evidence was, that, before the date of J. Jordan's patent, ships were constructed with wooden frames, covered by external wooden planking; that ships were also constructed with iron frames, of various constructions, covered by external iron plating.

In answer to a question put by the learned Judge to one of the plaintiffs' witnesses (Mr. Scott Russell)—“How is the absence of the iron plating, which you say is a material part of the strength of an iron ship, compensated for in J. Jordan's ship?” the witness answered, that in Jordan's invention so much of the iron plating as is most useful in an iron ship to give it strength was retained, in order to give that strength to this combination; and that, on the contrary, the parts of the iron that were left out were those that kept out the water, but did not strengthen the ship.

The infringement of the patent by the defendant was proved.

At the close of the plaintiffs' case, the defendant's counsel submitted that the plaintiffs ought to be nonsuited, upon the ground (*inter alia*) that the first claim in the specification was too wide in its terms, being a claim for a combination of any iron frame of a ship with any external wooden planking; and that upon the plaintiffs' own evidence, and particularly from the above answer of Mr. Scott Russell, it appeared that the only novelty in their claim was the substitution of external wooden planking for external iron plating as applied to a wooden frame; that since external wooden planking, as applied to a wooden frame, was an old contrivance, this claim was bad, within the principle of *Harwood v. the Great Northern Railway Company* (35 L. J. Q.B. 27); that each of the claims must be taken separately, and must stand or fall by itself; and that the objection to the first claim applied to all the other claims, except the sixth, to which, for the purposes of that trial, the defendant's counsel offered no objection.

The learned Judge directed that the case should go on, reserving leave to the defendant's counsel to raise his objections.

The defendant's counsel then called several scientific witnesses and practical ship-builders to contradict the plaintiffs' case as to the novelty of J. Jordan's invention, and drew attention to several previous patents of Dickinson, Ditchburn and others, which, it was alleged, had anticipated J. Jordan's invention. The defendant did not dispute that he had infringed the first claim, if that were construed to mean the combination of any iron frame with any wooden planking; but did not admit that he had infringed the sixth claim.

The learned Judge directed the jury that there was no question for them as to the infringement of the patent by the defendant, which was admitted. In answer to questions put by the learned Judge the jury found that at the time of the plaintiffs' patent a complete, rigid, independent frame of iron covered with wood planking was new. That an iron frame with timber keel, or timber stem, or timber stern-post, was also new. That iron plates for butt-

patent; that the alleged patent was a patent for a principle only, and not for any manner of new manufacture; that the alleged inventor by his specification claimed a principle of applying old contrivances to new objects; that the specification is unintelligible; that the alleged invention was of no use or advantage to the public; that the principle claimed by the specification was generally known to shipbuilders before the date of the letters patent; that the alleged invention was published before that date, and in proof thereof the defendant would rely on certain enrolled specifications for which letters patent had been granted to other inventors between 1814 and 1845 (the names and particulars of which were stated), and that J. Jordan's patent claimed some of the matters thereby patented.

joints when applied to the planking of ships, and applied for the purpose of adding strength to the plank and making it a water-tight joint, were also new. The learned Judge thereupon directed a verdict for the plaintiffs, giving leave to the defendant to move on the grounds hereafter set out in the rule, the Court to be at liberty to draw inferences of fact consistent with the findings of the jury.

Bovill accordingly obtained, on the 15th of January, 1866, a rule *nisi* calling on the plaintiffs to shew cause why the verdict should not be set aside and a verdict entered for the defendant, pursuant to leave reserved, on the grounds, first, that the alleged inventions in the first, second, third, fourth, fifth and ninth claims of the specification respectively, or some of them, are not subject-matters for a patent; secondly, that they were not new; thirdly, that the specification was insufficient; that it claimed more than it ought to have done; was too wide in its terms; did not sufficiently describe the invention, and did not distinguish what was new from what was old: or why a new trial should not be had, on the grounds, first, that the verdict was against the weight of evidence; secondly, that the Judge misdirected the jury in a certain particular, which (from the view taken by the Court) it is immaterial to state here; or why this Court should not dispose of the questions on the evidence.

Grove, Aston and Ledgard, for the plaintiffs, shewed cause.—There is no question about infringement, and the main questions arise upon the objection to the first claim in the specification, and they are whether the invention claimed is a new one, and next whether it is properly described. The invention substantially consists of an iron skeleton of a ship coated with a wooden skin, by means of which the ship can afterwards be sheathed with copper, which in the case of an iron ship cannot be done except there be wood between the copper and the iron. Iron ships, combined with wood, had been previously made, but before the plaintiffs' patent there had not been an iron skeleton of a vessel complete in itself before the wood was used like those made under the plaintiffs' patent, where the whole wood-work might be burnt without affecting the framework. It is objected that the claim is too large, so that it would comprehend any iron frame for a ship. It is submitted that the whole specification must be read together, and that it manifestly appears from it when so read that the patentee claims only a complete iron frame of a definite plan of construction to which a wooden covering may be attached; and this is explained by the sixth claim, which is for the construction of such an iron frame as mentioned in the first claim. The patentee distinctly says, I make no claim for any of the parts separately, but only when in combination to carry out my said invention. *Thomas v. Foxwell* (6 Jurist, N.S. 271) is not in point. The whole, no doubt, depends on the meaning of the term "iron frame"; if that means "any iron ship," of course the claim would be bad; but it is submitted that that is not the fair construction to be put on the term in this specification. The case of *Harwood v. the Great Northern Railway Company* (35 L. J. Q.B. 27) does not apply, as the gist of the judgment of the House of Lords in that case was, that the invention had been used before, and was, therefore, not new; but the finding of the jury in the present case is an answer as to there being here any want of novelty. It is said that the application of iron and wood as claimed in this invention, being the application of well-known materials in a manner also known before, cannot be the subject of a patent, but the combination and result produced by the plaintiffs' patent are both new, and sufficient therefore to be the subject of a patent—*Crane v. Price* (4 Man. & G. 580; s. c. 12 Law J. Rep. (N.S.) C.P. 81). Until used it could not have been known whether by reason of the expansion and contraction of iron by heat and cold the wooden planking to a complete iron framework of a vessel would not have burst.

Bovill (with him *Webster* and *Macnamara*), for the defendant, in support of the rule.—Our objections to the patent are that some of the claims in the specification are not new, are not the subject-matter of a patent, claim more

than they ought to have done, are too wide in their terms, do not sufficiently describe the invention, and do not distinguish what is new from what is old. Our objections for the purpose of this argument are only to the first, second, third, fourth, fifth, and ninth claims. We do not dispute that if the patent is good in every respect, the first claim is so wide that what the defendant did was an infringement of it. But the first claim, we say, is clearly bad, as being too wide, and not new. We do not admit that the defendant had infringed anything except the first claim. Each claim in the specification must be taken separately; and, adopting this construction, the first claim is so wide as to include *every* iron frame (of any construction) which is covered with external timber planking (of any construction). The undisputed evidence shewed that, long before the date of this patent, wooden frames were covered with wooden planking, and iron frames with iron plating. Our evidence at the trial shewed that the covering of an iron frame with external timber planking was published in the year 1841, in Ditchburn's patent, and on this point the verdict should be set aside as being against evidence. But apart from that, and assuming, for the sake of argument, that Jordan was the first to cover an iron frame with external timber planking, still this is not the subject-matter of a patent, because it is only the application of old contrivances to an analogous object. It appeared from the plaintiffs' own evidence that Jordan's alleged invention consisted in nothing more than in taking the ordinary iron frame of a ship covered with external iron plating, and taking away of that external plating so much as served only to keep out the water and not to strengthen the frame, and substituting for it wooden planking. This case therefore falls precisely within the rule laid down by the House of Lords in *Harwood v. the Great Northern Railway Company* (35 L. J. Q.B. 27). It was there held, that a certain contrivance of fish-joints having been used for bridges and other purposes, a patent for applying the same contrivance to a new purpose, the ends of rails used on railways, could not be upheld. So here, external wooden planking was long before this patent applied to wooden frames, and the only novelty (if any) was in applying it to iron frames.

[BYLES, J.—Is there not this distinction between this case and *Harwood v. the Great Northern Railway Company* (35 L. J. Q.B. 27), that here the patent is for the application of an analogous contrivance to the same purpose, while in *Harwood's* the patent was for the application of the same contrivance to an analogous purpose?]

The two cases are identical in principle. The present case also falls within the rule of *Horton v. Mabon* (12 Com. B. Rep. N.S. 437; s. c. 31 Law J. Rep. (N.S.) C.P. 255), *Ormson v. Clark* (14 Com. B. Rep. N.S. 435; s. c. 32 Law J. Rep. (N.S.) C.P. 291) and *The Patent Bottle Envelope Company v. Seymer* (5 Com. B. Rep. N.S. 164; s. c. 28 Law J. Rep. (N.S.) C.P. 22).

Bovill was then stopped by ERLE, C.J., who said that if the Court required to hear any further argument, they would inform him.

Cur. adv. vult.

On the 27th of April the judgment of the Court was read by

BYLES, J.—This was a patent for “certain improvements in the construction of ships and other vessels navigating on water.” The jury found a verdict for the plaintiffs on several questions left to them; but it was objected by the defendant that the alleged invention could not be the subject of a patent, and that point was reserved for the decision of the Court.

The first and principal claim in the specification is for the construction of ships with *an* iron frame, combined with an external covering of timber planking for the sides, bilges, and bottoms.

The only other claim necessary to be mentioned is the sixth, which is for the construction of iron frames adapted to an external covering of timber for the sides, bilges, and bottoms, as described.

The validity of the sixth claim, which is for a complete and strong iron frame of a definite construction, was not disputed at the bar, so far as the present action is concerned.

It was contended by the counsel for the defendant that the expression "iron frame" in the first claim, was not confined to an iron frame such as that specified in the sixth claim, but comprehended whatever might, according to the ordinary use of language, be called "an iron frame" for a ship. And, on a careful consideration of the specification, we are of that opinion. The counsel for the plaintiffs laid much stress on the rigidity and strength of the model produced at the trial, and made in conformity with the sixth claim. Those qualities would be very material if we were considering the merits of the sixth claim itself; but we find nothing in the specification requiring any definite degree of rigidity or strength or any peculiarity of construction in the frame mentioned in the first claim.

The first claim therefore is, according to our construction, a claim for planking with timber any iron frame of a ship.

Questions of this nature must, of course, depend very much on the extent to which scientific and practical knowledge of the subject had been carried at the date of the patent.

The evidence (from which, by the arrangement made at the trial, we are at liberty to draw inferences consistent with the findings of the jury) shewed (what indeed is common knowledge) the extensive use of iron as a material in shipbuilding, and, amongst other things, that composite ships, partly of iron and partly of wood, had frequently been constructed; that frames partly of iron and partly of wood had been coated with iron, and that the iron coating of iron vessels had been placed upon iron frames of more or less strength and completeness.

Then arises the main question in the cause. Iron and wood being both of them materials long used for the construction of the frame and coating of vessels, can the application of wooden planking to the iron frame of a vessel (without any peculiarity in the nature of that planking) be the subject of a patent? We think it cannot. It is not only the substitution of one well-known and analogous material for another, that is, wood for iron, to effect the same purpose of an iron vessel, but it is the application of the same old invention, namely, planking with timber which was formerly done on a wooden frame to an analogous purpose, or rather the same purpose, on an iron frame. In this view of the case the recent decision of the Exchequer Chamber and of the House of Lords, in *Harwood v. the Great Northern Railway Company* (35 L. J. Q.B. 27), appears to us to be in point, and decisive for the defendant. There grooved iron fish-plates having been before used for fastening the scarf-joints of timbers, a patent was taken out for their application to fastening the butt-joints of iron rails, and it was held that the patent was bad, because it claimed the application of an old contrivance to an analogous purpose.

The result is, that the verdict must be entered for the defendant on all the issues involving this question.

Rule absolute accordingly.

[IN THE COMMON PLEAS.]

SMITH v. THACKERAH AND ANOTHER.

May 25, 1866.

35 L. J. C.P. 276; 1 H. & R. 615; L. R. 1 C. P. 564; 14 L. T. 761; 14 W. R. 832;
12 Jur. N.S. 545.

Not applied, *Richards v. Jenkins*, 1868, 18 L. T. 437; 17 W. R. 30 (Ex.).
Referred to, *Mitchell v. Darley Main Colliery Co.*, [1884] E. R. A.; 53
L. J. Q.B. 471; 52 L. T. 675; 32 W. R. 947 (C. A.): affirmed, (sub nom.,
Darley Main Colliery Co. v. Mitchell), [1886] E. R. A.; 55 L. J. Q.B. 529;
11 App. Cas. 127; 54 L. T. 882 (H.L.); *Att.-Gen. v. Conduit Colliery Co.*,
[1895] E. R. A.; 64 L. J. Q.B. 207; [1895] 1 Q.B. 301; 71 L. T. 771;
43 W. R. 366 (Q.B. D.).

Action—Lateral Support—Adjoining Landowners—Damage.

EASEMENTS.—*In order to entitle the owner of land to succeed in an action against a neighbour for excavating near his boundary, it is necessary that appreciable damage should have been caused thereby.*

The declaration alleged that the plaintiff was possessed of certain land, which received lateral support from certain adjoining land; that the defendants dug in the said adjoining land a certain well near the said land of the plaintiff, and thereby and for want of keeping the sides of the said well shored up, or otherwise preventing the consequences thereafter mentioned, wrongfully deprived the said land of the plaintiff of its said support, whereby it sunk, and certain walls, &c. thereon sunk, and the plaintiff received certain specified damage.

The defendants pleaded not guilty, and not possessed.

At the trial, it appeared that the defendants had dug the well as in the declaration alleged, and afterwards filled it up; that the soil was friable and sunk in the centre of the filled-up well about nine inches, and that a wall of the plaintiff fell, whereby he received damage to the amount of about 15*l.* For the plaintiff, it was contended that the plaintiff's lands would have sunk even if the wall had not been there, and so he was entitled to 15*l.*, and that at all events he was entitled to nominal damages, as some portion of his land under any circumstances must have subsided.

The learned Judge directed the jury that, unless they thought (excluding the wall from their attention) appreciable damage had been caused by the well, their verdict should be for the defendants; but that if they thought there was appreciable damage, then for the plaintiff. The jury found that there had been no appreciable damage to the land, and the learned Judge directed a verdict to be entered for the defendants, with leave to the plaintiff to move to set it aside and enter a verdict for himself for such sum below 15*l.* as the Court should direct, on the ground that the facts proved at the trial entitled the plaintiff to a verdict without proof of pecuniary damage.

A rule *nisi* having been obtained pursuant to such leave,

Joyce shewed cause.—This was an action for injury to lateral support, and it was conceded that the wall was new and there was no right to lateral support for it. With respect to the land, there was not any appreciable damage, and that is necessary in such a case as this to entitle the plaintiff to succeed. This follows from the principle laid down in *Bonomi v. Backhouse* (El. B. & El. 622; s. c. 28 Law J. Rep. (N.S.) Q.B. 378; 34 Law J. Rep. (N.S.) Q.B. 181), that the damage, and not the act, is the cause of action.

[ERLE, C.J.—I directed the jury in the following way: “ Unless you think there was appreciable damage from the well (excluding the wall from your attention) your verdict should be for the defendant, but if appreciable for the plaintiff.”]

Yes, and it is submitted that the direction was correct, for the present case was not like the case of *Browne v. Robins* (4 Hurl. & N. 186; s. c. 28 Law J. Rep. (N.S.) Exch. 250), where the land would have subsided even if the building had not existed.

Serj. Robinson and Sharpe, in support of the rule.—Where there is an injury to a right appreciable damage is unnecessary. Now here there not only was, but there must have been a subsidence of the soil even if the wall had not been there. This being so, the notes to *Ashby v. White* (1 Smith's Lead. Cas. 105) and *Broom's Commentaries*, p. 82, shew that the plaintiff is entitled to at least nominal damages. But he is entitled to more; because as the land would have subsided he is entitled also to recover for the damage to the wall, which sank down with the land, as is shewn by the case of *Browne v. Robins* (4 Hurl. & N. 186; s. c. 28 Law J. Rep. (N.S.) Exch. 250).

ERLE, C.J.—I am of opinion that this rule should be discharged. Where there is an actionable wrong, such, for instance, as a person stepping on another man's land, or a returning officer refusing a vote tendered to him, or an interference with the flow of water to which a man is entitled, it is not necessary to prove pecuniary damage. But where an adjoining owner of land does a lawful act of ownership on his land, which is no wrong of itself, it may become actionable if appreciable damage be caused to his neighbour. Thus, for instance, if a man has a drawing-room window, and his neighbour builds a chimney which pours its smoke into it, the question of damage arises, and the maintainability of the action depends on the annoyance caused and the circumstances under which it occurs; again, if dancing causes a vibration in a neighbour's house, there is not necessarily a cause of action; but if it would probably bring down the house, he has no right to have a ball, and would be liable after notice for the falling of the house because damage occurred. So the noises of trades, as of a coffee-mill or plate-rolling mill, these only became actionable grievances because of the damage. Now, in the present case, a well was properly sunk and no damage accrued from this act, which was done by the right of ownership in the soil; it was then filled up,—this also was lawful; but being filled with soft materials it subsided about nine inches in the centre. I think, on the evidence, that between the well and the plaintiff's land there was some subsidence of the sandy particles of the plaintiff's land, so that some of the plaintiff's land was moved. But still the acts of the defendant were lawful acts of ownership, and it was left to the jury to say whether there was any appreciable damage, and they find there was none that was appreciable. It is said that the action lay if any particle of the plaintiff's soil fell. I am of opinion that this is not so, for I think that this is a case where there was a lawful act, which could only become actionable if appreciable damage accrued from an unreasonable use of the soil as between neighbours. Where certain chemical works were erected and caused destruction of the herbage of a neighbour, it was held that there was a cause of action, but the learned law Lords said that if there was no sensible material damage no action lay. I am therefore of opinion that there is no cause of action, because the jury have found that there was no appreciable damage.

BYLES, J.—I am of the same opinion. Where there is a trespass, the act itself without any damage is a cause of action. But, as was said in the judgment of the Exchequer Chamber in *Bonomi v. Backhouse* (El. B. & El. 622; s. c. 28 Law J. Rep. (N.S.) Q.B. 378; 34 Law J. Rep. (N.S.) Q.B. 181), "no cause of action accrued for the mere excavation by the defendant in his own land, so long as it caused no damage to the plaintiff." Damage here would alone give a cause of action, as has been pointed out by my Lord. There appears to have been none that was appreciable, and therefore the case of *Bonomi v. Backhouse* (El. B. & El. 622; s. c. 28 Law J. Rep. (N.S.) Q.B. 378; 34 Law J. Rep. (N.S.) Q.B. 181) is in point.

MONTAGUE SMITH, J.—I am of opinion that the finding of the jury concludes

this case. The direction of the learned Judge is not here complained of, nor is there an application for a new trial. The jury finds there was no appreciable damage, *i. e.*, not any damage in the legal sense. It has been argued that if there be any subsidence there is necessarily damage; but it is a question of degree, and there might be damage only to an inappreciable extent, and if there is no *damnum* there is no *injuria*, the act here being *per se* lawful, and only constituting an *injuria* by reason of sensible damage ensuing.

Rule discharged.

[IN THE COMMON PLEAS.]

June 9, 1866.

TODDERDELL v. THE FAREHAM BLUE BRICK AND TILE COMPANY
(LIMITED).

35 L. J. C.P. 278; L. R. 1 C.P. 674; 14 W. R. 919; 12 Jur. N.S. 901.

See *Ashbury Railway Carriage and Iron Co. v. Riché*, [1875] E. R. A.; 44 L. J. Ex. 185; L. R. 7 H.L. 653; 33 L. T. 401; 24 W. R. 794 (H.L.).

Joint-Stock Company—Power of Directors to bind Company.

COMPANY.—*Seven persons signed a memorandum of association of a company for making bricks; the memorandum was duly registered. There never were any articles of association. Two of such persons (one professing to act as managing director, the other as chairman of the company) engaged the plaintiff as foreman of the company at certain brick-works. In an action by the plaintiff for his wages,—Held, that, in the absence of proof to the contrary the company must be taken to have given authority to such two persons to engage the plaintiff.*

This action was brought to recover a sum alleged to be due for six weeks' wages from the defendants to the plaintiff as foreman to the said company.

At the trial, a verdict was found for the plaintiff, with leave reserved to the defendants to move to enter a nonsuit, on the ground that there was no evidence to go to the jury of any liability of the defendants to the plaintiff.

Pope now moved pursuant to such leave, and on the following statement of facts:—The question is, whether the company are liable, or the two persons who, in fact, engaged the services of the plaintiff. On the 27th of November, 1865, a memorandum of association of the company was registered. This memorandum was signed by seven persons, and described the objects of the company as follows: "Thirdly, the objects for which the company is established are, the manufacture of blue and other bricks, tiles and goods to be used for building, paving, stabling, drainage, or any other useful purpose, and the sale and export thereof respectively at home and abroad. Also, the manufacture and sale of all such other goods and articles, useful or ornamental, of whatever nature or kind, as can or may be made or manufactured, wholly, or in part, out of earth, clay, gravel, sand, loam, or any other sort of earth and soil. Also, for the making, vending or exporting, as the company may think proper, all or any of the said bricks, tiles, goods and articles. To purchase, take on lease, or otherwise hire land, buildings and other premises for the purposes of the said company. Also, to sell, let or dispose of any land, buildings or other premises and property so purchased, taken or hired, or belonging to the said company, if deemed expedient. Also, to employ all necessary workmen and servants, and to make or purchase all such materials, machinery, plant, fixtures, fittings and things as shall be necessary for the due carrying out the objects of the company, and to enter into any contracts, and generally to do all such

acts and things for effectually carrying out all or any of the above objects as may be deemed necessary, or incidental, or conducive to the attainment thereof." There never were any articles of association, nor were any shares allotted. On the 29th of November, 1865, two of the persons who had signed the memorandum of association entered into the following agreement with the plaintiff: "Agreement made this 29th of November, 1865, between the undersigned, Joseph Brace and Thomas Thompson Ponsonby, and the undersigned, Charles Totterdell, whereby, for the consideration hereinafter named, it is agreed that the said Charles Totterdell shall be employed as foreman to the Fareham Blue Brick and Tile Company (Limited), at a salary of 3*l.* per week, a house on the works rent free, or an allowance in lieu thereof of 10*l.* per annum, and coal not exceeding six tons per annum. Salary to commence December 16, 1865. This agreement is entered into provided the said Charles Totterdell manufactures blue bricks from the company's clay at Fareham, equal in quality to those made by him at Bishops Waltham, samples of which are now at the stations on the London and South-Western Railway. Provided Charles Totterdell carries out the manufacture as above described, six months' notice is to be given and accepted on either side as cancelling this agreement; but in the event of Charles Totterdell failing to carry out the manufacture as described above, then and in such case one month's notice from the company shall be held to cancel and void this agreement. This agreement the one professed to sign as managing director, the other as chairman of the company. The plaintiff thereupon entered on certain land indicated to him by Brace and Ponsonby, carried on the business of brick-making there, under this agreement, and was paid from time to time by Brace and Ponsonby. But being unable to get six weeks' wages he brought this action against the company.—[He also went into a history of the company, whereby it appeared that Brace and Ponsonby, having a lease of the land, had agreed with one Thompson (one of the seven) to get an underlease for him on behalf of the company which they were about to form, and to assign their brick business also in the same way, but that the deeds of underlease and assignment in fact had not been executed by or to the company as contemplated; and he made various statements as to the company as a body not having acted; but these facts clearly could not have been before the jury at the trial.]—At the trial, the defendants called no evidence, but contended that the plaintiff should be nonsuited, and it is submitted that they were right in that contention. By 25 & 26 Vict. c. 89, s. 15. it is enacted, that "in the case of a company limited by shares, if the memorandum of association is not accompanied by articles of association, or in so far as the articles do not include or modify the regulations contained in the Table marked A. in the first schedule hereto, the last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company, in the same manner and to the same extent as if they had been inserted in articles of association and the articles had been duly registered." And as, by clause 53, until directors are appointed, the subscribers of the memorandum of association shall be deemed to be directors, Brace and Thompson were directors. The proceedings of directors are governed by clauses 66. to 71, which amongst other things empower them to determine the quorum necessary to transact business, and also to delegate their powers to a committee; but nothing of the kind was done in the present case; there really was no power in Brace and Ponsonby to bind the company, and the plaintiff cannot, by simply shewing that they, being and professing to act as directors, signed this agreement, make the company responsible.

WILLES, J.—I am of opinion that there should be no rule. This is an action for work done against a company constituted under the 25 & 26 Vict. c. 89. ss. 6. and 15, without any articles of association: the work was within the scope of the objects of the company, and done on land which the company either had taken, or afterwards made up their mind to take. Brace and Ponsonby engaged the plaintiff as foreman, and signed the agreement, one describing

himself as director, the other as chairman, of the company. The agreement, on its face, was made on behalf of the company; the work was done under the agreement; the plaintiff had also done work previously, been paid by Brace and Ponsonby, and given them a receipt; and the form of the transaction was that the plaintiff was dealing with these two persons as acting for the company. The question is, whether the plaintiff has made out a case against the company, whereby the company is bound; and inasmuch as the defendants called no evidence, if there be any evidence for the plaintiff it will be enough. The question of whether the company is bound depends on the power of the directors. Now, by the 1st Schedule, Table A, clause 53, "Until directors are appointed, the subscribers of the memorandum of association shall be deemed to be directors," therefore the seven persons who signed the memorandum in the present case were directors. Then, by clause 66, "The directors may . . . determine the quorum necessary for the transaction of business . . ."; and, by clause 68, "the directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit. . . ." It therefore appears that the agreement made by Brace and Ponsonby was a document which they might have had authority to make, and which might have been properly made by them for the company. The result of the authorities is, that persons (in the situation of these directors) who might have had authority, and who do an act purporting that they have it, must be taken to have had authority, especially in the presence of the fact of the action of the parties on the assumption that this was so. And here Brace and Ponsonby had ostensible authority to bind the company. The point was much considered in the case of *The Royal British Bank v. Turquand* (5 El. & B. 248; s. c. 24 Law J. Rep. (N.S.) Q.B. 327), in which case the Queen's Bench gave judgment for the plaintiffs, and the Exchequer Chamber (6 Ibid. 327; s. c. 25 Law J. Rep. (N.S.) Q.B. 317) affirmed such judgment on the ground that where parties dealing with the directors of joint-stock companies would, on reading the deed or statute limiting their authority, find a permission to do an act on certain things being done, such person have a right to assume that such things have been done. It is true that the agreement in the present case is not under seal, and therefore there is no estoppel; but still the evidence adduced for the plaintiff was not rebutted, and till then it is to be assumed that these directors had power to bind the company.

BYLES, J.—I am of the same opinion. It is clear the company existed, and the directors existed; and the law provides that a committee of one or more directors might act, so that these two directors might have had power to act. The company consisted of only seven persons, and the question of whether the other five gave authority is immaterial in the present case; because, if a person gave an appearance of authority, he will be bound by an act within such apparent authority. Here ostensible authority was given, and there was, therefore, evidence to go to the jury.

MONTAGUE SMITH, J.—I am of the same opinion. The agreement was within the scope of the business of the company. It was made by two directors professing to act for the company; it was one which these two directors might have had authority to make, either as a quorum or a committee: why, therefore, is the company not to be bound? The company appoint directors, who make a contract, apparently within their powers, and the onus is therefore on the company to shew that there was no authority. In *The Royal British Bank v. Turquand* (6 Ibid. 327; s. c. 25 Law J. Rep. (N.S.) Q.B. 317), Chief Justice Jervis says, "Parties dealing with the directors of these joint-stock companies are bound to read the deed or statute limiting the directors' authority, but they are not bound to do more. The plaintiffs, therefore, assuming them to have read this deed, would have found not a prohibition to borrow, but a permission to borrow on certain things being done. They have, in my opinion, a right to infer that the company, which put forward these directors to issue a bond of this sort, have had such a meeting, and passed such a resolution as were

requisite to authorize the directors in so doing." Why are we not here to assume that what was apparently well done was really so done? The plaintiff also here did work on land which was substantially the land of the company, which must have had knowledge of his so acting.

Rule refused.

[IN THE COMMON PLEAS.]

May 29, 1866.

M'ANDREW AND OTHERS v. CHAPPLE AND ANOTHER.

35 L. J. C.P. 281; L. R. 1 C.P. 643; 14 L. T. 556; 14 W. R. 891;
12 Jur. N.S. 567.

Referred to, *Jackson v. Union Marine Insurance Co.* [1875] E. R. A.;
44 L. J. C.P. 27; L. R. 10 C.P. 125; 31 L. T. 789; 23 W. R. 169 (Ex. Ch.).

Charter-Party—Deviation—Being Ready—Condition Precedent.

SHIPPING.—*The plaintiffs, who were owners of an unfinished steamer at Newcastle, chartered her to the defendants (who knew her state) by a charter-party which provided "that the said ship, being tight, &c., should, with all convenient speed (on being ready), having liberty to take an outward cargo for owners' benefit direct or on the way, proceed to Alexandria," and there take a cargo for England. When the time for a trial trip came the builders objected to her returning to Newcastle, on account of the dangerous bar; the plaintiffs therefore put on board ballast and cargo for London, where she was to be completed and all defects were to be put right, instead of in Newcastle. The ship arrived in London, was put right, and no delay occurred by these proceedings; she then, on her voyage out, took a cargo to Constantinople, which caused her to arrive at Alexandria a few days later than she otherwise would have done. The defendants refused to furnish a cargo, whereupon the plaintiffs brought their action:—Held, that there had been no breach of any condition precedent by the plaintiffs; that they were entitled to succeed in their action; and that the defendants had their remedy by cross-action for any damage that had accrued to them.*

This was an action brought by the plaintiffs against the defendants, for the recovery of damages for the loss sustained by the plaintiffs, by reason of the defendants having made default in shipping a cargo on board the plaintiffs' vessel, *Ephesus*, under the circumstances hereinafter mentioned; and by consent of the parties, and by order of Martin, B. there was stated without any pleadings the following

CASE.

The plaintiffs are shipowners, carrying on business at Liverpool and London, under the style and firm of Robert M'Andrew & Co., and were before and at the time of the transactions hereinafter mentioned, and have ever since continued to be, the owners of the steamer *Ephesus*. The defendants are merchants and shipowners, carrying on business at Liverpool under the style and firm of Chapple, Dutton & Co. On the 15th of October, 1864, the said steamer *Ephesus* was launched at Newcastle, a great portion of her engines and machinery having already been put in her, and was immediately afterwards placed in the hands of Messrs. Randolph, Elder & Co., engineers, for completion ready for sea. About the 1st of December, 1864, negotiations were opened between the plaintiffs and the defendants for the purpose of the chartering of the *Ephesus* by the defendants; these negotiations were conducted by Mr. Nance, a ship-broker, on behalf of the plaintiffs, and by Mr. Pothonier, a

ship-broker, on behalf of the defendants. On the 7th of December, 1864, the aforesaid negotiations were concluded by a charter-party being made by and between the plaintiffs and the defendants, and signed by or on behalf of the said parties respectively, which said charter-party provided "that the said ship, being tight, staunch and strong and every way fitted for the voyage, shall, with all convenient speed (on being ready), having liberty to take an outward cargo for owners' benefit direct or on the way, proceed to Alexandria, Egypt, or so near thereunto as she may safely get, and there load from the factor of the said freighters, in the customary manner, a full and complete cargo of cotton, . . . the captain being at liberty to take other usual cargo (on freight) for ballast only, and to render customary assistance with boats and crew in loading, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, &c., and being so loaded shall there-with proceed to London or Liverpool direct as ordered, on signing B Lading"; and contained stipulations as to payments of freight, &c., and the usual exception as to the act of God, &c. In the course of the negotiations Mr. Pothonier was informed by Mr. Nance that the plaintiffs would not guarantee the time within which the vessel would be finished, and that he should therefore insert in the charter-party the words "on being ready," and these words were inserted accordingly. After the making of the said charter-party, the plaintiffs urged Messrs. Randolph, Elder & Co., from time to time, to complete the fitting up of the *Ephesus*, with as much despatch as possible, and did all that was in their power to expedite the completion of the vessel fit for sea. Between the time of the launch and the sailing of the ship from Newcastle, as hereinafter mentioned, several casualties occurred in the finishing of the engines and machinery; but Messrs. Randolph, Elder & Co. were not guilty of any unreasonable delay in proceeding with the completion of the work. It is usual for steamers to make a trial trip before starting on their first voyage; and in order to have a satisfactory trial trip at Newcastle it is necessary for steamers to put out to sea, having to cross and re-cross the bar at the mouth of the Tyne, an operation accompanied by some risk in the case of a steamer of the size of the *Ephesus* at that period of the year. About the middle of the month of December, 1864, the plaintiffs proposed to the builders, at the request of Randolph, Elder & Co., that the vessel should make a trial trip to sea and back over the bar, but this was objected to by the builders, and thereupon it was arranged that the vessel should make her trial trip from Newcastle to London instead of returning to the Tyne, and that the deficiencies of her machinery, if any, should be made good in London. Accordingly, on the 12th of January, 1865, the ship left Newcastle for London, with 1,400 tons of coals, shipped under charter-party. Before leaving Newcastle, the ship, in order to avoid delay at Alexandria, loaded sufficient ballast to enable her to bring back a cargo of cotton from Alexandria, but no delay at Newcastle was occasioned by her so doing, or by the shipment of the coals. The ship met with accidents to her machinery between Newcastle and London, where she arrived on the 15th of January, 1865, and was detained in London repairing the same for about six weeks, but such repairs were executed there as speedily as they could have been done at Newcastle. While in London, the ship took on board goods for Malta, Syra, Constantinople, Smyrna and Alexandria, but no delay was thereby occasioned, the goods being shipped before the repairs to the machinery were complete. The ship sailed from London on the 1st of March, 1865, and again met with accidents to her machinery, and put into Plymouth, and was kept there a few days repairing the damage done, after which she sailed, on the 9th of March, 1865, from Plymouth for Malta, and after touching and unloading cargo there, and at Syra, Constantinople, and Smyrna, arrived at Alexandria on the 29th of April, 1865. The ship, when she sailed from Newcastle, was not complete and ready for the chartered voyage. There was no usage of trade by which vessels bound from Newcastle or London to Alexandria are justified in taking goods to Syra, Constantinople or Smyrna if the geographical position of the various ports does not warrant such a course. After the making of the

charter-party, many letters passed between the plaintiffs and the defendants or their London house, and their respective attornies. [These letters, which were set out at length in the case, were relied on by the plaintiffs as a waiver of any breach of a condition precedent which had occurred; but, in consequence of the view the Court took on the previous question, it is unnecessary to insert them.] The *Ephesus* arrived at Alexandria on the 29th of April, 1865, and was ready to load a cargo on the 1st of May, 1865. Had the *Ephesus* sailed direct from London to Alexandria and discharged her outward cargo there, instead of taking cargo to the various ports at which she touched on her way out, she would have been ready to load her homeward cargo at Alexandria a few days before the said 1st of April, 1865. Upon the 29th of April, 1865, the master of the *Ephesus* addressed a letter to Mr. Grace, the person mentioned by the defendants as their agent, informing him of the arrival of the vessel, and that laying days would commence on the 1st of May. To this letter the said master received a reply, stating that a cargo could not be provided, and advising him to get other employment. To this reply the said master returned an answer reiterating his first letter. Freight for cotton at Alexandria fell gradually and continuously from the month of January, 1865, to the month of May, 1865. On the 5th of May, 1865, the master, not having received any cargo from the said Charles Grace, went to his office at Alexandria. The said Charles Grace was at the time absent in Europe, but the master of the *Ephesus* saw Mr. Glover who was clerk of the said Charles Grace, and who had authority to act for the latter. He stated to Mr. Glover that the steamer was ready to receive cargo, and formally demanded a cargo from him, whereupon the latter informed him that he had no cargo for him, and that the master must therefore seek a cargo elsewhere for his vessel. The master accordingly did the best he could, but was unable to obtain more than a small freight.

The question for the opinion of the Court is, whether under the aforesaid circumstances the plaintiffs have a right of action against the defendants for refusing to load the *Ephesus* at Alexandria as aforesaid. The Court, or Court of Appeal, is to be at liberty to draw all such inferences of fact as a jury would be entitled to do. If the Court shall be of opinion in the affirmative, then judgment shall be entered up for the plaintiffs for 4,133*l.* 3*s.* 9*d.* and costs of suit. If the Court shall be of opinion in the negative, then judgment of *nol. pros.*, with costs of defence, shall be entered up for the defendants.

Mellish (Cohen with him), for the plaintiffs.—There was no warranty as to the condition of the ship at the time of the charter, nor as to the time necessary to get her ready. In the proviso "on being ready," the word "ready" means "finished." The ship was unfinished to the knowledge of both parties, and this clause was therefore inserted. This being so, two breaches of the charter-party might be alleged: first, that the ship was not in every way fitted for the voyage to Alexandria; secondly, that she went to ports to which she was not entitled to go. Now these were not breaches of conditions precedent according to the authorities; if they were, the consequence would be that if the ship were not ready at the moment of starting, or there was an hour's delay on the voyage, the contract would be void. The first objection here is, that the ship was not ready at Newcastle, but she was ready at Alexandria, which was sufficient. Again, the going to London was "on the way." It is clear a trial trip was necessary, and it was better to go on to London than back over the bar to Newcastle. The builders objected to the going over the bar again, and the repairs were as speedily done in London. So that, although there may have been a nominal breach, no delay resulted; and this being so, the going to London could not be such a breach as allowed the throwing up of the charter-party. The going to London was not a different voyage.

[WILLES, J.—Suppose she had gone to Edinburgh; to what extent does going on a different voyage affect you, if the object of the voyage is not frustrated?]

Clipsham v. Vertue (5 Q.B. Rep. 265; s. c. 13 Law J. Rep. (N.S.) Q.B. 2) shews it does not affect us; so do *Tarrabochia v. Hickie* (1 Hurl. & N. 183; s. c.

26 Law J. Rep. (N.S.) Exch. 26) and *Freeman v. Taylor* (8 Bing. 124; s. c. 1 Law J. Rep. (N.S.) C.P. 26), which latter seems to be the original case. With respect to the first of the two alleged deviations, the one to London, it was *bona fide*, and there was no delay and no throwing up of the voyage. And as to the second, to Constantinople, though it is not contended that it was "on the way," yet there was only a delay of a few days, and it was the subject of a cross-action.

[BYLES, J.—In *Seeger v. Duthie* (8 Com. B. Rep. N.S. 45; s. c. 29 Law J. Rep. (N.S.) C.P. 253; 30 Law J. Rep. (N.S.) C.P. 65) we have all the cases before us.]

In *Behn v. Burness* (3 Best & S. 751; s. c. 32 Law J. Rep. (N.S.) Q.B. 204) the Court, in discussing *Dimech v. Corlett* (12 Moo. P.C.C. 199), says in its judgment, "But the Court did not, we apprehend, mean to intimate that the frustration of the voyage would convert a stipulation into a condition, if it were not originally intended to be one." The only complaints are, first, that the ship ought to have been ready at Newcastle; secondly, that she ought not to have gone to London or Constantinople. As to the first, there was no breach, and certainly no delay was caused; as to the second, there was only a delay of a few days caused, for which a cross-action will lie; the not proceeding with reasonable speed is not a condition precedent; and even if the frustration of the voyage would be a defence, that did not occur in the present case; and it is submitted that the case of *Dimech v. Corlett* (12 Moo. P.C.C. 199) is in point. (He also argued the question of waiver.)

Edward James (Watkin Williams with him), for the defendants.—Whether a stipulation be a condition precedent depends on the intention to be gathered from the document itself, and does not depend on subsequent matters. If there be a condition precedent, it must be fulfilled, and it is immaterial whether delay was caused or not. Here there is a condition precedent, which has been violated. The stipulation is, that the ship is to make a voyage from Newcastle to Alexandria, and also may take an outward cargo "direct or on the way." She was therefore to start direct from Newcastle, or at least from some place on the way. Suppose she had gone to Hamburgh, and then on, it could hardly have been contended that this place was on the way. If she had gone to Edinburgh and back to Newcastle, and thence started, it perhaps might have been different. It is submitted that London was not on the way to Alexandria; the other side admit that Constantinople was not. Was there, then, a condition precedent? It is submitted there was. In *Clipsham v. Vertue* (5 Q.B. Rep. 265; s. c. 13 Law J. Rep. (N.S.) Q.B. 2) there was no stipulation like the one in the present case; and the parties may make it as much a condition precedent that the ship shall start and go direct, as that she shall start on a particular day; and the meaning of the present contract is, that the charterer says to the shipowner, "You may take a cargo, but you must not interfere with my right to have the vessel at Alexandria, and must go direct." The expressions made use of in *Behn v. Burness* (3 Best & S. 751; s. c. 32 Law J. Rep. (N.S.) Q.B. 204) favour this view. (He also argued the question of waiver.)

ERLE, C.J.—In this case the charterer says that he has a defence to the action, because there is a condition precedent which has been broken, and which entitles him to throw up the charter. Now, it is clear that a charter may contain a stipulation or a condition which, if broken, then exonerates the charterer. And the question is, whether here there is a stipulation for breach of which an action would be the remedy, or a condition the breach of which exonerated the defendant. This is a matter of construction of the instrument and intention of the parties. The charter here says, "Shall with all convenient speed (on being ready), having liberty to take an outward cargo for owner's benefit direct or on the way, proceed to Alexandria;" and this is relied on as containing a condition for the breach of which the defendant may throw up the charter. But, in my opinion, there is nothing to shew that this

was intended to be a condition precedent. The defendants complain of two deviations, the first deviation being to London, the second to Constantinople. If there were a condition that the vessel should go direct from Newcastle to Alexandria there would have been a breach of it. But I think it clear that there was only a stipulation, and that it was not the intention of the parties that the defendant should be exonerated if there was a slight deviation. In *Behn v. Burness* (3 Best & S. 751; s. c. 32 Law J. Rep. (N.S.) Q.B. 204) the charter contained the words "now in the port of Amsterdam," and the Court there held that this was a condition which was the base of the contract, and which, being broken, was an answer to an action for not loading; but here I think this was not the case. The question here is one of construction; and I am of opinion that here there is merely a stipulation for the breach of which an action will lie, and not a condition precedent the breach of which exonerates the charterer. This being the construction of the charter, it is unnecessary to go into the other questions.

WILLES, J.—I am of the same opinion. The defendant seeks here to answer the action by setting up a deviation and delay. It is settled (in this Court, at least), that if the deviation and delay have the effect of depriving the charterer of the entire benefit of the contract, or, as it has been expressed, goes to the whole root of the matter, or entirely frustrates the object in view, there is an answer to the action; but a bare deviation short of this only gives an action for damages, and does not defeat the charter. From the time of *Boone v. Eyre* (1 H. Black. 273), *Ritchie v. Atkinson* (10 East, 295), and *Davidson v. Gwynne* (12 Ibid. 381), this has been the rule; and the expressions used in the more recent cases are not new phrases. In the present case I think there was a delay which is to be compensated in damages, and does not go to the root of the matter or frustrate the object in view. And it may be observed that this vessel was not engaged for a particular cargo, and the matter may have been merely a speculation on the fall or rise of freight. It appears the ship was a few days late at Alexandria, and, as the rates were falling, it follows there was a few pounds difference in the freight, the consideration; this being so, apply the above principle, and it follows that the delay is matter for a cross-action and not for resistance to the present action.

BYLES, J.—I am of the same opinion. The true principle is laid down by my Lord in *Seeger v. Duthie* (8 Com. B. Rep. N.S. 45; s. c. 29 Law J. Rep. (N.S.) C.P. 253; 30 Law J. Rep. (N.S.) C.P. 65)—"The construction to be put on these contracts depends on the terms of the individual contract, and what we have to look to is to ascertain the intention of the parties, and whether a particular stipulation is a condition precedent or an independent stipulation is to be ascertained by what we consider to have been the intention of the parties expressed in the instrument." This is the true principle, and correctly puts the result of the cases. Now here the words are, that the ship shall proceed "with all convenient speed (on being ready), having liberty to take an outward cargo for owner's benefit, direct or on the way." The condition, if it be one, is not express, but implied, and therefore, in order to see if it be a condition, one must look to the question of inconvenience, and if this were to be construed as a condition, most charter-parties would be defeated. It is clear law, no doubt, that in such a case as this there is an implied undertaking not to deviate; but in *Freeman v. Taylor* (8 Bing. 124; s. c. 1 Law J. Rep. (N.S.) C.P. 26), where the vessel deviated to the Mauritius, and there was a delay of many weeks, it was held that, in order to excuse the freighter from loading, the deviation must be such as to deprive him of the benefit of the contract. Here the deviation to London was probably nothing but a trial trip, and did not add a day to the length of the voyage; and that to Constantinople, though it was an actual breach, still it was not a breach of a condition, which is an answer to the action.

MONTAGUE SMITH, J.—I am of the same opinion. There is but one question which is one of construction, viz., whether the stipulation, "shall with all convenient speed (on being ready), having liberty to take an outward cargo,

for owners' benefit, direct or on the way, proceed to Alexandria," is a condition or not. I think it clear that it is not a condition precedent. If damage has ensued, there must be compensation, but it does not go to the whole consideration, and is recoverable by cross-action. The question of the object in view being wholly frustrated does not arise here, as no other consequence has ensued than a deprivation of freight.

Judgment for the plaintiffs.

[IN THE COMMON PLEAS.]

June 5, 1866.

LEES v. NEWTON.

35 L. J. C.P. 285; 1 H. & R. 734; L. R. 1 C.P. 658; 14 W. R. 938.

Applied, *Wood v. Wood*, [1868] E. R. A.; 37 L. J. P. 25; L. R. 1 P. 467; 18 L. T. 110; 16 W. R. 568 (Mat.). Referred to, *In re Smith*, [1893] E. R. A.; 62 L. J. Ch. 336; [1893] 2 Ch. 1; 68 L. T. 337; 41 W. R. 289 (C. A.); *In re Edgcombe*, [1902] E. R. A.; 71 L. J. K.B. 722; [1902] 2 K.B. 403; 87 L. T. 108; 50 W. R. 678 (C. A.).

Bankrupt—Arrest after Protection—Penalty—Bankrupt Law Consolidation Act, 1849, s. 113.

BANKRUPTCY.—*An adjudicated bankrupt, who had obtained protection, was arrested by a sheriff's officer by virtue of a warrant issued under an attachment out of Chancery for non-payment of money; he shewed his protection and claimed his discharge, but the officer detained him longer than would have been necessary to obtain a copy of the protection, and on the same day lodged him in gaol; the bankrupt brought an action against the officer for penalties under the Bankrupt Law Consolidation Act, 1849, s. 113:—Held, that the officer was liable for one penalty.*

This was an action, brought by the plaintiff against the defendant, to recover penalties under the Bankrupt Law Consolidation Act, 1849, s. 113, at the rate of 5*l.* per diem, under the following circumstances, which were stated in the form of a special case.

In the year 1857 one H. Lees filed a bill in Chancery, against the plaintiff and others, praying, among other things, that the plaintiff should pay over to him certain sums of money received as an executor and trustee. On the 16th of February, 1865, an order was made by the Master of the Rolls that on or before the 26th of April, 1865, the plaintiff should pay certain sums of money, which, however, he was unable to do. On the 27th of April, 1865, the plaintiff was duly adjudicated bankrupt, and obtained an order of protection. On the 1st of May, 1865, an attachment was issued out of Chancery against the plaintiff, for disobedience to the before-mentioned order. On the 2nd of May, 1865, the sheriff of Lancashire thereunder issued his warrant to the defendant to attach the plaintiff. On the 3rd of May, 1865, the defendant arrested the plaintiff by virtue of this warrant, whereupon the plaintiff produced his protection to the defendant, and demanded to be discharged, but the defendant would not discharge him, but kept him in custody longer than was necessary for obtaining a copy of such protection, and until the defendant on the same day delivered him to the gaoler of Lancaster Castle, the same being the prison of the sheriff of Lancashire, and the plaintiff thenceforth remained in custody of the said gaoler till discharged as hereafter mentioned. On the 4th of May, 1865, the defendant was served with a copy of the plaintiff's protection order and an attorney's letter, demanding his discharge, under pain of the penalties for

which the action was brought; and on the same day the plaintiff shewed his order of protection to the gaoler, who refused to discharge him. On the 13th of May, 1865, the plaintiff applied to the Court of Bankruptcy at Manchester for his discharge, but the Court refused, thinking that as the plaintiff was in custody under an attachment out of Chancery, the gaoler would not be justified in releasing him. On the 2nd of June, 1865, the plaintiff passed his last examination, obtained his order of discharge in bankruptcy, and again applied to the Court to be discharged from custody, but the Court again refused to do so. On the 6th of June, 1865, the matter was brought before the Master of the Rolls, who ordered him to be discharged, and on the 8th of June, 1865, he was so discharged.

The question now submitted to the Court was, whether the plaintiff was entitled to recover any, and if so, how many, of the penalties sought to be recovered.

Field (Holker with him), for the plaintiff.—The plaintiff was arrested for debt within the 113th section of the statute; this is decided by *The King v. Edwards* (9 B. & C. 652), *Ex parte Parker* (3 Ves. 554) and *Ex parte Bury* (7 Jur. O.S. 406). Again, even if it may be said that the defendant could not make the gaoler discharge the plaintiff, and that the gaoler had no power to do so, still a person who puts a man into the custody of one who has no authority to discharge him must pay the penalty of his act, and the plaintiff is entitled to 5*l.* per day till the 8th of June.

Crompton Hutton, for the defendant.—The sum for which the plaintiff was attached was, no doubt, in the nature of a debt; but the question is, whether it was a debt within section 113. The 5 Geo. 2. c. 30. s. 5. is the first enactment on this matter, and the 6 Geo. 4. c. 16. repeats the words therein contained. It is submitted that these statutes meant arrest on mesne process, a process then in force, and usually referred to when such words were used, as distinguished from final process. And the present statute has the same meaning. *Ex parte Russell* (1 Rose, 278) favours this view. Again, the policy of the act, like the common law, was to privilege a man from arrest during the conduct of the proceedings in bankruptcy—*Ex parte Jackson* (15 Ves. 117) and *Phillips v. Poland* (35 L. J. C.P. 128.)

Field, in reply, cited *In re M'Williams* (1 Sch. & Lef. 169).

ERLE, C.J.—I am of opinion that our judgment must be for the plaintiff for one penalty. The law has imposed an extreme risk on the officer making an arrest, but we must administer the law as we find it. And as the Courts have held that an attachment like this is an attachment for non-payment of a debt within section 112. of this statute, and we cannot say that the word "debt" has different meanings in section 112. and section 113, we must hold that the plaintiff is entitled to recover a penalty for the day during which the defendant kept him in custody.

WILLES, J.—I am of the same opinion. It does seem hard upon the officer when, as we see, the Court of Bankruptcy held the same opinion as he did on this question, and held that this case was not within section 113. Still, however, this decision was erroneous, and after the case of *In re M'Williams* (1 Sch. & Lef. 169), before Lord Redesdale, it would be impossible to hold otherwise. *Ex parte Parker* (3 Ves. 554) is also the same way. Is then the officer to decide at his peril? This throws a great burthen on him, but I am obliged to say that he must, for section 113. takes away all discretion. According to the words of the section, he cannot detain the bankrupt longer than is necessary for getting a copy of the order of protection. Here the officer detained the bankrupt longer than was necessary, and as 5*l.* is to be paid for every day and part of a day the bankrupt is detained after such time has elapsed, the officer is liable to one day's penalty; but he is only liable for one day, because when the defendant was put in gaol he was then entirely out of the control of the plaintiff.

MONTAGUE SMITH, J.—I am of the same opinion. In this matter we are

entirely precluded from an original opinion by the cases which have been decided. They decide that an attachment for non-payment of money is an execution for a debt, and that an arrest thereunder is an arrest for a debt within the old statutes, the words of which are the same as those in the act now in force. These cases are not merely decisions in equity, for these decisions were acted on by the Queen's Bench in the case of *The King v. Edwards* (9 B. & C. 652), and as the defendant detained the plaintiff longer than was necessary to obtain a copy of the protection, he is liable; but he is only liable to one penalty, because after the plaintiff was lodged in gaol the detention was not by the defendant.

[IN THE COMMON PLEAS.]

June 7, 1866.

KELLY v. MORRAY.

35 L. J. C.P. 287; 1 H. & R. 684; L. R. 1 C.P. 667; 14 L. T. 624; 14 W. R. 939; 12 Jur. N.S. 769.

Bankruptcy—Creditors' Assignee, Appointment of—Certificate under the Seal of the Court.

BANKRUPTCY.—*In order to prove his title as creditors' assignee, the plaintiff put in evidence a certificate, dated before action, certifying his proper appointment before action, signed by the Registrar for the Commissioner, and sealed with the seal of the Bankruptcy Court:—Held, that the certificate so sealed was conclusive, and that the defendant could not go into evidence to shew that there was no signature by the Commissioner or his deputy till after action brought.*

The plaintiff, as creditors' assignee of one Thomason, a bankrupt, sued the defendant for certain goods which he had seized under a bill of sale executed by the bankrupt. The defendant, among other things, denied the plaintiff's title as assignee.

At the trial, a certificate was put in by the plaintiff, which bore date the 9th of January, 1866, and certified that on the 6th of January, 1866, the plaintiff was duly chosen assignee, and, on his consent, his appointment was ratified by the Commissioner. This certificate was sealed with the seal of the Court of Bankruptcy, and signed by the Registrar as acting for the Commissioner.

The action was commenced on the 13th of February, 1866, and the defendant called evidence to shew that, although the choice by the creditors and oral ratification by the Commissioner were before action, the signature was not till long after action brought; and he contended that the plaintiff could not, therefore, maintain his action.

A verdict was found for the plaintiff, with leave reserved to the defendant to move to enter a nonsuit, on the ground that the plaintiff's title as assignee had not accrued when the action was brought.

A rule *nisi* having been granted pursuant to such leave,

Giffard and Horatio Lloyd shewed cause.—The question turns on the 24 & 25 Vict. c. 134. s. 123, which enacts, that "Where the election of an assignee shall have been accepted by the person elected and confirmed by the Court, the Court shall, by certificate under the hand of the Commissioner and the seal of the Court (to be called the certificate of appointment), declare such creditors' assignee to have been duly elected, and appoint him to the said office accordingly. Such appointment shall be final, and shall not be subject to review or appeal, except as hereinafter provided." It is submitted that the choice by the creditors and ratification by the Commissioner constitutes the appointment,

and that the certificate is merely the evidence, just as the date of an order in bankruptcy is the day of its making, not its drawing up—*Ex parte The Dudley and West Bromwich Banking Company* (32 Law J. Rep. (N.S.) Bankr. 68). In moving the rule, the other side cited *Ex parte Nash* (1 Dea. & Ch. 445) in support of the proposition that the appointment is not complete till the declaration of appointment is signed by the Commissioner; but, on examination, it will be found that it was there merely decided that the duration of the meeting was in the discretion of the Commissioner.

[WILLES, J.—By section 203. the document is to be deemed a record, and a record may be drawn up at any time. BYLES, J.—And by section 206. a copy of any proceeding, sealed with the seal of the Court, is to be conclusive evidence that such proceedings have taken place.]

That is so; and, further, the act is only directory, and the appointment valid without a signature, just as a list of voters unsigned by the overseers is not invalid, though the 6 & 7 Vict. c. 18. s. 13. directs that they “shall” sign—*Morgan v. Parry* (17 Com. B. Rep. 334; s. c. 25 Law J. Rep. (N.S.) C.P. 141).

M’Intyre, in support of the rule.—By section 116. the creditors may choose an assignee, who may be rejected by the Court, and by section 123, if he accepts, the Court “shall, by certificate under the hand of the Commissioner, and the seal of the Court, declare him duly elected, and appoint him accordingly.” Consequently, it is clear that the appointment is the appointment of the Commissioner in the manner specified. And *Ex parte Nash* (1 Dea. & Ch. 445), decided under 1 & 2 Will. 4. c. 56, shews that this is so. And as by section 117. it is only on his appointment that the property vests in him, the plaintiff here brought his action too soon.

[WILLES, J.—Does not section 203. shew that section 123. is directory?]

ERLE, C.J.—I am of opinion that this rule should be discharged. The choice and appointment were made before action, but the objection is taken that the signature of the Commissioner or person acting for him was not affixed till after action brought. I think, however, that the seal of the Court made this document valid and a record. By section 203. any proceeding or writing purporting to be a copy of it, so sealed, is to be evidence that such proceedings have taken place, and be deemed a record; and it is therefore incompetent for us to inquire into the matter.

WILLES, J.—I am of the same opinion. The appointment was made and the seal affixed before action brought, but the signature was appended after. Section 123. draws a distinction between the act of the Court and the Commissioner; and it also appears to me that the object of the section was to enable the production of evidence of the appointment, and that this certificate is in much the same position as a certificate of conformity. But, however this may be, by section 1. the Court of Bankruptcy is made a court of record, and by section 203. a document sealed by the seal of the Court is to be deemed a record thereof, and is, therefore, binding on us.

BYLES, J.—I am of the same opinion. All we have to see is, if the document on the face of it is right, for it is a record, and any error in it can only be rectified by application to the Court of Bankruptcy. Here there is both the seal of the Court and the signature of the Commissioner, and the document is good on its face.

MONTAGUE SMITH, J.—I am of the same opinion.

Rule discharged.

[IN THE COMMON PLEAS.]

Jan. 11, 12, May 30, 1866.

In the matter of the complaint of DANIEL PALMER v. THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

35 L. J. C.P. 289; L. R. 1 C.P. 588; 15 L. T. 159; 15 W. R. 11.

Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31. s. 2.—Undue Preference and Prejudice—Injunction—Authority of previous Decisions under the Act.

CARRIERS.—*The decisions on applications for an injunction against undue preference, under the Railway Traffic Act, 17 & 18 Vict. c. 31. s. 2, ought not to bind the Court in the manner that a precedent in law binds, and therefore the cases of Garton v. the Bristol and Exeter Railway Company (6 Com. B. Rep. N.S. 639; s. c. 28 Law J. Rep. (N.S.) C.P. 306) and Baxendale v. the South-Western Railway Company (12 Com. B. Rep. N.S. 758) are not always to be followed whenever the vans of a railway company are admitted into their goods station after the hour when it is closed against the public in general.—So held by Erle, C.J. and Montague Smith, J.; but held by Willes, J. and Keating, J. that those cases are binding precedents, and, moreover, that they are right.*

Henry James, in Michaelmas Term last, had obtained a rule, on behalf of the complainant, calling on the London and South-Western Railway Company to shew cause why an injunction should not issue enjoining them to desist from giving an undue preference to themselves and to other persons.

The complainant was a carrier, and the complaint was, that the gates of the Nine Elms station of the company were closed at half-past six p.m. against the reception of goods from the complainant for conveyance that evening, although the company's own vans, and also those of Messrs. Baxendale (carriers under the name of Pickford & Co.), were admitted after that hour, and the goods brought by them forwarded that same evening. The consequence of this was, as stated in the affidavits in support of the rule, that both the railway company and Messrs. Pickford, who had receiving-houses for goods in the city of London and borough of Southwark, near to the receiving-houses of the complainant, received goods at their said receiving-houses up to the hour of seven p.m., which they were able to forward on the same night by the company's railway, whilst the complainant could not safely receive and forward the same evening by the railway goods which were brought to any of his receiving-houses after half-past five p.m., as it took about an hour for a cart to drive from such receiving-houses to the said goods station at Nine Elms.

The rule was applied for under the Railway and Canal Traffic Act, 1854, (17 & 18 Vict. c. 31. s. 2.), and it was obtained on the authority of the case of *Garton v. the Bristol and Exeter Railway Company* (6 Com. B. Rep. N.S. 639; s. c. 28 Law J. Rep. (N.S.) C.P. 306) and *Baxendale v. the South-Western Railway Company* (12 Com. B. Rep. N.S. 758), from the facts in which cases the present one did not essentially differ.

The nature of the answer of the railway company, as disclosed by the affidavits of their officers, is fully stated in the following judgment of Erle, C.J.

On the 11th and 12th of January—

Giffard shewed cause against the rule, and

Henry James and Eyre Lloyd argued in support of it.

Cur. adv. vult.

On the 30th of May, the following judgments were delivered.—

ERLE, C.J.—This was an application for an injunction against undue prejudice, and the affidavits on the part of the applicant shew that he and the

railway company and Messrs. Baxendale are collecting carriers collecting goods to be forwarded by the railway; that the gates of the company's station are closed at half-past six against public in general; that the vans of the applicant arriving after that hour have been frequently excluded; and that the vans of the railway company and of Messrs. Baxendale arriving after that hour have been constantly admitted and the goods forwarded the same evening.

The affidavits in answer shew, first, that the company contract to deliver at its destination before morning each and every consignment received into the station before half-past six, and that there is good reason for fixing that hour for the limits of receipt under that contract; and, secondly, that some goods are received into the station after half-past six, and forwarded the same night, and that in so doing the company act rightly both in respect of their own interests and of their duty to their customers.

As to the first point, viz., that there is good reason for fixing the hour of half-past six as the limit of receipt under the contract, the affidavits of the officers of the company state—that traffic is managed in the manner best adapted to secure for all the public in the utmost degree safe and cheap accommodation, without any partiality; that there are daily from Nine Elms 22 goods trains, with 720 railway trucks, carrying 1,000 tons and that 525 road vans arrive daily at that station. That arrangements must be made for delivering this amount of traffic every night among 257 stations. That for the first train at 10.35 there were in April 2,400 consignments each day; that every consignment had to be received, weighed, carried from scales, sorted, loaded on hand trucks, conveyed to railway trucks, entered on truck-lists, loaded into trucks and invoiced. That this process for the first of the goods trains for the more distant stations, in North Devon, has to be repeated in a degree for the goods trains succeeding each other at half-hour intervals till three A.M., for the stations in nearer counties. That the line must be drawn at some point to limit the contract of the company to forward in the course of the night, and that half-past six is the latest practicable time for the receiving of goods with a contract so to forward them. That the outgoing trains are to be arranged, not only with reference to their own safety (but also with reference to the incoming trains, when an analogous process has to be repeated for distributing goods arriving in London. That the hour for contracting to forward the same night must be fixed with reference not only to great differences in the quantity of traffic to which the contract would apply on different nights, but also to great differences in the purposes of the consignors.

These being the facts relevant to the time of closing, I think that the directors had good reason for fixing on half-past six as the latest time for receiving goods under the contract, and that this Court ought not to compel the company to incur the risk of numerous breaches of contract and of numerous collisions by interfering with the complex arrangements in subordination to each other above described.

As to the second point, that some goods are received into the station after half-past six, and forwarded the same night, the affidavits in answer shew that this is done by right, and according to duty, the company having a right to forward goods at any time, and a duty to forward them at all times without delay. When the contract is to attach, there must be a limit of time, and the party claiming to come in under that contract must comply with that limit; and as the applicant claims that his goods should be received and forwarded under the contract, they are properly excluded when not within the time limited for the contract. With respect to the charge that goods are received after half-past six and forwarded the same night, as far as the complaint is general, the answer must be equally general, and it shews classes of cases where the facts complained of are done lawfully and properly, without causing undue prejudice to any one. Thus it appears that the general rule above mentioned for closing the gates at half-past six, and excluding vans after that time, is subject to exception, at the discretion of the superintendent, according to circumstances, such as goods for shipment on a ship about to sail, perishable

goods, accidental delays on the road, and the like, and that the complainant has had the benefit of this exception impartially with all other customers. Then, also, with respect to admitting some of the vans of the railway company after half-past six: it appears that there are twenty-seven receiving-houses, and several carmen collecting from several receiving-houses lying in several lines from the circumference of collection towards the centre several times in a day, and that the last collection begins at the circumference at half-past four, and as the quantities vary, each carman is detained more or less as he approaches the station, and so is often admitted after half-past six, and the goods are then forwarded as far as can be conveniently done; and it further appears that in several receiving-houses goods are sorted and weighed, and invoiced and made fit for immediate forwarding, which cannot be done by a stranger to the company, and that there is a reason for admitting vans so loaded from those houses at a later hour, and forwarding those goods for these receiving-houses. The goods for the earliest trains may be sorted from the goods for the later trains, and sent forwards according to the station in time for performing the contract as to those goods; but this species of sorting must be done by agents for the company, as a mistake in sorting would make them liable for a breach of contract.

These being the facts, and half-past six being shewn to be the proper hour for closing, in reference to the contract, if this rule is made absolute, it must be in effect for an injunction against forwarding any goods at all received after half-past six.

The consequence of such an injunction would be that the applicant would have a contingent possibility of being employed to cart some of the goods now carted by the railway company, that is, in case the consignors of such goods were induced by reason of the delay to consign to the railway through him instead of to the railway direct. On the other hand, the consignors of all the goods detained would suffer twenty-four hours' useless delay, the railway company would have to warehouse those goods for twenty-four hours, and the complex arrangements above described would be disturbed.

As to receiving goods after half-past six, all parties are at liberty to receive at the receiving-houses at all hours any goods; the only question is in respect of the obligation to forward. That obligation only attaches where the contract attaches, but where the contract does not attach, still the company has, and ought to have the option of forwarding goods at any time, and violates no right in doing so. The affidavits of the defendants are positive, that the vans admitted after half-past six are so admitted without any partiality or improper motive, and I see no reason for disbelieving them. If we granted an injunction against forwarding in the night any goods unless received at the station before half-past six, we should defeat the purpose of the statute under which we are acting, as that statute, section 2, enacts that every railway shall afford all reasonable facility for receiving, forwarding and delivering traffic on their railway. The proposed injunction would, as it seems to me, cause a violation of the duty thus created, if it caused useless delay.

So the matter would have stood if it had been *res integra*; but it is said that we are concluded by authority, and that the cases of *Bazendale v. the South-Western Railway Company* (12 Com. B. Rep. N.S. 758) and *Garton v. the Great Western Railway Company* (6 Com. B. Rep. N.S. 639; s. c. 29 Law J. Rep. (N.S.) C.P. 306) are in point. In answer to this, I beg to say that the argument from authority seems to me to be without conclusive force in guiding the exercise of this jurisdiction; the question whether undue prejudice has been caused being a question of fact, depending on the facts proved in each case. The legislature intended, by the Traffic Act, to facilitate the transport (that is, the receiving, forwarding and delivering of traffic); and for the purpose of promoting such facility, gave to this Court a discretionary power over all the operations of railway companies, relating to transport of traffic, by issuing an injunction against undue prejudice. And as the terms "undue prejudice" are unlimited, any operation may be within them; so that the power is, in effect,

arbitrary, and is not subject to any review, either in respect of the questions of fact or law.

The injunction is a severe infliction as a censure, as a fine in the shape of costs, and as an interruption in the conduct of a very complicated and important business, the directors being subject to imprisonment, and the company being liable to a fine, not exceeding 200*l.* per day, for disobedience to an injunction. Also it is a procedure, in which the railway company can never gain anything, and must always lose something in the shape of costs. The legislature, assuming that some directors would suppose themselves to be above the control of the law, seems to have created the anomalous jurisdiction to bring them down to the level of the law in case of need; and intrusted such a power to this Court of law, in the confidence that the rights of railway companies, under the law, would here be securely protected. In exercising this jurisdiction, and granting an injunction, it seems to me that the Court has to consider the conflict of affidavits, and ascertain therefrom what is the complaint, whether the public have any interest in it, and whether any fair interests of the railway company are involved in it, and whether the directors intentionally violate their duty towards the public, or their company, or the complainant. I recite these considerations for the purpose of supporting my opinion that the grounds for this extraordinary interference must, in each instance, in their nature be almost singular, and can scarcely ever afford any guidance for deciding a subsequent application for an injunction. In confirmation of this opinion, I rely upon the course taken by this Court in granting an injunction against this company at the suit of Mr. Baxendale. I concurred in that decision because I considered myself bound by the precedent in *Garton v. the Great Western Railway Company* (6 Com. B. Rep. N.S. 639; s. c. 28 Law J. Rep. (N.S.) C.P. 306). In each case the gates of the goods' station had been closed against the public in general at a fixed hour, and the vans of the company were supposed to be admitted after that hour; and as such admission was decided to be an undue prejudice to Mr. Garton, this Court was induced to decide that an admission of the vans of this company (the South-Western) was also an undue prejudice to Mr. Baxendale; and, on the authority of these two cases, Mr. Palmer now moves for another injunction; and I have been thus obliged either to grant every such application or to reconsider the question of authority, and I have come to the conclusion that it ought not to bind in the manner that a precedent in law binds.

I do not presume to discuss the merits of Mr. Garton's case, as I was not a party to it. I assume it must have been properly decided; but still it is not a precedent that must be always followed wherever the vans of a company are admitted into a station after it is closed against the public. I do not know whether in *Garton's case* (6 Com. B. Rep. N.S. 639; s. c. 28 Law J. Rep. (N.S.) C.P. 306) the affidavits of the officers of the company were disbelieved, and the motives of the directors discredited, or whether the interest of the collecting carrier was considered of more importance to the public than the interest of the railway company; such considerations appear to have had weight with this Court in some of the cases against the Great Western Railway Company. None of these considerations appear to me to be relevant against the directors of this company. In my opinion they have done their duty in the conduct of their business, and ought not to be interfered with on the complaint now before us. I am further confirmed in this view by the consequence of the injunction granted at the suit of Mr. Baxendale. I thought at the time it was granted that the defendants had been doing their duty in a proper manner; nevertheless, the injunction went on authority; the consequence has been that the company, in supposed obedience thereto, have submitted to the will of Mr. Baxendale, and appear to have admitted his vans at all hours. The admission of Mr. Baxendale's vans appears to have induced Mr. Palmer to claim a similar admission, and would be a ground for the admission of everybody, if precedent was to be followed. But it is certain that we ought not to follow any precedent if in doing so we should defeat the

intention of the legislature as above described; that intention was declared to be to facilitate transport of traffic; it seems to me that the injunction now applied for, that is, an injunction against closing at half-past six, or against forwarding after half-past six, would, in its practical operation, prevent the railway company from forwarding on the same night any goods which arrived at the station after half-past six, and would, therefore, be a hindrance, instead of a facility to transport, and so would be contrary to the interest and convenience of the public. Such an injunction might be the source of private profit to Mr. Palmer, but he has no right to demand that the interests of the public or of the railway should be sacrificed for his private gain. For these reasons I think that the rule should be discharged.

WILLES, J.—Mr. Justice Keating and myself are of opinion that the precedents, which would entitle the applicant to judgment, bind us; and, moreover, that they are right.

MONTAGUE SMITH, J. concurred in the judgment of Erle, C.J.

As the Court was thus divided,

The rule dropped.

[IN THE COMMON PLEAS.]

June 2, 1866.

SCOTT (*public officer*) v. THE UXBRIDGE AND RICKMANSWORTH RAILWAY COMPANY.

35 L. J. C.P. 293; L. R. 1 C.P. 596; 14 L. T. 596; 14 W. R. 893;
12 Jur. N.S. 602.

Referred to, *Lee v. Bude & Torrington Junction Railway Co.*, [1871] E. R. A.; 40 L. J. C.P. 285; L. R. 6 C.P. 576; 24 L. T. 827; 19 W. R. 954 (C.P.); *Greenwood v. Sutcliffe*, [1892] E. R. A.; 61 L. J. Ch. 59; [1892] 1 Ch. 1; 65 L. T. 797; 40 W. R. 214 (C. A.).

Scire Facias against a Shareholder on a Judgment against a Railway Company—Tender—Costs.

COMPANY.—*The plaintiff, having recovered judgment against the defendants, a railway company, gave a shareholder notice that he was about to apply for a scire facias against him; part of the judgment debt was satisfied by payments from other persons. The plaintiff claimed to be entitled to recover from the shareholder a sum which included the residue of the judgment debt, interest thereon, and costs incurred in certain writs of elegit against the company. This sum the shareholder offered to pay under protest; but the plaintiff refused to receive it under protest, and applied for a scire facias:—Held, that the tender under protest was valid; that the costs were not chargeable against the shareholder; and that the rule ought to be discharged, with costs, without prejudice to a future application if the sum claimed, less the costs, were not paid within a reasonable time.*

This was a rule calling on B, a shareholder of the Uxbridge and Rickmansworth Railway Company, to shew cause why a writ or writs of *scire facias*, on the judgment obtained by the plaintiff in this cause, should not be issued forth against him, as such shareholder, to enable the plaintiff to have execution upon the said judgment, to satisfy him for the residue unpaid on such judgment, amounting to 1,652*l.* 14*s.* 8*d.*, to the extent of his shares in the capital of the said company not paid up.

On the 25th of March, 1865, judgment was signed in the action for 1,646*l.* 2*s.* 2*d.* debt, and 6*l.* 12*s.* 6*d.* costs. Writs of *elegit* were issued, under one of which 80*l.* were realized, and a shareholder paid 200*l.* on the 2nd of May, 1866. On the 25th of April, 1866, a notice was served on B, which stated that

1,572l. 14s. 8d., parcel of the judgment, remained unsatisfied, and that a *scire facias* would be applied for. The plaintiff, at the same time, carried on similar proceedings against some other shareholders; and communications took place between the attorney of the plaintiff and the attorney of B. and three other shareholders, with a view to a settlement. The result may be summed up thus: On behalf of the plaintiff a claim was made for 1,596l. 3s. 6d., a sum which was arrived at in the following way: the shareholders were debited with 1,652l. 14s. 8d., the original sum due under the judgment, and 72l. 19s. for interest; they were then credited with 280l., the amount paid, and then debited with 150l. for costs, and 9s. 6d. for additional interest. This sum the shareholders offered to pay under protest, but the plaintiff refused to accept the money, unless such protest was withdrawn. The 150l. for costs were costs incurred in executing the writs of *elegit*.

Karslake shewed cause, and contended, first, that proper notice ought to have been given of the amount due, and this had not been given, as the demand was of 1,596l., whilst 1,445l. was really due; and, secondly, that the tender under protest was justifiable, and that, under such circumstances, the Court, in its discretion, would not allow the writs to issue.

Wood supported the rule.

ERLE, C.J.—This is a rule obtained by a creditor, who had recovered a judgment against a company, calling upon a shareholder of that company to shew cause why a *scire facias* should not issue against him, to enable the plaintiff to have execution upon the judgment against the company. Now, these proceedings against the shareholder are proceedings that would entail very considerable cost upon him, and the statute which authorizes us to give the plaintiff the remedy he seeks for, imposes upon us the duty of seeing that the process of the Court is not abused by such creditor. And I think it clear that the party seeking this remedy ought to enable the shareholder to pay everything that is due to the creditor, and ought to enable the shareholder to know what that sum is; because, if the rule is made absolute, and the *scire facias* issues, and the other proceedings issue, they are all at the cost of the debtor; and if the debtor is willing to pay every farthing that is due, the party that comes to us for leave to issue this process ought to shew him what is due. Now, I observe that this rule is for a *scire facias* against a party, to shew cause why he should not pay the residue unpaid on a judgment, amounting to 1,652l. 14s. 8d.; and at the time when this rule was moved for, I think that the whole of this sum was not due from the debtor under that judgment, there having been some payments made thereon. But it is the settlement between the attorneys that I go upon; it is that which induces me to discharge this rule. I assume that they are, both of them, gentlemen of the highest respectability, advising their clients according to what they believed to be their rights, standing explicitly on their view of the law. The attorney for the creditor made out his statement of the demand: this amounted not to 1,652l., but to 1,596l. 3s. 6d.; for after giving credit for 280l. paid off, he put into that claim 150l. for costs, and a certain sum for interest, and so made up the balance remaining due to be 1,596l. 3s. 6d. The attorney for the debtor offered to pay this sum under protest, but the attorney for the creditor refused to receive it under protest. And that is the point where these two gentlemen, both of whom I assume to be of high respectability, have stood upon their respective rights. The one says, "You are going on against my clients with proceedings that will run up a considerable amount of costs; I am willing to pay you every farthing of your demand, and so to stop every cost of further proceedings; but as I do not believe it is due, I will pay it under protest." The other says, "I will not take it under protest." And so these expensive proceedings have gone on. I am clearly of opinion that the debtor, being called on in these legal proceedings to pay the debt that is claimed from him, has a right to stop those legal proceedings by payment; and the payment is just as valid where it is made under protest as where it is made without protest. And the debtor has a right to say, "I will stop the proceedings

by paying this money, but I protest it is more than I am bound to pay." And in putting in that protest, he reserves to himself any recourse to a just right which the law gives him. And here he might well say, "I propose to give you this 1,596l. 3s. 6d. under protest, because in that demand there was a claim for 150l. costs, which, as at present advised, I think was in excess of the proper demand of the creditor." The parties have stood on their respective rights; they have resorted to this rule, which is a rule which we are bound to make absolute or discharge, according to the real rights or interests of the parties; and in my opinion we are bound to discharge it, because the defendant was willing to have done that which would have stopped the necessity for those proceedings; the creditor has come here without any cause.

WILLES, J.—I am of the same opinion. It appears to me that Mr. Wood stated just now with great accuracy the amount which the applicant is really entitled to, and that amount does not include the 150l., or any part of it, under the judgment in the action, and interest. And it would have been well if Mr. Wood's advice had been taken, and acted upon at the time when the correspondence between the attornies took place. The shareholders' attorney does not appear to express any opinion as to whether the 150l. was or might not be due, but was desirous to avoid litigation, and tendered to the attorney of the applicant all that he claimed under protest. Now, if he had tendered all that was claimed, and it had been refused, it must be admitted that this application could not have stood, and the rule must have been discharged, because it would have been an abuse of the process of the Court to apply for or act upon such a rule, or to issue a *scire facias* under such circumstances. The case, therefore, may be decided on the question of whether there was a valid tender, and whether a debtor, tendering an amount which he is satisfied to pay, rather than be sued for it, may guard himself against an admission that the claim is a just one, so as to enable himself to take further proceedings to test the justice of the claim by adding the words "under protest" to his tender, and tendering under protest. This is a question of general importance. It is quite obvious that he may. I think the protest imposes no condition on the tender. The creditor has only to say, "I take the money—protest as much as you please," and neither party makes any admission. Whereas, if the debtor were not allowed to use some such expression on paying the money, there would be, from his silence, an implied admission that the claim on him was a just one; which, in the case of a disputed claim against a person anxious to avoid litigation, might lead to very unjust consequences. I desire to say I entirely concur in the law and good sense of the ruling of the Lord Chief Baron to that effect in the case of *Manning v. Lunn* (2 Car. & K. 13). The tender being a good one, these proceedings were unnecessary; and therefore I think the rule ought to be discharged.

KEATING, J.—I am of the same opinion.

MONTAGUE SMITH, J.—I am of the same opinion. I will only say that the protest cannot affect the validity of the tender. If the claim is rightly made, and can be legally sustained, the words of protest used by the debtor in paying, cannot, in the slightest degree, affect the creditor. Whereas, if the claim is not well founded, or is excessive, the debtor might be compromised in paying it, unless he added those words.

Karslake.—The rule will be discharged, with costs.

ERLE, C.J.—Yes; rule discharged, with costs.¹

(1) It appeared that there was a similar rule against another shareholder, against which also *Karslake* shewed cause; and one against a third, in which no cause was shewn. The latter was made absolute, *Wood* undertaking that execution should not issue for more than was really due. With respect to the former, it was also discharged, with costs, the Court giving liberty to *Wood* to apply again (in that case and the case in the text) if within a reasonable time the creditor was not paid the sum he claimed, less the 150l. for costs, which the Court said they thought he was entitled to demand.

[IN THE COMMON PLEAS.]

May 1, June 12, 1866.

APPLEBY AND ANOTHER v. MEYERS.

35 L. J. C.P. 295; L. R. 1 C.P. 615; 14 L. T. 594; 14 W. R. 835: reversed,
36 L. J. C.P. 331; L. R. 2 C.P. 651; 16 L. T. 669 (Ex. Ch.).

Contract—Machinery—Accidental Fire—Right to recover for Portion of Machinery erected.

The plaintiffs contracted with the defendant to erect certain machinery in his buildings; when the machinery was only partly erected, a fire broke out in the buildings and destroyed both the buildings and the machinery then erected thereon:—Held, that the plaintiffs were entitled to recover from the defendant the price of that portion of the machinery which had been so erected and destroyed.

This was an action brought by the plaintiffs against the defendant, to recover the sum of 419*l.*, for work done and materials provided under the circumstances hereafter stated. By consent of the parties, and by the order of a Judge, there was stated for the opinion of the Court, without pleadings, the following

CASE.

On the 30th of March, 1865, the plaintiffs entered into a certain agreement with the defendant, which was headed—"Specification and estimate of engine, boiler, lifts, &c., for B. Meyers, Esq., Southwark Street,—Messrs. Tillott & Chamberlain, architects,—30th of March, 1865," which contained ten distinct headings, viz., 1, boiler; 2, engine; 3, shafting; 4, lifts; 5, shafting; 6, drying-room; 7, copper pans; 8, tanks; 9, pump; 10, steam boxes: under which headings were particular descriptions of the work to be done respectively, in connexion with them, and the prices to be paid; and which then concluded with these words: "We offer to make and erect the whole of the machinery of the best materials and workmanship of their respective kinds, and to put it to work for the sums above named respectively, and to keep the whole in order, under fair wear and tear, for two years from the date of completion. All brickwork, carpenters' and masons' work and materials are to be provided for us, but the drawings and general instructions required for them to work to, will be provided by us, subject to the architect's approval

(Signed) "Appleby, Brothers."

The total cost of the said works, if they had been completed under the said contract would have amounted to 459*l.*

On the 4th of July, 1864, a fire accidentally broke out on the premises of the defendant in Southwark Street, which entirely destroyed the said premises and the works which then had been erected by the plaintiffs in part performance of the contract above set out. At the time of the fire the works contracted to be erected as aforesaid had not been completed. The premises upon which the several works were to be erected were the property of the defendant, in his occupation, and under his entire control. The plaintiffs had access thereto only for the purpose of performing their contract. At the time of the fire, portions of the items Nos. 1 to 8, were erected and fixed, and some of the materials for others were on the premises. The defendant had not completed the carpenters' and masons' work, to be prepared by him under the said agreement. The tank had been erected by the plaintiffs, and was used by the defendant by taking water therefrom for the purpose of his business, but the other apparatus connected with it, as specified in No. 8, was not completed. The plaintiffs' workmen were still engaged in continuing the erection and completion of the same at the time of the fire.

The question for the opinion of the Court is, whether, under the above

circumstances, the plaintiffs are entitled to recover for the whole or any portion of the contract price.

If the Court shall be of opinion that the plaintiffs are entitled to recover for the whole, judgment shall be entered up for the plaintiffs for 412l. 10s. If the Court shall be of opinion that the plaintiffs are entitled to recover for part only, then judgment shall be entered for such sum as an arbitrator shall direct; he having power to certify for costs, if necessary; in either case, with costs of suit. If the Court shall be of opinion in the negative, then judgment of *non pros.*, with costs of defence, shall be entered up for the defendant.

Holl, for the plaintiffs (May 1).—The plaintiffs are entitled to recover for what they have done on the defendant's premises. Portions of many of the items were erected and fixed to the premises, and the tank was in actual use; portions of others were on the premises; and the defendant had no more than a right to enter to work. The property therefore passed, and the plaintiffs the entitled to recover. Thus, in *Menetone v. Athawes* (3 Burr. 1592), it was held that a shipwright might recover for work done to a ship which was burnt during the progress of the work in a dock belonging to himself, but for the use of which the shipowner would have to pay; and Lord Mansfield called it a desperate case for the defendant, the shipowner. In the present case salvage would have belonged to the defendant. In *Story on Bailments*, s. 426, the author says, "If, while the work is going on a thing belonging to the employer, or after it is finished, but before it is delivered, the thing perishes by internal defect, by unavoidable accident, or by irresistible fire, without any default of the workman, *Pothier* holds that the latter is entitled to compensation to the extent of the value of the labour actually performed, unless his contract import a different obligation, for the maxim is *res perit domino*." He then says that the same rule holds in the Roman law, and that Mr. Bell has deduced certain rules, the second of which is that if a man be "employed in working up the materials of, or in adding his labour to, the property of his employer, the risk is with the owner of the thing with which the labour is incorporated." And he concludes, in section 426 a, that "these principles seem also well founded in the common law." Here the plaintiffs were adding to land which belonged to the defendant.

Hannen, for the defendant.—This is not a question of whether property passed, but whether a condition precedent has been fulfilled. In *Menetone v. Athawes* (3 Burr. 1592) there was no stipulation as to the time of payment; and in *Chitty on Contracts* (7th edit.), p. 514, the author, after citing that case as an authority for the position that "the destruction of the work by an accidental fire or other misfortune, before it is finished or delivered, does not deprive the workman of his right to remuneration to the extent of the work done," goes on to say, "unless by the uniform custom of the particular trade, payment is not to be made until the work is completed and delivered." For which proposition he cites *Adlard v. Booth* (7 Car. & P. 108), where it was held that a printer who had delivered a portion of the copies of a work, but was prevented from supplying the whole number by a fire on his premises, was not entitled to be paid even for the copies delivered. The dividing line is the time for payment, and in the present case it had not arrived. In *Taylor v. Caldwell* (5 Best & S. 826; s. c. 32 Law J. Rep. (n.s.) Q.B. 164), the defendant had agreed to let the plaintiff a music-hall to carry out certain entertainments; it was burnt down, and it was held that the defendant was excused from performing his contract; and in delivering the judgment of the Court, Mr. Justice Blackburn says, "There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible; . . . but this rule is only applicable where the contract is positive and absolute, and not subject to any condition express

or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled, unless, when the time for fulfilment of the contract arrived, some particular specified thing continued to exist, . . . the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused, in case, before breach performance becomes impossible from the perishing of the thing, without default of the contractor." Both parties are excused; it is just as if the contract had never been; on the one hand, the workman cannot be sued for non-completion, on the other he cannot sue for what he has done.

Holl, in reply.—*Taylor v. Caldwell* (5 Best & S. 826; s. c. 32 Law J. Rep. (N.S.) Q.B. 164) is in favour of the plaintiffs, for it shews they are excused from completing. In *Adlard v. Booth* (7 Car. & P. 108) the fire was on the plaintiff's premises. And the before-cited passage in *Story on Bailments* contains the true rule.

Cur. adv. vult.

The judgment of the Court¹ was now (June 12) delivered by—

MONTAGUE SMITH, J.—In this case the plaintiffs, who are engineers, had contracted, by an agreement in writing, with the defendant to do certain works upon buildings on his premises, viz., to provide and erect upon them a steam-engine, and machinery connected with it. The works were divided into different parts, and separate prices were fixed upon each of those parts. The plaintiffs agreed to provide and erect the machinery for those prices. The case finds that the premises were in the occupation, and under the entire control of the defendant; that all parts of the work were far advanced towards completion; that some parts were so nearly finished that the defendant had used them for the purposes of his business; but that none of the parts into which the work had been divided were absolutely complete. The works were in this state when an accidental fire broke out on the defendant's premises and destroyed the defendant's buildings and the works done upon them by the plaintiffs.

The question submitted to us is, whether, under the circumstances, the plaintiffs are entitled to recover the whole or any portion of the contract price. It is clear that the plaintiffs cannot recover the whole contract price, as a specific sum, for that was only to be paid on the completion of the works, an event which has not happened. But we think that, under the circumstances, they are entitled, upon an implied contract, to be paid the value of the work done, which value we assume, from the form of the question, the parties are content to estimate upon a due proportion of the contract price.

It was contended, for the defendant, that the fire was a common misfortune, excusing both parties from the performance of the contract; and we were pressed to adopt the principle laid down by the Court of Queen's Bench, in the case of *Taylor v. Caldwell* (5 Best & S. 826; s. c. 32 Law J. Rep. (N.S.) Q.B. 164). In one part of that judgment it is said, no doubt in general terms, "The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing a condition is implied, that the impossibility of performance arising from the perishing of the person or thing, shall excuse the performance." The Court of Queen's Bench may have properly adopted and applied this principle in the case of the contract before them; but we think it cannot be correctly applied to the present case, where the contract is of a different kind, and appears to us to fall within the qualification of the principle found in the early part of the same judgment, where the Court says that, "in the absence of any express or implied warranty that the thing shall exist," the contract

(1) *Erle, C.J., Byles, J., Keating, J. and Montague Smith, J.*

is not to be construed as a positive contract, or subject to an implied condition that the parties shall be excused by the perishing of the thing before breach. By the agreement between these parties, the machinery was to be fixed to the buildings of the defendant, so that the parts of it when and as fixed would become his property and subject to his dominion. And we think we fulfil the intention of those who entered into this contract by holding that it is an implied term of it that the defendant should provide the buildings, the subject on which the work was to be done, and keep them in a fit state to enable the plaintiffs to perform their part of the contract. If the defendant had refused to allow the plaintiffs to have the use of the buildings, or by his own act or default had rendered them unfit to receive the work, there can, we apprehend, be no doubt that the plaintiffs might either have sued for a breach of the contract, or have treated the contract as rescinded, and recovered the value of the work done on a *quantum valebat* count. These rights of action would accrue to the plaintiffs, not by reason of any express words of agreement, but in virtue of the implied term of the contract to which we have referred.

Then is the non-performance of this implied term, on the part of the defendant, excused by the happening of an accidental fire? We think it is not excused by that event. The general rule of law is clear, that when a man contracts to do a thing, he is bound to do it or make compensation, notwithstanding he is prevented by inevitable accident. We hold that an implied promise is present in this contract on the part of the defendant to provide and keep up the buildings, and as a consequence he must be liable in this case, unless we ought to annex a condition or exception to his promise exonerating him from the performance of it in the case of fire or other accident. When the plaintiffs agreed to expend their materials and labour on buildings of the defendant, of which he was to retain the possession and control, it is reasonable to infer that it was contemplated that the subject on which the work was to be done, should be provided and kept at his risk and peril; and it is unreasonable to suppose that the parties intended that if a fire happened, in no way attributable to the plaintiffs, the defendant should be set free from all obligation under the contract. We think that if we were to imply an exception or condition having this effect, we should not fulfil, but frustrate the real intention of the parties. It appears to us that such a fire no more excuses the defendant than an eviction of both plaintiffs and defendant from the buildings by title paramount would have done.

No decision directly in point was cited to us. But the learned counsel on both sides referred to *Story on Bailments* (section 426. and following sections), and each relied on certain passages, as being in his favour. The application of the maxim *res perit domino* to cases of a kind in some respects like the present, is discussed by the learned author; but the authorities he has collected appear to leave open the precise question we have to decide in this case. The judgment of the Court is for the plaintiffs to the extent before indicated.

Judgment for the plaintiffs.

[IN THE COMMON PLEAS.]

May 25, 1866.

HOOPER v. THE BRISTOL PORT RAILWAY AND PIER COMPANY.

35 L. J. C.P. 299.

Lands Clauses Consolidation Act, s. 68.—Pleading.

COMPULSORY PURCHASE.—*In an action against a railway company under section 68. of the Lands Clauses Consolidation Act, for the full compensation claimed because of a default by the company to summon a jury within twenty-*

one days, a plea "that the claim was not a bona fide claim within the statute, but in fraud of the defendants and without any reasonable cause," will not be allowed.

Coleridge applied for a rule calling on the defendants to shew cause why the plaintiff should not be allowed to plead the plea hereinafter mentioned. —The action is under the Lands Clauses Consolidation Act, section 68, for the full amount of the compensation which the plaintiff has claimed under that act, and which he says he is entitled to because the defendants failed to summon a jury within twenty-one days. The matter has been before Mr. Justice Keating, at chambers, who has referred it to the Court. The plea the defendants ask to be allowed to plead is, that the "claim was not a bona fide claim within the statute, but in fraud of the defendants, and without any reasonable cause." In *Hayward v. the Metropolitan Railway Company* (4 Best & S. 787; s. c. 33 Law J. Rep. (N.S.) Q.B. 73) Mr. Justice Mellor says, "The 68th section is intended to meet a different state of circumstances. If the company have taken or injuriously affected land, the claimant may have the compensation assessed under that section, and he may make his claim, which ought to be a bona fide one, because it puts the company under the liability to pay the amount with costs if they do not comply with it and issue their warrant to the sheriff within twenty-one days after the receipt of the notice of claim."

[WILLES, J. referred to *Wade v. Simeon* (2 Com. B. Rep. 548; s. c. 15 Law J. Rep. (N.S.) C.P. 114).]

ERLE, C.J.—I am of opinion that the plea cannot be allowed. It must be understood, however, that we do not intend to prejudice any application to plead a plea framed on *Wade v. Simeon* (2 Com. B. Rep. 548; s. c. 15 Law J. Rep. (N.S.) C.P. 114), or as counsel may advise, setting out how the claim was a fraudulent one.

The other Judges¹ concurred.

*Rule refused.*²

[IN THE COMMON PLEAS.]

June 6, 1866.

MULLETT v. MASON.

35 L. J. C.P. 299; 1 H. & R. 779; L. R. 1 C.P. 559; 14 L. T. 558; 14 W. R. 898; 12 Jur. N.S. 547.

Discussed, *Smith v. Green*, [1876] E. R. A.; 45 L. J. C.P. 28; 1 C.P. D. 92; 33 L. T. 572; 24 W. R. 142 (C.P. D.).

Damages—False Representation—Consequential Damage—Cattle Plague.

ANIMALS. FRAUD AND MISREPRESENTATION.—*The defendant sold to the plaintiff a cow which he knew to be infected with a contagious disease, falsely representing to the plaintiff that she was free from disease, and the plaintiff, believing the representation to be true, put the cow in a shed with other cows of his own, which became thereby infected with the disease and died:—Held, that in an action against the defendant for fraudulently representing the cow to be free from disease, the plaintiff was entitled to recover, in addition to the*

(1) Willes, J., Byles, J. and Montague Smith, J.

(2) On a subsequent day the Court allowed the defendants to plead a plea, setting out certain facts on which the defendants relied, without discussing its validity, and gave the plaintiff, who was willing that the plea should be pleaded, leave to reply and demur.

purchase-money he had paid for the cow, the value of the other cows he had lost by reason of their so becoming infected, such damage being the natural consequence of the plaintiff acting on the defendant's representation as if it had been true.

The first count of the declaration stated that the defendant by warranting a cow to be then free from disease, sold the said cow to the plaintiff; yet the said cow was not then free from disease. The second count alleged that the defendant was possessed of a cow which, as the defendant then well knew, was diseased; and the defendant, by then fraudulently concealing from the plaintiff that the said cow was diseased, and representing to him that it was free from disease, induced the plaintiff to buy the said cow for 10*l.* 15*s.*, and which the plaintiff paid to the defendant. Third count—that the defendant was possessed of a cow which, as the defendant then well knew, was a foreign cow, imported into England from parts beyond the seas, and that it had not come from the farm of the father of the defendant, and that it was then suffering from a disease which would infect other cows with which it might be placed or come into contact, and the defendant, by then fraudulently concealing from the plaintiff that the said cow was diseased, and representing to him that it was free from disease, and that it was not a foreign cow, and that it had come from the farm of his the defendant's father, induced the plaintiff, who was then a farmer possessed of other cows, as the defendant well knew, to buy the said cow for 10*l.* 15*s.*, which the plaintiff paid to the defendant, by means of which said several premises the plaintiff lost the said sum of money, and the said cow became of no use to the plaintiff, and infected other cows of the plaintiff with the said disease, and the plaintiff was compelled to sell them at a much lower price than he otherwise would have obtained for them, and the plaintiff otherwise incurred great trouble and expense.

Pleas—First, to the first count, a denial of the warranty; secondly, to the first count, that the said cow was at the time of the said alleged warranty free from disease; thirdly, to the second and third counts, not guilty; fourthly, to the second count, that the said cow in that count mentioned was not diseased as alleged; fifthly, to the third count, that the said cow in that count mentioned was not suffering from the disease therein mentioned as alleged. Issue joined on these pleas.

At the trial, before Pigott, B., at the last Staffordshire Spring Assizes, the following facts were in evidence: The defendant, a cattle-dealer and butcher at Handsworth, in Staffordshire, who had bought the cow, the subject of the action, on the 13th of July, 1865, at the Metropolitan Cattle Market, sold her five days afterwards to the plaintiff, at West Bromwich, in the same county, for 11*l.*, with a warranty of being free from disease. The cow, which was a foreign animal, though represented by the defendant to have come from his father's farm, soon shewed symptoms of illness, and within a week of the sale to the plaintiff died of the cattle plague. That disease was not then known in England, and the jury found that the defendant was not aware when he sold the cow that she was suffering from the rinderpest, but that he knew she was infected with a contagious disease. It appeared that the plaintiff had placed the cow in a building with other cows of his own, and that five of those cows (one of them having been tied up alongside the cow bought of the defendant) became infected with the disease of the cattle plague, and either all died or were obliged to be slaughtered. The jury gave a verdict for the plaintiff for 11*l.* in respect of the money paid for the cow bought of the defendant, and 98*l.* in respect of the other five cows the plaintiff had lost.

Matthews, for the defendant, afterwards obtained a rule nisi for a new trial, on the ground that the Judge misdirected the jury in leaving to them the question of special or consequential damages, or for reducing the damages to 11*l.*, the price paid for the cow sold by the defendant.

Huddleston now shewed cause.—The plaintiff is entitled to keep the special damage on the third count. The defendant warranted the cow, and fraudulently concealed from the plaintiff the fact that she had a contagious disease. The special damage is the natural consequence of the plaintiff acting on the faith of the warranty which the defendant had given.

[WILLES, J.—It is like the case of *Langridge v. Levy* (2 Mee. & W. 519; s. c. 6 Law J. Rep. (n.s.) Exch. 237).]

Quite so; the damage is the result of the defendant's false representation.

H. Matthews, in support of the rule.—There cannot be any difference between the measure of damages for the breach of warranty and for a false representation; and this special damage which is now sought to be recovered was not the natural result either of the breach of contract, of the warranty, or of the act itself of which the defendant has been found guilty. It does not appear that the defendant knew the plaintiff had other cows, or that the plaintiff was likely to take the course he did of putting the cow in a shed with other cows. In *Borradaile v. Brunton* (8 Taunt. 533) it was ruled that, in an action for breach of warranty of a chain cable the plaintiffs might, in addition to the value of the cable, recover the value of a lost anchor to which the insufficient cable was attached; but on this case being cited in *Hadley v. Baxendale* (9 Exch. Rep. 341; s. c. 23 Law J. Rep. (n.s.) Exch. 179) Mr. Baron Alderson remarked, "On the same principle, why should not the jury give the value of the vessel if lost?" and Mr. Baron Parke said, "This case is commented on in *Sedgwick*. The 8th volume of *Taunton's Reports* is an apocryphal authority." In *Hill v. Balls* (27 Law J. Rep. (n.s.) Exch. 45) no action was held to lie against a person for selling a horse, which he knew to be afflicted with the glanders, at the suit of the purchaser who bought the same, believing it to be healthy, and placed it in his stable with another horse of his, which in consequence, became infected and died. There Mr. Baron Bramwell says, "But assuming that the declaration shews an unlawful act, I am also of opinion that no damage is stated flowing from it"—"in truth, it all flows from the plaintiff's buying the horse, and dealing with it as he did. Had he not bought it, he would have sustained none of the losses he complains of. Having bought it, had he thought fit at once to kill it, he would have sustained no loss but his first loss. But his buying it and dealing with it as he did are entirely his own acts, and not the result in any sense, certainly not the natural or necessary result of any act of the defendant." The case of *Langridge v. Levy* (2 Mee. & W. 519; s. c. 6 Law J. Rep. (n.s.) Exch. 237) is distinguishable, for there the gun was sold for the purpose of its being used by the plaintiff.

[ERLE, C.J.—A farmer buying a cow has a right to do with it what is usual in the case of cows, namely, to put it in a cow-house. WILLES, J.—My Brother Bramwell never meant it to be understood in *Hill v. Balls* (27 Law J. Rep. (n.s.) Exch. 45) that putting a glandered horse with another horse would not produce damage recoverable in an action, but merely that a mere sale of a glandered horse, without warranty or fraud, would not entitle the purchaser to recover the loss he had sustained.]

[ERLE, C.J. referred to *Randall v. Raper* (El. B. & El. 84; s. c. 27 Law J. Rep. (n.s.) Q.B. 266) and *Dingle v. Hare* (29 Law J. Rep. (n.s.) C.P. 143).]

In those cases the measure of damages was, in effect, the value of a good article, such as the article had been warranted to be when it was sold.

ERLE, C.J.—I am of opinion that this rule should be discharged. The plaintiff bought a cow of the defendant, which the defendant warranted to be sound, and it turned out that the cow was not sound and that she died of the cattle plague. The plaintiff further complained that the defendant fraudulently represented that the cow had no infectious disease and that the plaintiff was thereby induced to buy the cow, whereas the defendant knew that she had an infectious disease. Now, I do not stop to inquire into what

should be the damages for the breach of the contract of warranty, because it is clear that if a seller makes a false representation, and so induces a person to buy, the buyer has a right to act on that as if it were true; and if it turns out to be false, and the buyer suffers damage, the seller must pay for all the direct consequences that would ensue from the buyer so acting on the representation as if it were true. Here the defendant sold the cow on the representation that she was free from any infectious disease, and he must be liable for the consequences which followed from the plaintiff acting as if the cow were free from any such disease. The plaintiff accordingly put the cow in a shed with other cows, and the defendant must pay for the other cows which died in consequence of this.

WILLES, J.—I am of the same opinion. The judgment of my Brother Bramwell in *Hill v. Balls* (27 Law J. Rep. (N.S.) Exch. 45) is altogether inapplicable to the present case, because it is founded on a very different state of facts. There the declaration was, that the defendant sold a glandered horse which he knew to be possessed with that disease, and that the plaintiff, believing the horse to be healthy, was induced to buy it; but there was there no warranty nor any misrepresentation or fraud which induced the plaintiff to do what he did there, that is to say, to put the horse with other horses, and on that ground the declaration was held to be bad. That is inapplicable to a case like the present, where there has been a false representation made to the buyer, on which he has acted. The plaintiff, by acting on the defendant's false representation as if it were true, is entitled to recover damages for the injury he has sustained by putting the unsound animal amongst sound ones.

MONTAGUE SMITH, J.—I am of the same opinion. It is unnecessary to decide what would have been the damages if the plaintiff had rested his case on the breach of warranty alone. Here the defendant induced the plaintiff to buy the cow by representing it to be sound when he knew at the time that it had an infectious disease. It was an ordinary thing, and one which the defendant must have contemplated, that the cow would be placed among other cows, and that it would or might communicate the disease it had to other cows; and so the jury would have found, had the question been put to them. The plaintiff was induced, by the false representation of the defendant, to treat the cow in the ordinary way cows are treated; and the defendant must be held liable for the damage which consequently resulted from his wrongful act.

Rule discharged.

[IN THE COMMON PLEAS.]

June 9, 1866.

WALESBY v. GOULDSTONE.

35 L. J. C.P. 302; L. R. 1 C.P. 567; 14 L. T. 662; 14 W. R. 899;
12 Jur. N.S. 873.

See *Neale v. Clarke*, 1879, 4 Ex. D. 286; 41 L. T. 438 (Ex. D.). Followed, *Hubbard v. Goodley*, [1890] E. R. A.; 59 L. J. Q.B. 285; 25 Q.B. D. 156; 62 L. T. 736; 38 W. R. 639 (Q.B. D. Div.). See *Lovejoy v. Cole*, [1895] E. R. A.; 64 L. J. Q.B. 120; [1894] 2 Q.B. 861; 71 L. T. 374; 43 W. R. 48 (Q.B. D. Div.).

See now County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 57.

Costs—County Court—Claim for more than 50l.—Less than 20l. recovered—Admitted Set-off.

COUNTY COURT.—By 19 & 20 Vict. c. 108. s. 24. it is enacted, that

"where in any action the debt or demand claimed consists of a balance not exceeding 50*l.* after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the" (county) "Court shall have jurisdiction to try such action."

If a plaintiff suing in the superior Court claims more than 50*l.* without admitting any set-off to reduce it to that amount, and the defendant by proof of a set-off reduces the amount recovered below 20*l.*, the plaintiff is entitled to costs, as there is no "admitted set-off" reducing the claim to 50*l.*, so as to give the county court jurisdiction.

Quære—if there can be an "admitted set-off" without the consent of both parties?

This was a rule calling on the defendant to shew cause "why the Master should not be at liberty to tax and allow the plaintiff his costs of suit in this cause, on the ground that no plaint could have been entered in a county court for the plaintiff's demand in this action."

The declaration was on the common money count for work and labour done, materials provided and on accounts stated, and the particulars of demand claimed 51*l.* 17*s.* 11*d.*

The defendant, amongst other pleas, pleaded a set-off for goods sold and delivered, and by his particulars of set-off claimed 32*l.* 3*s.* 2*d.*

The cause was referred to the Master. When before him, the plaintiff admitted this set-off to be correct, and obtained an award for 19*l.* 14*s.* 9*d.* No credit for the set-off was given in the plaintiff's particulars of demand, and the plaintiff swore that he never admitted it before action, whilst the defendant's attorney swore the plaintiff had before action told him he claimed only 19*l.* odd, and would not settle it for 5*l.*, and did not care as to costs, as a certain trade association would have to bear them.

Beresford shewed cause.—The application is made under 15 & 16 Vict. c. 54. s. 4, only on the ground that the action could not have been brought in the county court, and it is said that it could not have been brought, because the claim is for more than 50*l.* Now, by 19 & 20 Vict. c. 108. s. 24, "where in any action the debt or demand claimed consists of a balance not exceeding 50*l.* after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the Court shall have jurisdiction to try such action." And inasmuch, therefore, as the plaintiff here could have admitted this set-off, which in truth he never disputed, he could have brought his action in the county court. Under 9 & 10 Vict. c. 95. s. 129. it has been held, that if the demand is reduced below 20*l.* by proof of part payment, the plaintiff is not entitled to costs—*Turner v. Berry* (19 Law J. Rep. (N.S.) C.P. 321; s. c. 5 Exch. Rep. 858); and under 13 & 14 Vict. c. 61. s. 11. that he is not entitled, if a set-off be proved which so reduces his demand—*Beard v. Perry* (31 Law J. Rep. (N.S.) Q.B. 180; s. c. 2 Best & S. 493). In *Avards v. Rhodes* (22 Law J. Rep. (N.S.) Exch. 106; s. c. 8 Exch. Rep. 312) it was held, under 13 & 14 Vict. c. 61. s. 1, which extends the jurisdiction to 50*l.* under the old limitations, that a man could not give jurisdictions by putting a set-off in his claim; that decision went on the ground that the "set-off had never been allowed before action by the defendant so as to constitute a part payment"; it therefore shews that where the set-off is admitted by the plaintiff and the defendant, it is equivalent to payment, and consequently the words "admitted set-off" in the recent act cannot mean that, but must mean admitted by the plaintiff.

[WILLES, J.—By the 35th County Court Rule, provision is made for entry in the particulars where the plaintiff desires to admit a set-off.]

Yes; and there is no injustice, because, if there be a *bona fide* dispute as to the set-off, an application for costs can be made on the ground that the case was fit to be tried in the superior Court.

[WILLES, J. referred to the 19 & 20 Vict. c. 108. s. 26, and the 13th pleading rule of the superior Courts.]

Prentice, in support of the rule.—In *Awards v. Rhodes* (22 Law J. Rep. (N.S.) Exch. 106; s. c. 8 Exch. Rep. 312), in delivering judgment, Lord Chief Baron Pollock says, that “balance of account” means “over and above payments,” and that a “demand originally exceeding 50*l.* being only reduced below it by offering to allow a set-off, never agreed to as part payment, was one over which the Court had no jurisdiction.” So, also, in *Beswick v. Capper* (7 Com. B. Rep. 669; s. c. 28 Law J. Rep. (N.S.) C.P. 216, n.), it was decided that a demand exceeding 20*l.* and reduced by a set off (admitted by the plaintiff) below that amount, was not within the jurisdiction of the county courts, under the 9 & 10 Vict. c. 95; and Mr. Justice Cresswell said, “No doubt the plaintiff was at liberty to abandon all above 20*l.* That, however, he does not do;” and, again, “You cannot compel a defendant to avail himself of his right to set off a counter claim;” and Chief Justice Wilde said, “To establish his right to recover . . . he would be bound to prove a demand exceeding the amount of the defendant’s set-off. The matter, therefore, was very much beyond what the legislature contemplated should be submitted to the inferior jurisdiction. The case of an adjusted account is altogether different. The only assent to the set-off here was by the plaintiff’s thinking fit to give credit for it in his particulars.” The statute was passed with reference to the existing law, and unless there is no dispute about the set-off, and it is admitted by both parties, it does not apply. The question is, whether when the action was brought there was an admitted set-off, and there was not, either by the plaintiff alone, or the plaintiff and the defendant. All that can be said is, the plaintiff might have admitted the set-off, but he is not bound to do so, and did not. It is submitted, first, that he is not bound to admit the set-off; and, secondly, that the admission must be *inter partes*, and not one which might be, but one that is actually admitted by them. The county court rule was made to meet this difficulty;—there was a doubt as to when the plaintiff was to abandon the excess, and the rule was to settle this.

ERLE, C.J.—I am of opinion that this rule should be made absolute. The plaintiff claimed a sum exceeding 50*l.* When the action was brought there was no formal admission of the set-off before the Court. The final result of the action was that a set-off of 32*l.* odd was proved, and the sum recovered was 19*l.* odd only. The plaintiff might have brought his action in the county court if there had been an “admitted set-off.” The set-off was proved, but the plaintiff had not admitted it. The question is, what is the meaning of the words “admitted set-off”? I think the words mean a set-off which the plaintiff chooses to admit at the time of action brought. He had an option to do so or not. It is considered by many a great privilege to be able to sue in the superior Courts, and we ought not to take it away without clear words. In the present case the plaintiff has not chosen to admit this set-off, and had a right to sue in the superior Courts. It seems to me that it is difficult to say that there can be an admission without the two consent, but, at least, the plaintiff must admit.

BYLES, J. and MONTAGUE SMITH, J. concurred.

WILLES, J.—Henceforth I shall conform with the opinion of the rest of the Court.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Common Pleas.)

June 15, 1866.

NEILL AND ANOTHER v. WHITWORTH AND OTHERS.

35 L. J. C.P. 304; 1 H. & R. 832; L. R. 1 C.P. 684; 14 L. T. 670; 14 W. R. 844; 12 Jur. N.S. 761.

Sale—Terms of Contract—Goods to be taken from Quay—Condition Precedent.

SALE OF GOODS.—In a contract to sell 500 bales of cotton, to arrive in Liverpool, per ship or ships, from Calcutta, there was the following stipulation: "The cotton to be taken from the quay:"—Held, that this stipulation was an independent stipulation for the seller's benefit, and not a condition precedent which the purchaser had a right to insist on being performed.

This was an appeal, by the plaintiffs, against a decision of the Court of Common Pleas, making absolute a rule calling on the plaintiffs to shew cause why a verdict found for them should not be set aside and entered for the defendants, or the damages reduced, pursuant to leave reserved.

The facts of the case are fully stated in the report of the case in the Court below (34 Law J. Rep. (N.S.) C.P. 155); and the following statement will be sufficient for the purposes of the present report.

The action was for non-delivery of 500 bales of cotton, bought by the plaintiffs from the defendants. The contract provided that the cotton was "to be taken from the quay." The cotton arrived, and was landed on the quay. By the dock regulations it was necessarily removed within twenty-four hours into certain warehouses. While on the quay, the plaintiffs applied for delivery orders, and could not get them. Afterwards, the defendants offered to deliver the cotton just as if from the quay, or to take it back to the quay, and there deliver. The plaintiffs refused this offer, contended that the contract was broken, and brought their action. The Court of Common Pleas held, that the stipulation, "the cotton to be taken from the quay," was an independent stipulation for the vendor's benefit, and not a condition precedent, which entitled the purchaser to insist on delivery on the quay, and made the rule absolute to enter a verdict for the defendants.

Mellish (E. James and Baylis with him), for the appellants.—It is submitted that the words "to be taken from the quay" were inserted in order to appoint a time and place of delivery. Goods were only allowed to remain on the quay a certain time, and it was intended that delivery should be made within that time. If the vendor is ready to take at the proper time and place, and the vendee is not ready to deliver, there is a breach. When there is a stipulation which requires both parties to act, in order that it may be performed, then *prima facie*, it is binding on both parties, and is not merely for the easement of one of them, as the Court below decided. Cotton is the subject-matter of much speculation; prices fluctuate, and it is important that a vendor should be bound to deliver at a particular time. If the words had been "to deliver," the other side would have "to take," without its being expressly said; so here, to take implies to deliver. It is said that there is an option given to the vendor to make the cotton merchantable, which could not be done on the quay; and therefore that he need not be ready to deliver there. But it is submitted that the vendor is still to tender there.

Holkar (Brett with him), for the respondents, was not called on.

POLLOCK, C.B.—We are all of opinion that judgment should be affirmed (*Pollock, C.B., Channell, B., Blackburn, J., Mellor, J., Pigott, B., Shee, J.*).

Judgment affirmed.

[IN THE COMMON PLEAS.]

June 20, 1866.

ARBUTHNOT AND OTHERS v. STRECKEISEN AND ANOTHER.

35 L. J. C.P. 305.

Contract of Sale, Construction of.

SALE OF GOODS.—*The plaintiffs, who expected to receive 576 bales of cotton from Madras, contracted to sell 202 bales thereof to C, then 123 to the defendants, then, again, 154 to the defendants, and then 97 to G. By these contracts the buyers were to take what arrived deliverable. Only 275 bales arrived deliverable. The plaintiffs delivered 60 to C, 30 to G, and 33 to the defendants under their first contract; they then tendered the remaining 152 to the defendants, in fulfilment of their second contract, which the defendants refused to accept. In an action on the second contract with the defendants,—Held, that such contract meant that the plaintiffs were to deliver and the defendants to accept the residue (up to 154) beyond 123; and that though the plaintiffs had broken their first contract with the defendants, they had fulfilled the second, and were entitled to succeed.*

This was an action against the defendants for refusing to accept 152 bales of cotton, sold to them by the plaintiffs on the 27th of October, 1863. At the trial a verdict was found for the plaintiffs, subject to a case which, in all material particulars, was as follows:

The plaintiffs received, on the 15th of October, 1863, a bill of lading, dated the 15th of September, 1863, for 202 bales of cotton, marked A. & Co. R.C., shipped on their behalf at Madras, and deliverable to them or their assigns. On the 21st of October, 1863, they received a similar bill of lading, dated the 22nd of September, 1863, for 277 bales similarly marked; and on the 5th of November, 1863, a similar bill of lading, dated the 26th of September, 1863, for 96 bales similarly marked, and also a similar bill of lading, dated the 1st of October, 1863, for one bale similarly marked.

On the 19th of October, 1863, the plaintiffs sold to Messrs. Casella & Co. 202 bales marked A. & Co. R.C., expected to arrive in London per the ship *Golden Age*, on the terms (amongst others) that if the quality should prove inferior to the guarantee, a fair allowance was to be made, to be settled by arbitration in the usual manner; that first and second class sea-damaged bales (if any) should be made merchantable and taken at one-eighth per pound less than the sound; that the third and fourth class sea-damaged bales (if any) should be taken at a fair allowance; that, should the cotton, or any portion thereof, not arrive, from loss of vessel or unavoidable causes, the contract for the whole or such portion was to be void; and that, should the cotton be transhipped and arrive in other vessels at London, the contract still should hold good. On the 24th of October, 1863, the plaintiffs sold to the defendants 123 bales A. & Co. R.C. under a similar contract, and on the 27th of October, 1863, they sold them, under a similar contract, 154 bales A. & Co. R.C., this being the contract declared on, and only differing from the others by the figures $\frac{1}{2}\frac{7}{8}$ being put against the cotton mark. And on the 4th of December, 1863, they sold under a similar contract 97 bales A. & Co. R.C. to one Von Glehn.

The *Golden Age* sailed from Madras in November, 1863, having on board (amongst others) the said 576 bales of cotton bearing the said mark, but unnumbered. The figures $\frac{1}{2}\frac{7}{8}$ were inserted by the sellers to indicate that they had already sold 123 bales, but nothing passed between them and the defendants as to the meaning of these marks.

The *Golden Age* was wrecked at Dungeness, but the whole of the cotton, except two bales, was saved, and transhipped and arrived in specie in London, some more or less damaged. Out of the whole only 275 bales were in a state

to be delivered to the purchasers; of these 123 bales were delivered as follows: 60 to Casella & Co., 30 to Von Glehn, and 33 to the defendants under the contract of the 24th of October, 1863. The plaintiffs then tendered the remaining 152 to the defendants in performance of the contract of the 27th of October, 1863; the defendants refused to receive them. The question was whether they were justified in so doing.

Hannen, for the plaintiffs.—There is nothing to exonerate the defendants from accepting the cotton sold to them on the 27th of October, and inasmuch as 123 bales had been already sold to them and two were lost, they were bound to accept according to their contract, 152 instead of 154.

Sir G. Honyman, for the defendants.—The other side are in this dilemma: either the defendants may look to all the contracts, or they may not; if they may, then the cotton should either be delivered rateably to all purchasers, or in priority; if they may not, then, though the plaintiffs had 275 bales, they only tendered the defendants 152.

Hannen, in reply.

WILLES, J.—I am of opinion that our judgment should be for the plaintiffs. The case might present a difficulty if the contracts with the other buyers were to be taken into account; but it is not necessary to decide whether they should be taken into account or not. If it were, we should have to consider if these contracts would be any defence, and it seems difficult to say there is a defence, because of other bargains to sell to strangers. However, this case is disembarrassed of this point, for taking the defendants' contracts alone, the plaintiffs have done all they were bound to do under their second contract. That was a contract of sale for 154 bales, and it followed another for 123. It has been insisted that we are to read the second contract without reference to the first, and if so, as 275 bales arrived the plaintiffs would be bound to deliver 154, and 152 would not do. But it would be an exceedingly narrow decision if we were to say that we could look at the second only, and that the defendants were entitled to 154 bales under it, though 123 had been already sold by the first contract. Suppose 154 had arrived, and 123 were delivered under the first contract, and the rest tendered under the second, would both be performed? We must construe the second with reference to the first, to shew the terms of the second, and when we find that the defendants had previously agreed for 123 bales, it necessarily follows that the 154 were bargained for over and above the 123, otherwise the provision as to non-arrival would be removed. There is less difficulty here because of the figures $\frac{1}{2}$ and $\frac{1}{4}$; these mean that 123 being already sold, the plaintiffs would deliver 154 more if 277 arrived. Now then, has the second contract been fulfilled? 275 bales arrived deliverable; the plaintiffs should have delivered 123 under the first contract, and the rest under the second; and as 33 only were delivered under the first, that contract was broken by the plaintiffs, though in consequence of the change in price, the defendants have profited by the 90 not being delivered. But still the plaintiffs have fulfilled the second contract, because they thereby only contracted to deliver what they had beyond 123 bales, and this they tendered.

BYLES, J.—I am of the same opinion. The second contract may well be read as one for the residue over 123 bales.

MONTAGUE SMITH, J.—I am of the same opinion.

Judgment for the plaintiffs.

[IN THE COMMON PLEAS.]

June 21, 1866.

FRY AND OTHERS v. THE CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA.

35 L. J. C.P. 306; L. R. 1 C.P. 689; 14 L. T. 709; 14 W. R. 920.

Referred to, *Gray v. Carr*, [1871] E. R. A.; 40 L. J. Q.B. 257; L. R. 6 Q.B. 522; 25 L. T. 215; 19 W. R. 1173 (Ex. Ch.). Discussed, *Porteous v. Watney*, [1878] E. R. A.; 47 L. J. Q.B. 643; 3 Q.B. D. 534; 39 L. T. 195; 27 W. R. 30 (C. A.). Referred to, *Manchester Trust v. Furness, Withy & Co.*, [1895] E. R. A.; 64 L. J. Q.B. 766; [1895] 2 Q.B. 539; 73 L. T. 110; 44 W. R. 178 (C. A.); *Diederichsen v. Farquharson*, [1898] E. R. A.; 67 L. J. Q.B. 103; [1898] 1 Q.B. 150; 77 L. T. 543; 46 W. R. 162 (C. A.). Adopted, *Turner v. Haji Goolam Mahomed Azam*, [1905] E. R. A.; 74 L. J. P.C. 17; [1904] A.C. 826; 91 L. T. 216 (P.C.).

Shipping—Bill of Lading—Incorporating in Bill of Lading Terms of Charter-Party—Lien for Freight.

SHIPPING.—By a charter-party the cargo was made deliverable “on being paid freight as follows: The ship to have a lien on cargo for freight; 3l. 10s. per ton of 50 cubic feet to be paid to captain or his agents on right and true delivery at port of discharge.” The charterer shipped a portion of the cargo under a bill of lading which stated freight to be payable as per charter-party:—Held, that the rate of freight only, and not the terms as to the lien mentioned in the charter-party, was incorporated in the bill of lading, and that, therefore, the shipowner had no lien as against a bona fide indorsee for value of such bill of lading for the whole chartered freight, but only for the freight due on the goods mentioned in the bill of lading.

The following special case was stated for the opinion of the Court without pleadings.

CASE.

Messrs. Sanderson, Frys, Rigge & Co., the plaintiffs in this action, carry on business as shipowners and merchants in St. Helen's Place, in the city of London, and are the owners of the ship *Her Majesty*.

The defendants are a chartered banking company, carrying on business in London, and also at Shanghai, in China, where they have a branch bank.

In the autumn of 1864 the said ship *Her Majesty* was at Shanghai, and was, by a charter-party dated the 14th of September, 1864, chartered by Messrs. Dadabhoy & Co., of that place, to take a full and complete cargo of cotton and [or] other merchandise, which they bound themselves to ship, in the usual way, for London or Liverpool as ordered.

Amongst other clauses the charter-party contained the following one, which is chiefly material in the present case:

“And, being so loaded, shall therewith proceed to London or Liverpool, as ordered at Shanghai, and deliver the said cargo on being paid freight as follows—The ship to have a lien on cargo for freight: Three pounds ten shillings (3l. 10s.) sterling per ton of fifty (50) cubic feet, measured in Shanghai, to be paid to captain or his agents on right and true delivery at port of discharge (the act of God, the Queen's enemies, &c., always excepted). The freight to be paid on unloading and right delivery of the cargo.”

A fac-simile of the charter-party, which is partly in print and partly in writing, was annexed to and formed part of this special case.¹

(1) The following is a copy of the charter-party:

“14th Sept. 1864.

“It is this day mutually agreed between George F. Seymour, master of the good ship *Her Majesty* (for and on behalf of himself and owners of the said vessel), burthen per register 1112 tons, now lying in the port of Shanghai, and Messrs. Dadabhoy & Co.—

“That the said ship, being tight, staunch and strong, and every way fitted for the voyage,

After some difficulty and delay, the charterers, Dadabhoy & Co., succeeded in procuring for the said ship a full and complete cargo, which, for the purposes of this case, is treated as divisible into three portions.

The first portion, consisting of 185 packages of tea and 42 bales of cotton, was shipped by the charterers themselves, and on their own account, under the bill of lading hereinafter set forth, the freight for the same being payable at the same rate as that agreed upon in the charter-party, and amounting, at 3*l.* 10*s.* per ton, to the sum of 101*l.* 8*s.* 10*d.*

The second portion (with respect to which similar questions arose between the plaintiffs and other parties, viz., the Commercial Bank Corporation of India and the East) was also shipped by the charterers under a similar bill of lading, and at the charter rate of freight.

The third portion, being by far the largest portion of the cargo, was shipped by other merchants at various rates of freight, all below the charter rate.

The difference between the total amount of the bill of lading freight payable upon the cargo as above mentioned, and the freight payable under the charter-party, was very considerable, and amounted to the sum of 1,710*l.* 8*s.* 10*d.* The portion of the cargo which had been shipped by merchants other than the charterers as above mentioned was duly delivered as hereinafter mentioned upon payment of the freight due upon the bills of lading of the same, and no question arises with respect to this portion of the cargo.

The large deficiency above mentioned between the amount of the bill of lading freight and that payable under the charter-party, gave rise to a question between the plaintiffs and the holders of the bills of lading of the first and second portions of the cargo above referred to respecting the right of the plaintiffs, upon the true construction of the bills of lading and charter-party, to a lien upon those portions of the cargo, under the circumstances hereinafter mentioned, for the whole balance of freight payable under the charter-party.

The following is a copy of the bill of lading under which the first portion of goods was shipped :

" [B.B.] 185. Shipped in good order and well conditioned by Dadabhoy & Co., in and upon the good ship or vessel called *Her Majesty*, whereof is master for this present voyage, Seymour, and now lying at anchor in the port of Shanghai, and bound for Liverpool, one hundred and eighty-five packages of tea, being marked and numbered as in the margin, and are to be delivered

shall with all convenient speed take on board in Shanghai a full and complete cargo of cotton and [or] other merchandise, cotton to be taken by measurement in Shanghai, the same to be placed alongside the ship within reach of her tackles, and not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, water and furniture, and exclusive of the poop and cabins, which shall remain for the use and benefit of the captain and owners; the said George F. Seymour to provide all necessary dunnage and ballast, and, being so loaded, shall therewith proceed to London or Liverpool, as ordered by charterers before final sailing of the vessel from Shanghai, or as near thereto as she may safely get, and deliver the said cargo, on being paid freight, as follows: the ship to have a lien on cargo for freight three pounds ten shillings (3*l.* 10*s.*) sterling per ton of fifty (50) cubic feet, measured in Shanghai, to be paid to captain or his agents on right and true delivery at port of discharge.

" The act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation, of what nature and kind soever, during the said voyage, always excepted.

" The freight to be paid on unloading and right delivery of the cargo. The ship at port of discharge to be consigned to the owners or their agents; lay days to commence twenty-four hours after written notice being given the charterers that the vessel is ready to receive cargo; seventy working days to be allowed the charterers for loading the ship. All cargo is to be loaded and discharged by people employed and paid by the ship. All port-charges and pilotage at Shanghai, as also at London or Liverpool, are to be borne by the ship; demurrage beyond that time to be paid by the charterers at the rate of eighty (80) Mex. dollars per day, paid in advance. Commission as customary, to be paid to the brokers by ship on gross amount earned under this charter. Penalty for non-performance of this agreement the estimated amount of freight.

George F. Seymour,
Dadabhoy & Co.

" Witness,

" F. Porter,

" R. Banyan."

in the like good order and well conditioned at the aforesaid port of Liverpool, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, excepted, unto or order, or to their assigns. Freight for the said goods payable in Liverpool as per charter-party, with primage and average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to three bills of lading all of this tenor and date, one of which bills being accomplished the others to stand void.

“ George F. Seymour.

“ Dated in Shanghai, Feb. 21, 1865.”

The said Dadabhoy & Co., after the shipment of the above goods by them, applied to the defendants' branch bank at Shanghai to make them an advance upon the security of the same, and it was thereupon agreed that, on receiving the bill of lading for the same, and also the letter of hypothecation hereinafter set out, the defendants should negotiate the draft of the said Dadabhoy & Co. for 1,250*l.* on Mr. R. E. Gibson, of Liverpool, payable to the drawers' order, and by them indorsed to the bank.

The above arrangement was carried out, and in pursuance of it the defendant negotiated the said Dadabhoy & Co.'s draft upon the said R. E. Gibson for 1,250*l.*, receiving from them, at the same time, the above-mentioned bill of lading, which was duly indorsed by them, and also the following letter of hypothecation :

“ The Chartered Mercantile Bank of India,
London and China.

“ Shanghai, March 7, 1865.

“ We having this day negotiated with you our bills of exchange drawn on R. E. Gibson, Esq., of Liverpool, the particulars of which are noted at foot, and having at the same time handed to you as collateral security for due payment of the said bills, the bills of lading and shipping documents belonging to us of the several goods also stated at foot, our agreement is understood to be as follows :

“ We hereby authorize the said Chartered Mercantile Bank of India, London and China, and the holders of the above bills for the time being to take conditional acceptances to all or any of such bills, to the effect that on payment thereof at maturity the above-mentioned bills of lading and shipping documents shall be delivered to the drawee or acceptors thereof, and such authorization on our parts shall be taken to extend to cases of acceptance for honour.

“ We further authorize the said bank, or any manager or agent thereof, on default being made in acceptance on presentment, or in payment at maturity of any of the above bills, or on the drawees' suspension of payment during the currency of the bills, to sell the said goods, and to apply the net proceeds (after deducting usual commission and charges) in payment of such bills with re-exchange and charges, the balance, if any, to be applied in liquidation of any other debt or liability of ours to the said bank; any ultimate balance to be at our disposal. And in case the net proceeds of such goods shall be insufficient to pay the amount of any such dishonoured bills, with re-exchange and charges, we authorize the Chartered Mercantile Bank of India, London and China, or the holders thereof for the time being, to draw on us for the deficiency, and we engage to honour such drafts on presentment, or to pay the said bank in London.

“ We further authorize the said bank, or the holders of the said bills for the time being, in case the aforesaid power of sale shall not have arisen at any time before their maturity, to accept payment from the drawees or acceptors thereof, and on payment to deliver the said bills of lading and shipping documents to such drawees or acceptors, and in that event the said bank, or the holders of said bills, are to allow a discount thereon for the time they may have to run, at the Bank of England minimum rate of the day, if

taken up in London, or if in India, Ceylon, or China, at the current rate of discount of the day on Government acceptances in India, Ceylon, or China, as the case may be.

" We also authorize the Chartered Mercantile Bank of India, London and China, or any manager or agent thereof (but not so as to make it imperative), to insure the above goods from sea risk, including loss by capture, and also from loss by fire on shore, and to add the premiums and expenses of such insurances to the amounts chargeable to us in respect of the said bills, and to take their recourse against the said goods or against us for their reimbursement, and also to sell any portion of the said goods which may be necessary for payment of freight, and the said bank are to take such measures generally, to make such charges for commission, and to be accountable in such manner, but not further or otherwise, as in ordinary cases between a merchant and his correspondent, it being hereby declared that the bank is not to be liable for the default of any broker or auctioneer employed in the sale of the goods.

" Lastly, it is mutually agreed that the delivery of the said collateral securities to your bank shall not prejudice your rights on the said bills in case of dishonour; nor shall any recourse taken thereon affect the title of the bank to the said securities to the extent of our liability to your bank as above. We are your obedient servants,

" Dadabhoy & Co."

BILLS AND DOCUMENTS REFERRED TO.

Particulars of Bills.			Particulars of Goods.	
Date.	Amount.	Drawee.	Bills of Lading.	Name of Ship.
March 7.	1,250 <i>l</i> .	R. E. Gibson, Esq.	[BB] 185 P Tea. [D] 42 B Cotton.	<i>Her Majesty.</i>

No copy of the charter-party was handed to the bank at Shanghai, and the officials of the bank there were not acquainted with its contents. They were, however, given to understand that the freight was 70*s*. per ton.

The said ship having received orders to that effect at Shanghai, proceeded on her voyage to Liverpool; and shortly after she set sail the said Dadabhoy & Co. stopped payment, and their estate is now being wound up in China by trustees, under a deed of assignment.

The news of the failure of Dadabhoy & Co. reached England before the arrival of the ship, as hereinafter mentioned. The draft above mentioned was accepted by the said R. E. Gibson, who failed before its maturity, and is still unpaid.

The said ship afterwards arrived in due course at Liverpool, and all the goods shipped by merchants, other than the charterers, were delivered to the consignees thereof upon payment of the freight according to the bills of lading for the same, and this (calculating the freight for the residue of the cargo, consisting of the first and second portions above mentioned at the charter rate) left a deficiency below the total amount of freight payable upon the cargo, according to the charter-party, of 1,710*l*. 8*s*. 10*d*., as before mentioned.

Under these circumstances, the defendants, as holders of the bill of lading and other documents above mentioned, relating to the 185 packages of tea and 42 bales of cotton, shipped by Dadabhoy & Co., claimed to be entitled to delivery thereof upon payment of the freight for the same, at the charter rate, viz., 3*l*. 10*s*. per ton, amounting to 101*l*. 8*s*. 10*d*. The plaintiffs, however, claimed to be entitled to a lien thereon for the whole balance of the freight due and unpaid under the charter-party, as above mentioned.

The plaintiffs and the defendants entered into the following memorandum of agreement:

"Memorandum. Whereas the Chartered Mercantile Bank of India, London and China claim to be *bona fide* holders for value of a bill of lading dated at Shanghai, February 21, 1865, for 185 packages of tea, and a bill of lading, dated February 8, 1865, for 42 bales of cotton, which said tea and cotton are now in the custody of the agents of the shipowners at Liverpool. And whereas Messrs. Sanderson, Frys, Rigge & Co., the owners of the said ship, claim payment of a balance of 1,930*l.* 4*s.* 5*d.* as due to them for freight as per charter-party entered into by Messrs. Dadabhoy & Co. at Shanghai, and they have accordingly asserted a lien on the before-mentioned tea and cotton for the full amount so due to them. And whereas the said bank, as holders of the said bills of lading, deny the right of the shipowners, as against them, for their alleged lien for charter freight, and claim delivery of the said 185 packages of tea and 42 bales of cotton on payment of freight at the rate of 70*s.* per ton, and which freight amounts to 101*l.* 8*s.* 10*d.* And whereas Messrs. Sanderson, Frys, Rigge & Co. have, for the purpose of enabling the holders of the said bills of lading to deal with the said goods as they may deem advisable, agreed to deliver up to the said bank the said 185 packages of tea and 42 bales of cotton, without prejudice, and on the understanding hereinafter mentioned, on receiving payment of the last-mentioned sum of 101*l.* 8*s.* 10*d.* It is, therefore, mutually agreed by and between the said parties, that on payment of the said sum of 101*l.* 8*s.* 10*d.* as and for freight on the said tea and cotton at the rate of 70*s.* per ton, the said Messrs. Sanderson, Frys, Rigge & Co. will deliver to the said bank an order on their agents at Liverpool for delivery thereof, it being nevertheless understood and agreed that, for the purposes of any future proceedings, it shall be considered that Messrs. Sanderson, Frys, Rigge & Co. have asserted a lien on the said tea and cotton for the whole of their said claim for 1,930*l.* 4*s.* 5*d.*, and that the said tea and cotton are to be delivered without prejudice to their right to recover against any party any sum beyond the said sum of 101*l.* 8*s.* 10*d.*, the same to be determined as if the said tea and cotton still remained in the docks subject to their lien (if any). Dated the 25th of September, 1865."

The above goods were thereupon delivered to the defendants and sold; and the net proceeds thereof, amounting to 1,514*l.* 17*s.* 11*d.*, having been received by the bank, they have in hand (after retaining their claim on the goods) a balance of 224*l.* 12*s.* 7*d.* (subject to the deduction thereof of some law charges in reference to the matter), payment of which has been required of them by the trustees of Messrs. Dadabhoy & Co.'s deed of assignment.

For the purposes of the present case it is to be taken that this claim is good and valid in law or in equity as against Messrs. Dadabhoy & Co.

The questions for the opinion of the Court are, first, whether the plaintiffs had a lien as against the present defendants upon the said tea and cotton for the unpaid balance of freight due under the charter-party, or any part thereof; secondly, whether the plaintiffs have a lien or claim to the said surplus of 224*l.* 12*s.* 7*d.*, less law charges, over and above the defendants' claim, and whether the defendants ought to hand the same over to the plaintiffs.²

If the Court should answer the first question in the affirmative, the judgment is to be entered for the plaintiffs for 1,514*l.* 17*s.* 11*d.*, being the net proceeds of the shipments, or such part as the Court may determine, and costs of suit.

If in the negative, then if the Court should answer the second question in the affirmative, judgment is to be entered for the plaintiffs for 224*l.* 12*s.* 7*d.*, less the before-mentioned legal charges, but without costs of suit.

If the Court should answer both questions in the negative, then judgment is to be entered for the defendants, with costs of suit.

(2) As regards this second question, the defendants had no interest in disputing it, and therefore, as between the plaintiffs and the defendants, judgment by consent was taken for the plaintiffs on the second question.

W. Williams, for the plaintiffs.—The question is, whether a shipowner is not entitled to a lien on the portion of the cargo represented by the bill of lading for the whole chartered freight, or whether the holder of the bill of lading has a right to have the goods mentioned in the bill of lading on payment of the freight only due in respect of such goods. The bill of lading in this case contains a reference to the charter-party, stating the freight to be payable "as per charter-party," and it is submitted that that makes it a reference to all the terms of the charter-party, and *inter alia* to the condition "the ship to have a lien on cargo for freight," and, consequently, that the bill of lading was indorsed to the defendants, with notice of the lien for freight, which was reserved to the shipowners by the charter-party. *Faith v. the East India Company* (4 B. & Ald. 630) shews that it is sufficient if the owner of the goods has notice of the terms of the charter-party. The cases of *Chappel v. Comfort* (10 Com. B. Rep. N.S. 802; s. c. 31 Law J. Rep. (N.S.) C.P. 58) and *Wegener v. Smith* (15 Com. B. Rep. 285; s. c. 24 Law J. Rep. (N.S.) C.P. 25) shew the effect of incorporating the terms of the charter-party into the bill of lading. In *Kern v. Deslandes* (10 Com. B. Rep. 205; s. c. 30 Law J. Rep. (N.S.) C.P. 297) the goods were shipped under a bill of lading, by which they were deliverable to B. or his assigns, he or they paying freight as usual. B. was the charterer's agent, to whom the charterer was indebted at the time of the shipment, and the bill of lading was handed to him in order that he might apply the proceeds of those goods in reduction of that debt, but he took the bill of lading with notice of the charter-party, and it was held that he was therefore not entitled to the goods without paying the chartered freight, which exceeded the amount of the bill of lading freight. The shipowners, by this charter-party, are not limited to a lien on any parcel of the cargo, but they have a lien on the whole cargo. In *Sanders v. Vanzeller* (4 Q.B. Rep. 260; s. c. (in error) 12 Law J. Rep. (N.S.) Exch. 497) the bill of lading stipulated for payment of freight as per charter-party, and in the course of the argument in the Exchequer Chamber, Mr. Baron Parke observed, "If the shipper had received one half of the goods and become insolvent, and the defendant had taken the other half under the bill of lading, could he have been liable to pay for all? The captain might say, 'I never proposed to divide the contract.' Does the bill of lading stipulate for payment for all, according to the contract in the charter-party, or only for the part comprised in the bill at the rate contracted for in the charter-party? It rather strikes me that the reference to the charter-party is made for the purpose of preserving an entire lien on the whole. If a part be delivered without payment, the rest may, perhaps, be detained under a lien for the whole freight." Mr. Baron Parke, on referring to that case in *Smith v. Sievking* in error (5 El. & B. 589), states, "There was a difference of opinion amongst the Judges in the Court of Error, as to the effect of such reference to the charter-party;" and he says, "I was one of the Judges who thought that such a reference was not inserted with the view to cast the burthen of payment on an assignee, but to provide against varying the charter-party or waiving the shipowner's lien." In *In re the Norway* (3 New Rep. 612, Adm.), where by the bill of lading the freight was made payable as per charter-party, and the charter-party stipulated for lump freight, Dr. Lushington was of opinion that the master had a lien on the cargo for his freight.

Quain (Field with him), for the defendants.—The reference to the charter-party in the bill of lading in the present case incorporates with it only so much of the charter-party as relates to the rate of freight. The cases which have been cited go to that extent and no further, and where more is required to be imported into the bill of lading there must be words to that effect, as was the case in *Wegener v. Smith* (15 Com. B. Rep. 285; s. c. 24 Law J. Rep. (N.S.) C.P. 25), where the bill of lading contained the words, "and other conditions, as per charter-party." The case of *Chappel v. Comfort* (10 Com. B. Rep. N.S. 802; s. c. 31 Law J. Rep. (N.S.) C.P. 58) strongly supports what the defendants contend for. The case of *Kern v. Deslandes* (10 Com. B. Rep.

205; s. c. 30 Law J. Rep. (N.S.) C.P. 297) merely decides that where the holder of the bill of lading can be identified with the charterer the rule now contended for does not apply. In the present case the defendants had no notice of the charter-party, except so far as it is referred to by the bill of lading, and the case is therefore very distinguishable from that of *Kern v. Deslandes* (10 Com. B. Rep. 205; s. c. 30 Law J. Rep. (N.S.) C.P. 297). Where by a bill of lading goods were made deliverable to order or assigns, "paying freight for the said goods, and all other conditions, as per charter-party," it has been held that this did not incorporate an exception in the charter-party as to "acts of enemies," and "restraints of princes"—*Russell v. Niemann* (17 Com. B. Rep. N.S. 163; s. c. 34 Law J. Rep. (N.S.) C.P. 10).

W. Williams replied.

ERLE, C.J.—I think our judgment should be for the defendants. The case turns on the construction of the words in the bill of lading, "freight for the said goods payable in Liverpool, as per charter-party." The bill of lading, which is for the delivery of goods at Liverpool, states the freight to be payable as per charter-party, and that is 3*l.* 10*s.* per ton, to be paid on right and true delivery of the goods at the port of discharge. Now, I think the words in the bill of lading refer to the charter-party for the rate of freight which is payable, and that it is, as there stated, 3*l.* 10*s.* per ton. The charter-party, however, contains a stipulation that the ship is to have a lien on cargo for freight, and it is contended that the shipowners have a right to demand the whole of the freight under the charter-party, for every part of the cargo, that is, that they are entitled to hold the goods mentioned in this bill of lading, until the chartered freight for the rest of the cargo has been paid. I think they have no such right, and that, though the rate of freight mentioned in the charter-party is incorporated in the bill of lading, the other terms and conditions in the charter-party are not incorporated. What my Brother Willes says in his judgment in *Chappel v. Comfort* (10 Com. B. Rep. N.S. 802; s. c. 31 Law J. Rep. (N.S.) C.P. 58) is applicable to this present case; "It may be," he says, "that for shortness, instead of stating the sums payable in respect of different kinds of goods, a reference is made to the charter-party, thus: 'paying freight as per charter-party;' but it is equally well established that, even in that case, the assignee of the bill of lading is only bound by the terms of the charter-party *quoad* the freight. It may be, and it often does happen, that the person who receives the goods intends to pay all the charges mentioned in the charter-party. But when it is intended that such an obligation should be imposed upon him, it should be done in plain words, as was done in *Wegener v. Smith* (15 Com. B. Rep. 285; s. c. 24 Law J. Rep. (N.S.) C.P. 25), and other cases, where, by the terms of the bill of lading, the goods were made deliverable to order against payment of the agreed freight and other conditions, as per charter-party." I agree with the judgment of my Brother Willes in that case, and if more of the charter-party is meant to be incorporated than what relates to the rate of freight payable, there should be words in the bill of lading to that effect, so as clearly to give notice of it to the assignee of such bill.

MONTAGUE SMITH, J.—I am of the same opinion. The defendants claim to be entitled to have delivered to them certain goods under a bill of lading, and the question is, what is the contract under that bill of lading? The plaintiffs, by it, undertake to deliver the goods unto order or assigns, "freight for said goods payable in Liverpool, as per charter-party." What does that mean? Why, that the rate of the freight for the goods is to be as specified in the charter-party. I think it incorporates no other terms of the charter-party; and I agree with what has been said, that there should be plain words to the purport in an instrument of this kind, when it is intended that there should be a lien on a portion of the cargo for the whole freight. It seems to me that this case differs from those where the freight was a lump sum, and therefore not divisible, and where, therefore, a stipulation in the bill of lading,

that the freight should be as per charter-party, might make the assignee liable to a lien for the whole freight. The case which is most favourable for the plaintiffs, and with which we have been strongly pressed, is that of *Kern v. Deslandes* (10 Com. B. Rep. 205; s. c. 30 Law J. Rep. (N.S.) C.P. 297); but that is distinguishable, as the Court in that case assumed that the holders of the bill of lading were inseparable from the charterers. Whether that was a right assumption or not does not matter now; it is sufficient for the purpose of distinguishing that case from the circumstances of the present one, that the Court there did so assume that fact.

ERLE, C.J.—My Brother Byles, before he left to go to chambers, desired me to say that, so far as he heard the argument, he concurred in the judgment we have given.

Judgment for the defendants on the first question.

[IN THE COMMON PLEAS.]

May 22, 1866.

NEEDHAM v. BREMNER.

35 L. J. C.P. 313; 1 H. & R. 731; L. R. 1 C.P. 583; 14 L. T. 437;
14 W. R. 694; 12 Jur. N.S. 434.

Husband and Wife—Judgment in Divorce—Estoppel—Action for Necessaries to Wife.

EVIDENCE. HUSBAND AND WIFE.—*In an action for necessaries supplied by the plaintiff to the defendant's wife whilst living apart from him, the defendant, in order to establish his wife's adultery, produced in evidence the record in the Divorce Court, in a suit by him against his wife for dissolution of marriage on the ground of adultery, in which it was found that his wife had been guilty of adultery, but as the husband was found to have been also guilty of adultery, the Judge Ordinary had dismissed the suit:—Held, that such evidence was admissible under the plea of never indebted; but that, as the judgment in the Divorce Court had not altered the status of his wife; it was not conclusive evidence of the adultery in the action between the plaintiff and defendant.*

The plaintiff sued the defendant in the Mayor's Court of London for necessaries supplied by him to the defendant's wife, who was living apart from her husband. The declaration contained the common money counts for board and lodging and attendance, and other necessaries and goods found and provided by the plaintiff for the wife of the defendant, and for money due on accounts stated. The defendant pleaded only never indebted. No question was raised at the trial as to whether the plaintiff's claim, 20l. 7s., was or was not strictly for necessaries supplied to the defendant's wife; but the defendant alleged that his wife had been guilty of adultery, and in support of this he gave in evidence the record and proceedings in the Divorce Court in a suit of *Bremner v. Bremner and Brett*, which had been instituted by him in that court for the dissolution of his marriage, on the ground of his wife's adultery with the co-respondent, and from which it appeared that the jury, on the trial of the cause in the Divorce Court, had found that the wife had been guilty of adultery with the co-respondent, but that the petitioner (the defendant in the present action) had also been guilty of adultery, and the result therefore was that the Judge Ordinary dismissed the petition. Notwithstanding this evidence, at the trial in the Mayor's Court, a verdict was found for the plaintiff for the amount claimed, subject to the question raised on behalf of the defendant

whether the record and finding of the jury in the Divorce Court were conclusive evidence that the wife had been guilty of adultery.

Henry James, for the defendant, subsequently, and pursuant to the leave reserved, obtained a rule *nisi* in this court to set aside the verdict, and to enter it instead for the defendant, if this Court should decide that such proceedings in the Divorce Court were conclusive as to the adultery. Against this rule

Nasmith now shewed cause.—Upon these pleadings the record in the Divorce Court is no estoppel. To be an estoppel it must be pleaded as such—*Outram v. Morewood* (3 East, 346). In *Roscoe on Evidence*, p. 157, 10th edit., it is laid down that “if the party forbears to rely upon an estoppel where he may plead it, he is taken to waive the estoppel and to leave the prior judgment as evidence only for the jury.” To the same effect is *Hannaford v. Hunn* (3 Car. & P. 148) and *The General Steam Navigation Company v. Guillon* (11 Mee. & W. 877; s. c. 13 Law J. Rep. (N.S.) Exch. 168).

Henry James, in support of the rule.—It is said that there ought to have been a plea of estoppel, but under the general issue the defendant is entitled to shew that his wife was not his agent to create this debt.

[ERLE, C.J.—We have no doubt that the point is raised under the general issue.]

The question then is, whether the finding of the jury in the Divorce Court and the judgment of the Judge Ordinary that the defendant's wife was guilty of adultery, are binding in this action. Such judgment is clearly binding as between the husband and the wife, and it is submitted that it is equally binding on the plaintiff who claims through them. In the learned notes to *The Duchess of Kingston's case* (2 Smith's Lead Cas. 5th edit. p. 676), after shewing how the grant of probate is conclusive against all the world, it is stated, “on the same principle, a sentence in a matrimonial suit is conclusive, for it is an adjudication upon the status of the parties.”

ERLE, C.J.—I am of opinion that this rule should be discharged. The judgment in the Divorce Court did not alter the status of the defendant's wife, but she continued to be his wife notwithstanding the jury thought that she had done wrong. Therefore, although the verdict in such divorce suit might as between the same parties be binding and conclusive, it certainly is not so as between other parties.

WILLES, J., BYLES, J. and MONTAGUE SMITH, J. concurred.

Rule discharged.

[IN THE COMMON PLEAS.]

May 24, 1866.

CARR AND ANOTHER v. THE WALLACHIAN PETROLEUM COMPANY (LIMITED).

35 L. J. C.P. 314; L. R. 1 C.P. 636; 14 L. T. 554; 14 W. R. 768: affirmed, [1867] E. R. A.; 36 L. J. C.P. 236; L. R. 2 C.P. 468; 16 L. T. 460; 15 W. R. 874 (Ex. Ch.).

Charter-Party—Substituted Contract—Guaranteed Freight—Loss of Vessel.

SHIPPING.—*The defendants, who had chartered the plaintiffs' vessel, which could carry 300 tons, to go to A. and there load a full and complete cargo of oil, and proceed therewith to London, at a freight of 84s. a ton, not being able to load such cargo, made a new contract with the plaintiffs, by which the charter-party was cancelled, and the plaintiffs were to put the vessel on the most profitable charter or trade procurable, and the defendants guaranteed*

the vessel "900l. gross freight home." The plaintiffs could only procure a cargo the gross freight of which to London was less than 900l., and the vessel accordingly left A. with such cargo:—Held, that the breach under the guarantie accrued when the vessel so left A. with a cargo not sufficient to earn 900l. freight, and the defendants were, therefore, liable for the amount of the deficiency, notwithstanding the ship and cargo were totally lost on the voyage.

First count of declaration—That before the making of the agreement thereafter mentioned, the plaintiffs, being the owners of two vessels, named respectively the *Izamados* and the *Botassis*, had chartered them to the defendants, for the conveyance of petroleum oil from Ibraila to London, for freight payable in that behalf by the defendants to the plaintiffs, which charter-parties the defendants, at the time of making the said agreement, were unable to fulfil, and thereupon it was agreed between the plaintiffs and the defendants that the said charter-parties should be cancelled, and that the defendants should guarantee to the said vessels a sum of 900l. each gross freight home from Ibraila to England, on the understanding that the parties should place the vessels at once on the most profitable charter or trade procurable, and that the vessels would carry 300 tons each, of whatever cargo they might take on board, or should they not take 300 tons each, that a proportionate reduction of the guarantie should be made for any proper quantity of cargo they might take. Averment, that the charter-parties were cancelled, and that the plaintiffs performed all conditions precedent. Breach, that the defendants did not guarantee to the said vessels, or either of them, a gross freight home from Ibraila to England of the stipulated amount; and that, although the said vessels earned by way of gross freight a sum far less than the stipulated freight, the defendants did not make good to the plaintiffs the deficiency, but therein made default, contrary to and in breach of the said agreement, whereby the plaintiffs not only lost the amount of the said deficiency, but also the use and interest thereof.

There were money counts for the hire of ships, for work done, and for money lent and paid, &c.

Pleas, *inter alia*, as to the first count, a denial of the agreement; and as to the residue of declaration, never indebted.

The cause was tried, before Erle, C.J., at the London Sittings after last Hilary Term, when it appeared that the defendants, in 1864, by two separate charter-parties, chartered the two vessels of the plaintiffs, called the *Izamados* and the *Botassis*, and by each charter-party, the vessel was to go to Ibraila on the Danube, and there load a full and complete cargo of petroleum oil, and proceed therewith to London, at a freight of 84s. per ton of 20 cwt. gross, payable, one-half on the arrival of the steamer, and the remainder by approved bills at two months from arrival.

Shortly after these charter-parties had been entered into, the depot of the defendants at Abraila was burnt down, and all their petroleum destroyed. They thereupon gave notice to the plaintiffs of their inability to load the vessels according to the charter-parties, and this led to a correspondence, which resulted in a Mr. Housden, on the part of the plaintiffs, attending on the 7th of September, 1864, a meeting of the directors of the defendants' company. What occurred at that meeting appears in the following extract from the company's minute-book: "Mr. Housden attended on the part of Messrs. Carr & Co., for the purpose of conferring with the directors on the subject of cancelling the charters of the *Botassis* and *Izamados*. It was proposed by the directors that this company will guarantee the above-named vessels a sum of 900l. each gross freight home, on the following understanding—that Messrs. Carr & Co. place the vessels named at once on the most profitable charter or trade procurable; that the vessels will carry 300 tons each of whatsoever cargo they may take on board, or, should they not take 300 tons each, that a proportionate reduction of the guarantie should be made for any

lesser quantity of cargo they may take; that the charter-parties dated the 9th and 10th of August last respectively for the vessels named be cancelled."

The plaintiffs assented to these terms, and caused their agents in the Danube to load both vessels with cargoes of barley on the plaintiffs' account, which were the best cargoes then procurable. The *Izamados* duly came home with her cargo, and the freight so earned was short of 900*l.* by 343*l.* 6*s.* 3*d.* The *Botassis* was also laden with the same quantity of barley at the same freight as the *Izamados*, and there was the same difference between her cargo, freight and the 900*l.* as in the case of the *Izamados*, but the *Botassis* was totally lost with her cargo on her voyage to England; and, therefore, the defendants contended that they were not liable on their guarantie for the deficiency of the freight of that vessel.

A verdict was found for the plaintiffs for 686*l.* 12*s.*, with leave to the defendants to move to reduce it by the sum of 343*l.* 6*s.*, if the Court should be of opinion that the defendants were not liable to pay that sum, in consequence of the *Botassis* having been lost. A rule *nisi* to that effect was accordingly obtained, against which—

Sir George Honyman now shewed cause.—The question is, what is the effect of the loss of the *Botassis*? The defendants had become unable to perform their engagement with the plaintiffs according to the terms of the charter-parties they had entered into, and the plaintiffs had a right of action against them in respect of this. Under these circumstances, it was agreed to cancel the charter-parties, and a new contract was made, by which, in effect, the plaintiffs gave up their right of demanding damages for the non-performance of the charter-parties on having the defendants' guarantie of a gross freight of 900*l.* for each vessel. Now, the gross freight for each vessel was short of such 900*l.* by 343*l.* 6*s.* Why, then, should not the plaintiffs recover such amount of deficiency? It is said that because in the case of the *Botassis* (that vessel having been lost), if the charter-party had remained in force, the plaintiffs would not have been entitled to her chartered freight, but must have sought indemnity from the underwriters, therefore the defendants are not liable.

[MONTAGUE SMITH, J.—When do you say there was a breach of the defendants' contract of the 7th of September, 1864?]

The moment the cargo was put on board the vessel. The contract is not a guarantie that the vessel should earn a freight of 900*l.*, but that the goods put on board should be such as would pay a freight of 900*l.*; therefore, when the vessel left, as she did, with a cargo which could only have earned freight to the amount of 556*l.* 14*s.*, the defendants were liable under their guarantie to make up the difference between that amount and 900*l.* *Yeames v. Lindsay* (3 Law Times, N.S. 855) is directly in point. There the defendants, who had agreed by a charter-party to load a cargo at 60*s.* per ton, got the plaintiffs to re-charter the vessel on the defendants promising to honour the plaintiffs' draft for the difference in the freight, if there should be a loss. The rate of freight fell, and there was a difference of 20*s.* per ton when the cargo was put on board; but the vessel having been afterwards lost, the defendants refused to accept the plaintiffs' draft, on the ground that, as the vessel never arrived at her destination, the plaintiffs were not liable for freight, and had sustained no loss; but this Court held, that the moment the cargo was put on board, there was a difference in the insurable value, and such a loss as was contemplated at the time of the contract.

W. Williams, in support of the rule.—The contract sued on was a new contract, made before there had been any breach of the charter-parties by the defendants, and might have been so pleaded to any action on the charter-parties. The present case is like *Stracy v. the Bank of England* (6 Bing. 754). Then, what was the contract of the 7th of September, 1864? It is submitted that it was that the plaintiffs should earn a gross freight of 900*l.* in respect of each vessel, so that the plaintiffs really had an insurable interest to the extent of 900*l.* on each vessel; for if the goods were lost during the voyage, the whole freight would be also lost. The words of the engagement are, "This company

will guarantee the above-named vessels a sum of 900*l.* each gross freight home." The contract surely, therefore, is a guaranteed freight of 900*l.*, and the plaintiffs had an insurable interest to that amount, and, if so, of course, as no freight was earned by reason of the loss of the *Botassis*, the plaintiffs' remedy would be against the underwriters, and not against the defendants.

ERLE, C.J.—I am of opinion that this rule should be discharged. The question turns on the meaning of the defendants' guarantie. The defendants guarantee the vessels a sum of 900*l.* each gross freight home, and I think that that was a substituted contract and ought to be construed with reference to the previous contract contained in the charter-party. By the charter-party, the defendants were to load a complete cargo of petroleum oil at a freight of 4*l.* 4*s.* per ton, and by the substituted contract the plaintiffs were to load the vessels with any other cargo they could get, and the defendants guarantee 900*l.* gross freight; that is to say, that whatever substituted commodity should be put on board, the freight for it should be worth to the plaintiffs 900*l.*, just as the freightage for the petroleum under the original contract would have been worth about 1,200*l.* If so, the contract would have been broken at the port of loading if less than the full cargo of petroleum had been put on board, and under the guarantie it is broken when the freight by the bill of lading for the goods put on board is not worth 900*l.* The word "freight" in the guarantie is what has introduced ambiguity in the matter.

WILLES, J.—I am of the same opinion. I think that the substituted agreement was a mere settlement of the amount to be paid by the defendants as the result of that breach of contract which must inevitably have taken place as soon as their warehouses at Ibraila had been burnt. The liability for not loading a cargo which should produce freight worth 900*l.* came to a head at the same time as it would have done if the vessel had not been loaded with a full cargo under the original contract; therefore if, when the vessel left the port of loading, she had not then a cargo which could produce freight worth 900*l.*, the defendants would be liable under their guarantie, and they would not be the less so because the vessel was afterwards lost. In my opinion, the liability accrued at the time the vessel left without a cargo sufficient to earn 900*l.* freight.

BYLES, J.—I also am of the same opinion, though I do not deny that I have had considerable difficulty in coming to that conclusion.

MONTAGUE SMITH, J.—I concur in thinking that the defendants' liability must be determined by the amount of the freight at the time when the cargo was put on board.

Rule discharged.

[IN THE COMMON PLEAS.]

May 24, 25, 1866.

GREENBERG v. WARD AND ANOTHER.

35 L. J. C.P. 316; L. R. 1 C.P. 585; 14 L. T. 760; 14 W. R. 795;
12 Jur N.S. 524.

Debtor and Creditor—Deed of Assignment—Reasonable Provisions as to Sale of Property and Payment of Dividends.

BANKRUPTCY.—By a deed of assignment of a debtor's property to trustees for the benefit of his creditors, it was provided that the trustees might sell on credit to the debtor, without security, and that if they paid dividends without notice of any particular creditor, the dividends were not to be disturbed:—Held, that such provisions were reasonable, and did not invalidate the deed.

This was a demurrer to a plea.

The declaration contained two counts, the first being the common money count, and the second a count on a bill of exchange, accepted by the defendants. The defendants pleaded, first (except as to a specified sum), never indebted; secondly, as to such sum, that "after the accruing of the parcel of the plaintiff's claim herein pleaded to, and after the 11th of October, 1861, the defendants were indebted to the plaintiff and divers other persons, and thereupon a deed hereinafter particularly set forth, bearing date the 14th of May, 1864, was made and entered into by and between the defendants, the persons in the said indenture named, Samuel Ward the elder and Samuel Ward the younger of the first part, Henry Cross Green, Thomas Robert Russell and John Jackson, as and being trustees for and on behalf of all the creditors of the defendants of the second part, and the several other persons whose names or the names of whose firms were written in the first column of the schedule under the said deed written, being respectively creditors, or claiming to be creditors of the defendants, and all other the creditors of the defendants of the third part, relating to the debts and liabilities of the defendants, and their release therefrom, which said deed was and is in the words and figures following." The plea then set out, *verbatim*, the deed which conveyed to the trustees all the property, debts, claims and rights of the debtors in the most ample terms; "upon trust nevertheless from time to time to sell and dispose of, and realize or collect and receive the said premises hereby conveyed and assigned, as hereinafter mentioned or expressed, and intended so to be, and every part thereof, by public sale and private contract, and in one or more lot or lots, with liberty to sell the same on credit to the said debtors or either of them, or any other person or persons, with or without security for the purchase-money, or any part thereof, as shall seem expedient; and upon trust, out of the moneys to be received by these presents to pay all costs and expenses of investigating, on the part of the creditors, the affairs of the said debtors, and of proposing, preparing and executing these presents, and of or occasioned by the carrying into effect the trusts hereby created; and in the next place (so far as the same may extend) to pay, retain and satisfy, rateably and without preference, administering the assets, and distributing joint and separate estates in like manner as in bankruptcy, except in any case where the contrary may be hereby provided for, to and amongst the parties hereto of the third part, including themselves, the said trustees and their partners (if any) so far as they may be creditors as aforesaid, and including all the creditors of the said debtors, the several debts and sums due to such creditors respectively, accounting such creditors in respect of such amount only as upon account fairly stated, after allowing, according to the provisions of the Bankruptcy Law, the value (if any) of mortgage securities, and other such available securities or liens, as shall appear to be the balance due to them respectively from the debtors, subject to the covenant herein contained for verifying the amounts thereof, and to pay the ultimate residue (if any) of the said moneys, after satisfying the whole of the said creditors the full amount of their said debts, with interest hereon, unto the said debtors in like manner as in bankruptcy. Provided always, that no former dividend should be disturbed, and no liability in consequence of such dividend shall be incurred by the trustees by reason or on account of any debt or debts due to creditors as aforesaid, and whereof the trustees shall not have had notice before such dividend shall have begun to be paid." The deed then declared, that the trustees might employ the debtors; that the execution of the deed by a creditor should be no admission by the trustees as to the validity or amount of his debt which they might require to be verified by solemn declaration; that the trustees should have all the powers, &c. of a creditors' assignee, or of creditors under the authority of the Court; that the trustees might give an allowance to the debtors; that questions of administration should be decided by the Bankruptcy Law, and that the trustees should be liable only for their wilful default, &c., and should pay moneys into the bank when amounting to 50l.

The deed then contained a release (without prejudice to mortgages, liens, and remedies against third parties) by the creditors of all debts, &c., a covenant not to sue &c., a power to plead the deed in bar, an avoidance of the deed in case of concealment of property, a covenant by the debtors to assist the trustees and execute all necessary deeds &c., a power for one trustee to act on the death or incapacity of the other, and schedules of the creditors. The plea then stated that "a majority in number representing three-fourths in value of creditors of the defendants, whose debts respectively amounted to 10*l.* and upwards, did in writing assent to and approve of the said deed, and the said trustees appointed by the said deed executed the same, and the execution of the said deed by the defendants was attested by a solicitor, and within twenty-eight days from the day of the execution of the said deed by the defendants, the same was produced, left, having been first duly stamped, at the office of the Chief Registrar of the Court of Bankruptcy for the purpose of being registered, and together with such deed there was delivered to the said Chief Registrar an affidavit by the defendants that a majority in number representing three-fourths in value of the creditors of the defendants whose debts respectively amounted to 10*l.* and upwards, had, in writing, assented to and approved of the said deed, and also stating the amount in value of the property and credits of the defendants comprised in the said deed, and the said deed did, before the registration thereof, bear such ordinary *ad valorem* stamp duties as were provided by the Bankruptcy Act, 1861, in that behalf, and immediately on the execution of the said deed by the defendants, possession of all the property comprised therein, of which the defendants could give or order possession, was given to the said trustees, and at the time of the execution of the said deed the plaintiff was a creditor of the defendants, in respect of the parcel of the claim herein pleaded to, within the meaning of the Bankruptcy Act, 1861; and all conditions precedent, matters, things, and times by the said deed required to have been performed, and to have happened, existed, and elapsed to render the said deed binding upon the plaintiff and the other creditors, and to render the said deed pleadable as a bar to this action, were performed, and did happen, exist, and elapse before the commencement of this suit, and nothing was done or happened or existed to the contrary thereof in that behalf; and all conditions in the said statute having been performed, and all things in the said statute happened necessary in that behalf, the plaintiff became and was and is bound by the said deed as if he had been a party thereto, and had duly executed the same."

To this second plea there was a demurrer.

Field (Holl with him), in support of the demurrer.—This deed is bad. By one of its clauses the trustees are empowered to sell the property to the debtor himself on credit, and without security. Such a power as this destroys the equitable remedy against the trustees for breach of trust, and is on that account distinguishable from the recent case of *Coles v. Turner* (35 L. J. C.P. 169; s. c. Law J. Rep. C.P. 373), which will be relied on by the defendants. Such a clause is unreasonable and vitiates the deed. Next, there is inequality in the distribution amongst the creditors. The deed does not provide for distribution amongst all the creditors. The trustee may sell and divide the next day, and there is no liability in consequence of creditors afterwards coming in, of whom the trustee had not had previous notice.

Quain, in support of the plea.—First, it is said that the deed is bad because it gives a power to the trustees to sell to the debtors with or without security. But the argument on the other side assumes recklessness in the trustees; the Court, however, will make no such assumption; the trustees must exercise reasonably the power given to them, but if they do so, the Court will not interfere. As to authority, the case of *Coles v. Turner* (35 L. J. C.P. 169; s. c. Law Rep. C.P. 373) is decisive. The only difference between that case and the present is, that here we have the words "to the debtor," but this very point was put by counsel in argument, and answered in that case. Secondly, it is said the deed is bad because it provides that the trustees are not to be

accountable if they, before notice of any creditor, pay dividends, and that such creditor is to come in without disturbing them. But this is the method of administering in Chancery—*Broadbent v. Thornton* (4 De Gex & Sm. 65)—and in Bankruptcy.

Field, in reply.—First, it is impossible to see how the first clause is consistent with *bona fides*. Secondly, the case of *Broadbent v. Thornton* (4 De Gex & Sm. 65) is not in point; there the creditor knew of the deed and other matters, but lay by.

ERLE, C.J.—I am of opinion that our judgment should be for the defendants on the demurrer. By this deed, no doubt, very ample powers are given to the trustees; and if they combined with a portion of the creditors to defraud the others, perhaps the Court of Bankruptcy or a Court of Equity could interfere. But we must not assume wilful waste; and if there be not, they may sell to the debtors. The power is the same as that in *Coles v. Turner* (35 L. J. C.P. 169; s. c. Law Rep. C.P. 373), which governs the present case. As to the other clause, as to not disturbing the dividends, the same observations apply; we are not to assume an intention to defraud.

WILLES, J.—I am of the same opinion; and I do not see how we can, consistently with *Coles v. Turner* (35 L. J. C.P. 169; s. c. Law Rep. C.P. 373), decide otherwise.

BYLES, J.—I am of the same opinion. As to the first point, *Coles v. Turner* (35 L. J. C.P. 169; s. c. Law Rep. C.P. 373) is in point; as to the second point, the stipulation is a reasonable one.

MONTAGUE SMITH, J.—I am of the same opinion.

Judgment for the defendants.

[IN THE COMMON PLEAS.]

June 4, 1866.

CONNELLY v. BREMNER.

35 L. J. C.P. 319; 1 H. & R. 612; L. R. 1 C.P. 557; 14 L. T. 520;
14 W. R. 781; 12 Jur. N.S. 762.

Practice—Pleading after Two o'clock on Saturday—Rule, E. T. 1856—Signing Judgment—Acquiescence in Judge's Order.

PRACTICE.—Notwithstanding the rule of Easter Term, 1856, that if service of pleadings be “made after two o'clock, p.m., on Saturday, the service shall be deemed as made on the following Monday,” when a defendant has all Saturday to plead, the plaintiff cannot regularly sign judgment by default until the opening of the office on the morning of the following Monday.

Where a Judge has made an order at Chambers out of term, to set aside a judgment by default on an affidavit of merits, and on payment of the plaintiff's costs, the defendant, by complying with such order, for the purpose of getting rid of the judgment, does not so acquiesce in the order as to prevent his applying to the Court in the next ensuing term to alter its terms.

The question in this case was, whether a judgment, signed by the plaintiff for want of a plea, was regular or not. The action was to recover the balance of an account for wages alleged to be due to plaintiff, as ship's cook of the *Water Witch*, and the defendant's attorneys having sent a cheque by post to the plaintiff's attorneys at Liverpool, Willes, J., on the 2nd of May last, made

an order extending the defendant's time to plead "until a day after cheque returned or taken in part payment." The cheque was received back by the defendant's attorneys on Friday, the 4th of May last, in a letter from the plaintiff's attorneys, dated the 3rd of May. The pleas were delivered on Saturday, the 5th of May, after two o'clock, p.m. On that day, between two and five, p.m., and before the pleas had been delivered, the plaintiff signed judgment by default, as for want of a plea.

On the 8th of May a summons was taken out to set aside such judgment for irregularity, with costs, on the ground that the same had been signed before the defendant's time for pleading, under the said order of Willes, J., had expired. This summons was heard, before Byles, J., on the 9th of May, when that learned Judge being of opinion that the defendant's time for pleading had expired before the pleas had been delivered, held that the judgment was regular, and, therefore, he only made an order to set aside the judgment upon an affidavit of merits, and on payment of costs. These costs were taxed at 2l. 5s., and were afterwards paid by the defendant.

Early in this term, *Sir G. Honyman*, on behalf of the defendant, obtained a rule calling on the plaintiff to shew cause why the said order of Byles, J. should not be amended or varied, by directing the judgment signed by the plaintiff to be set aside, with costs, to be paid by the plaintiff to the defendant or to his attorney, and why the plaintiff should not refund to the defendant or to his said attorney the said sum of 2l. 5s., the taxed costs paid by him in pursuance of the said order. Against this rule,

Hume Williams now shewed cause.—The judgment signed by the plaintiff was regular. By the rule of Easter Term, 1856, it is ordered that "service of pleadings, notices, summonses, orders, rules, and other proceedings shall be made before seven o'clock, p.m., except on Saturdays, when it shall be made before two o'clock, p.m. If made after seven o'clock, p.m., on any day except Saturday, the service shall be deemed as made on the following day, and if made after two o'clock, p.m. on Saturday, the service shall be deemed as made on the following Monday." The pleas in this case, having been delivered after two o'clock on Saturday, are not to be considered as delivered on that day at all; and the defendant's extended time to plead, even if it gave him all Saturday to plead, had therefore expired before the plaintiff signed judgment; but it is submitted that the defendant's time expired at nine o'clock a.m. on Saturday morning, which was a day after the defendant's attorneys had received the cheque back from Liverpool. Moreover, the defendant took the benefit of the order of Mr. Justice Byles, having drawn it up and paid the plaintiff's costs under it; he cannot therefore now be heard against it.

Sir G. Honyman appeared in support of the rule, but was not called upon.

ERLE, C.J.—The rule of practice is thus laid down in 1 *Chit. Arch.*, 11th edit. p. 246: "If the defendant do not plead on or before the day on which the time expires, the plaintiff may sign judgment on the opening of the office on the morning of the following day, unless in the mean time, and before the signing of it, the defendant has delivered a plea." If we apply that rule literally, the defendant had all the day of Saturday to plead, and the plaintiff might have signed judgment on the following Monday, unless in the mean time, and before signing, the defendant had delivered a plea; and that is the general rule. I think that the order of my Brother Willes meant that the defendant should have one whole day to plead after the day on which the cheque had been received back; and that, therefore, the defendant had all Saturday to plead in. Then there is the rule of Court, that pleas must be pleaded on Saturday before two o'clock, and that if pleaded after that time they are to be deemed as pleaded on the following Monday. The Judgment Office being, however, open on a Saturday after two o'clock, the plaintiff signed judgment, and the pleas were subsequently delivered on that same day. Now, I am of opinion that the plaintiff had no right to sign judgment

on that Saturday; the exemption in favour of the clerks after two o'clock on a Saturday leaves the rule of practice as before; and, consequently, the plaintiff had no right to sign judgment until the opening of the office on the following Monday. Then it is said that the defendant took advantage of the order of my Brother Byles, and got the judgment set aside on payment of costs, and therefore that he cannot now have that order altered. But I think that as that order was made out of term, and as unless the judgment had been set aside with due diligence the plaintiff would evidently have issued execution, the defendant's legal advisers did not acquiesce in that order by paying the costs and taking the benefit of it by getting the judgment set aside, and that by coming to this Court, as they did, early in the next term, they came as soon as they could. I therefore think the defendant should have back the costs he so paid; but that is all we now award.

WILLES, J.—I am of the same opinion. I think the rule of Easter Term was not intended to alter the rule of practice, as stated in *Chit. Arch.* in the passage which has been cited.

KEATING, J.—I am of the same opinion; but at the same time I think we ought not to go further than has been stated by the Chief Justice, namely, that the defendant should get back the costs he paid, but not receive costs. When a party has all Saturday to plead in, the plaintiff cannot sign judgment until the following Monday.

MONTAGUE SMITH, J.—I also concur with the rest of the Court; but if I had been at chambers, I should have had a difficulty in making a different order from what my Brother Byles made.

Rule absolute, but without costs.

[IN THE COMMON PLEAS.]

May 31, June 2, 4, 1866.

GRILL v. THE GENERAL IRON SCREW COLLIER COMPANY
(LIMITED).

35 L. J. C.P. 321; L. R. 1 C.P. 600; 14 L. T. 711; 14 W. R. 893;
12 Jur. N.S. 727; affirmed, [1868] E. R. A.; 37 L. J. C.P. 205; L. R. 3 C.P. 478;
18 L. T. 485; 16 W. R. 796 (Ex. Ch.).

Referred to, *Giblin v. M'Mullen*, [1869] E. R. A.; 38 L. J. P.C. 25; L. R. 2 P.C. 317; 21 L. T. 214; 17 W. R. 445 (P.C.). See *Oppenheim v. White Lion Hotel Co.*, [1871] E. R. A.; 40 L. J. C.P. 231; L. R. 6 C.P. 515; 25 L. T. 93 (C.P.). Adopted, *Notara v. Henderson*, [1872] E. R. A.; 41 L. J. Q.B. 158; L. R. 7 Q.B. 225; 26 L. T. 442; 20 W. R. 443 (Ex. Ch.). Applied, *The Chasca*, [1875] E. R. A.; 44 L. J. Adm. 17; L. R. 4 A. & E. 446; 32 L. T. 838 (Adm.). Referred to, *Scaramanga v. Stamp*, [1879] E. R. A.; 48 L. J. C.P. 478; 4 C.P. D. 316; 41 L. T. 191 (C.P. D.); affirmed, [1880] E. R. A.; 49 L. J. C.P. 674; 5 C.P. D. 295; 42 L. T. 840; 28 W. R. 691 (C. A.). Referred to, *Chartered Mercantile Bank of India v. Netherlands Steam Navigation Co.*, [1883] E. R. A.; 52 L. J. Q.B. 220; 48 L. T. 546; 31 W. R. 445 (C. A.). See *The Xantho*, [1887] E. R. A.; 56 L. J. Adm. 116; 12 App. Cas. 508; 57 L. T. 701; 36 W. R. 353 (H.L.). Referred to, *Steinman v. Angier Line, Ltd.*, [1871] E. R. A.; 60 L. J. Q.B. 425; [1891] 1 Q.B. 619; 64 L. T. 613; 39 W. R. 392 (C. A.). Applied, *The Glendarroch*, [1894] E. R. A.; 63 L. J. Adm. 89; [1894] P. 226; 70 L. T. 344 (C. A.). Referred to, *Trinder Anderson & Co. v. Thames and Mersey Marine Insurance Co.*, [1898] E. R. A.; 67 L. J. Q.B. 666; [1898]

2 Q.B. 114; 78 L. T. 485; 46 W. R. 561 (C. A.); *Fenten v. Thorley*, [1903] E. R. A.; 72 L. J. K.B. 787; [1903] A. C. 443; 89 L. T. 314; 52 W. R. 81 (H.L.). See *Price v. Union Lighterage Co.*, [1904] E. R. A.; 73 L. J. K.B. 222; [1904] 1 K.B. 412; 89 L. T. 731; 52 W. R. 325 (C. A.). Referred to, *In re Etherington v. Lancashire & Yorkshire Accident Insurance Co.* [1909] E. R. A.; 78 L. J. K.B. 684; 100 L. T. 568 (C. A.) 85.

Shipping—Bill of Lading—Excepted Perils—Barratry and Perils of the Seas—Loss of Vessel and Goods from Negligence—Merchant Shipping Act, 1854, s. 299—Evidence on Commission.

SHIPPING.—*The plaintiff shipped goods on board the defendants' vessel, the Black Prince, under a bill of lading, which contained, inter alia, the exceptions of "barratry" and "perils of the sea." The Black Prince, with the plaintiff's goods on board, was lost in a collision with another vessel, the Araxes. In an action on the bill of lading for the loss of the goods, there was evidence at the trial that the collision arose from the Black Prince star-boarding instead of porting her helm, as required by the rules laid down by the Merchant Shipping Act, 1854; and a collision occasioned by non-observance of such rules is, by section 299. of that act, to be deemed to have been occasioned "by the wilful default of the person in charge" of the offending ship. The Judge told the jury that if a collision was brought about by the negligence of those on board the Black Prince, the loss would not be a peril of the sea, and that for that purpose he could not distinguish between gross negligence and negligence; and he left it to the jury to say whether there was want of due care on the part of the Araxes, by which care the collision would have been avoided:—Held, that the contravention of the rules of the Merchant Shipping Act, 1854, by those in charge of the Black Prince, in starboarding instead of porting the helm, did not amount to barratry within the exception in the bill of lading.*

Held, also, that the direction of the Judge was right, and that, being bound by the case of Lloyd v. the General Iron Screw Collier Company (3 H. & C. 284; s. c. 33 Law J. Rep. (N.S.) Exch. 269), he did right in not directing the jury that the loss of the Black Prince was caused by perils of the sea, within the exception in the bill of lading.

EVIDENCE.—*It is no objection to the admissibility of depositions taken under a commission, that the Commissioner did not put any of the written interrogatories or cross-interrogatories which were sent out with the commission, but took the evidence of the witnesses under a viva voce examination.*

And, semble, any irregularity in the mode of taking the depositions cannot be a ground for refusing to admit them at the trial, but can only be taken advantage of by applying to the Court or a Judge at chambers to suppress the depositions.

This action, which was tried, before Erle, C.J., at the London Sittings after last Hilary Term, was brought to recover thirty-seven casks of argols (tartar) shipped, at Messina, in Sicily, by the plaintiff, on his own account, on board the defendants' steamer, the Black Prince, under a bill of lading, signed by the defendants' agent, by which the goods were made deliverable at the port of London, to the order of the plaintiff or his assigns, "the act of God, the Queen's enemies, pirates, robbers, thieves, barratry of master or mariners, restraint of princes and rulers, fire, accident or damage from machinery, boilers, steam, or from other goods by contact, sweating, leakage or otherwise, and accidents or damage of the seas, rivers and steam navigation, of whatever nature or kind soever, excepted."

The declaration alleged a loss of these goods with the Black Prince, in consequence of a collision between her and a steamer, the Araxes, caused by the negligence of the defendants' servants and mariners in the Black Prince.

The pleas were, first, a denial of the bailment; secondly, not guilty; and, thirdly, that the loss was occasioned by the excepted perils in the bill of lading.

The plaintiff took issue on these pleas; and also replied, to the third plea, that the supposed excepted perils consisted wholly of the collision in the declaration mentioned, and that the collision was caused and the supposed perils incurred solely by the gross negligence and improper conduct of the defendants' servants and mariners.

It was proved that, on the night of the 8th of November, 1860, while the *Black Prince* was off Cape St. Vincent, in the prosecution of her voyage to England, she met and came in collision with the steamer *Arazes*, and that in consequence of that collision the *Black Prince* sank and was lost with all her cargo, including the said goods of the plaintiff. Both vessels were English, and it appeared from the evidence that when the two vessels were about four miles apart, the *Black Prince* was sighted by those on board the *Arazes*, half a point on her starboard bow, and that the *Arazes* thereupon ported her helm. The *Black Prince*, however, instead of porting her helm as the two vessels approached each other, starboarded, and the port-bow of the *Arazes* came in contact with the starboard side of the *Black Prince*, and the latter sunk and was lost. It was contended at the trial, on behalf of the defendants, that the loss was caused by perils of the sea, and therefore was excepted by the bill of lading; and, further, that the conduct of the master and mariners on board the *Black Prince* amounted to barratry, and so fell within the exceptions in the bill of lading; and in support of the argument that it amounted to such barratry, reliance was placed on the 296th, 298th and 299th sections of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104),¹ by which a collision occasioned by non-observance by any ship of the rules there laid down is to be deemed to have been occasioned by the wilful default of the person in charge of such ship.

The learned Judge reserved this last point, and he left the jury the question whether there was want of due care on the part of the *Arazes*, by the exercise of which care the collision would have been avoided, telling them that if that question was answered in the negative there would be a verdict for the plaintiff, but that if they were of opinion there was want of due care on the part of the *Arazes*, by which the accident would have been avoided, the defendants would be entitled to the verdict. The learned Judge also told the jury that if the collision was brought about by negligence on the part of the *Black Prince*, the loss would not be a peril of the sea, and that, for that purpose, he could not distinguish between gross negligence and negligence,

(1) Sect. 296. "Whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port so as to pass on the port side of each other; and this rule shall be obeyed by all steam ships and by all sailing ships, whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command."

Sect. 298. "If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any rule for the exhibition of lights or the use of fog-signals issued in pursuance of the powers hereinbefore contained, or of the foregoing rule as to the passing of steam and sailing ships, or of the foregoing rule as to a steam ship keeping to that side of a narrow channel which lies on the starboard side, the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary."

Sect. 299. "In case any damage to person or property arises from the non-observance by any ship of any of the said rules, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of such ship at the time, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary."

and that it would be evidence of such gross negligence in this case if a party wilfully starboarded when the law said he ought to port.

The jury stated that there was no want of ordinary care on the part of the *Arazes*, and that there was negligence on the part of the *Black Prince*, which caused the collision, and a verdict was thereupon entered for the plaintiff, damages, 1,220*l*.

In the course of the trial an objection was made, on behalf of the defendants, to the reception of depositions tendered in evidence by the plaintiff. These depositions had been taken at Messina, under a commission issued for that purpose, at the instance of the plaintiff. The defendants had not joined in that commission, but they had appointed a Mr. Francis Tagliavia, of Messina (who was the defendants' ship agent at that port, and had signed the bill of lading the subject of the action), to act as their agent upon the execution of such commission for the examination of witnesses at that place. Mr. Tagliavia had had due notice of the commission, and had attended and cross-examined on behalf of the defendants all the witnesses produced and examined under the same; but it was objected that the defendants had not had notice that the plaintiff's attorney would have attended on the execution of the commission, and also that the defendants had been led to believe from the written interrogatories that the plaintiff himself would have given evidence, and that they had prepared and sent out cross-examinations accordingly; whereas the plaintiff never appeared as a witness, and the evidence of the witnesses who were produced and examined was taken *viva voce*, none of the written interrogatories in chief or cross-interrogatories being put to the witnesses. The learned Judge, however, received the depositions.

In the course of Easter Term last,

E. James, for the defendants, obtained a rule *nisi* to set aside the verdict, and to enter it for the defendants, pursuant to the leave so reserved at the trial, on the ground that the conduct of those in charge of the defendants' ship brought the case within the exception of barratry in the bill of lading; or for a new trial, on the ground that the learned Judge ought to have told the jury that the loss was caused by perils of the seas within the bill of lading, and also that he ought to have left to the jury whether the loss was caused by gross negligence; also whether the loss might not have been avoided by care on the part of those on board the *Arazes*; and on the ground of the misreception of the depositions taken at Messina; or why the entry of final judgment on the verdict should not be stayed, on the ground that the matters set forth in the replication to the third plea did not take the case out of the protection given to the defendants by the bill of lading.

The Solicitor General, Hannen and Cohen shewed cause.—The defendants are liable unless the case falls within the exceptions in the bill of lading. Now, first, as to what is barratry. The other side rely on the 17 & 18 Vict. c. 104. s. 299, which enacts, that if damage be caused by non-observance of the rules, it shall be deemed to have been caused by the wilful default of the person on deck. No doubt the section has this effect, that if there be a guilty intention to defraud an owner, there is barratry. This case has been in Admiralty (15 Moore, P.C.C. 122), but this point was never suggested. And the only case is *The Seine* (Swa. Adm. Rep. 411), and there Dr. Lushington said that if the argument were right, both his Court and the Privy Council had been wrong a hundred times. *The Druid* (1 W. Rob. Adm. Rep. 391) also shews that this point is altogether novel and contrary to received opinion. The case of *Earle v. Rowcroft* (8 East, 126) will be relied on by the other side; but there the master knew his act was wrong and criminal, and all the case says is, that an intention to defraud the owner is not necessary. By the argument on the other side, any infringement of a rule on a mere matter of judgment would constitute a criminal offence. In *Tuff v. Warman*² such a

(2) 2 Com. B. Rep. N.S. 740; s. c. 26 Law J. Rep. (N.S.) C.P. 263: in error, 5 Com. B. Rep. N.S. 573; s. c. 27 Law J. Rep. (N.S.) C.P. 322.

construction was never suggested at the bar or by the Court. It becomes necessary to ascertain what the law was before the statute. In 2 *Parsons's Maritime Law*, 239, it is laid down—"If an unlawful act be done without intention, or through inadvertance or ignorance, it is not barratry. The act must be wrongful in itself and wrongfully intended." Again, Lord Ellenborough laid down—"To constitute barratry, which is a crime, the captain must be proved to have acted against his better judgment"—*Todd v. Ritchie* (1 Stark. 240). In *Arnould's Law of Marine Insurance*, 2nd edit., sect. 310, p. 844, "barratry" is defined as "not only every species of fraud and knavery covinously committed by the master with the intention of benefiting himself at the expense of his owners, but every wilful act on his part of known illegality, gross malversation or criminal negligence, by whatever motive induced, whereby the owners or the charterers of the ship (in cases where the latter are considered owners *pro tempore*) are in fact damnified"; and the author says, that losses caused by the captain's ignorance or incompetence are not barratrous, unless he "acted against his better judgment," for which he cites *Phyn v. the Royal Exchange Assurance Company* (7 Term Rep. 505). There are two incontestable propositions as to barratry: first, it is not necessary to intend to do a wrong to the owner; secondly, the mere intention to do what turns out to be a damage to him is not barratry unless he had wrongful intention; it is not enough that damage accrues. The case of *Earle v. Rowcroft* (8 East, 126) illustrates that the master need not intend to do a wrong to the owner. Further, counsel in that case put the distinction between the case where the act was absolutely unlawful, and the master must be taken to know he must not break the law, and the case where the act was ambiguous and took its character from the intention, and intention was necessary. And Lord Ellenborough throughout his judgment seems to acknowledge this distinction, and after deciding the case, says, "We do not feel any apprehension that simple deviations will be turned into barratry to the prejudice of underwriters; for unless accompanied by fraud or crime, no case of deviation will fall within the true definition of barratry as above laid down"; which shews that mere intention to do the act is not necessarily enough, because it may be an ambiguous matter (take deviation as an illustration), which may necessarily bring a loss, or may be a question of judgment, and it then becomes necessary to see whether the intention was wrongful. *Phyn v. the Royal Exchange Assurance Company* (7 Term Rep. 505) illustrates this; and the case of *Sadler v. Dixon* (8 Mee. & W. 895; s. c. 11 Law J. Rep. (N.S.) Exch. 435) shews that wilful default is not necessarily barratrous. This being the state of the law before the statute, does the statute make it barratrous to infringe the rules laid down? The language has been copied from act to act, and the more recent ones are to be found in *Pritchard's Adm.* 28, Dig. 147, new edit. It is not likely that it was the intention of the legislature to alter the law on a different subject when passing these enactments, and it would be curious if the law has been mistaken ever since these statutes both by Bar and Judges, the question having been directly involved in every case of a collision where the statutable rule has been broken. In *Morrison v. the General Steam Navigation Company* (8 Exch. Rep. 733; s. c. 22 Law J. Rep. (N.S.) Exch. 233), after alluding to the Admiralty Regulations, Pollock, C.B. stated that the Court was clearly of opinion that no change of the law had been effected by them. In *Sadler v. Dixon* (8 Mee. & W. 895; s. c. 11 Law J. Rep. (N.S.) Exch. 435) it was assumed that a wilful act was not necessarily barratrous. The wilful default must be a criminal default knowing it to be criminal, to be barratrous. Secondly, as to perils of the seas, this point is decided by *Lloyd v. the General Iron Screw Collier Company* (3 H. & C. 284; s. c. 33 Law J. Rep. (N.S.) Exch. 269).

[WILLES, J.—Yes, notwithstanding that the Court apparently was not aware that seven years before the same point was decided by this Court in *Phillips v. Clark* (2 Com. B. Rep. N.S. 156; s. c. 26 Law J. Rep. (N.S.) C.P. 168).]

That case in this Court was not cited, because the Court of Exchequer had already come to the same conclusion before it was cited. Again, in America the same rule holds; this is shewn by *Jones v. Pitcher* (3 Stewart & Porter, 135); and the author in *Parsons's Maritime Law*, vol. i. p. 191, sums up thus: "As between an underwriter and the insured owner of a ship, the former will be answerable for a loss by a collision, although caused by the negligence of the master or crew, because it is considered as a peril of the sea; but a collision so occurring will not exempt the owner of the vessel from being liable to the shipper of goods for damage caused to them thereby." Thirdly, as to gross negligence, there is really no distinction between negligence and gross negligence. Thus, in *Wilson v. Brett* (11 Mee. & W. 113; s. c. 12 Law J. Rep. (N.S.) Exch. 264), Rolfe, B. said, "I said I could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet."

[WILLES, J.—In *Beal v. the South Devon Railway Company* (3 H. & C. 337), a definition of "gross negligence" is given by Crompton, J., in delivering the judgment of the majority of the Court of Exchequer Chamber. ERLE, C.J.—I advisedly abstained from using a word to which I can attach no definite meaning; and no one, as far as I know, ever was able to do so.]

Moreover, the question of gross negligence cannot arise in such a case as this, for if negligence were proved it was negligence for which a carrier would be liable—*Wild v. Pickford* (8 Mee. & W. 443; s. c. 10 Law J. Rep. (N.S.) Exch. 382); where Parke, B. says, "The weight of authority seems to be in favour of the doctrine . . . that it is enough to prove an act of ordinary negligence." As to contributory negligence, there was no misdirection in the summing up. Fourthly, as to the depositions being receivable in evidence. It is objected that the interrogatories were not put to the witness, but a *viva voce* examination. But the other side appointed an agent who cross-examined, and how can they object now? And if it was found more convenient, it was quite competent for this course to be adopted.

[WILLES, J.—And ought not the objection to have been taken before the trial, at chambers?]

Yes; the objection should be taken as suggested. And, further, after assenting and cross-examining, they cannot object.—[They also referred to *MacLachlan on Shipping*, 458, *Worms v. Storey* (11 Exch. Rep. 427; s. c. 25 Law J. Rep. (N.S.) Exch. 1), *Siordet v. Hall* (4 Bing. 607), *Dakin v. Oxley* (15 Com. B. Rep. N.S. 646; s. c. 33 Law J. Rep. (N.S.) C.P. 115) and *The Ida* (1 Lush. 6).]

E. James, Karlake and Sir G. Honynman, in support of the rule.—One of the questions is, whether the loss of the goods was not a loss occasioned by the perils of the sea within the exception mentioned in the bill of lading. The learned Judge rather treated the matter as if it were a case of collision between two ships, and the question was, which ship was in fault; but the real question, it is submitted, was, not whether there was a want of care on the part of the *Araxes*, by which the collision could have been avoided, but whether the loss of the goods could have been prevented by the exercise of care on the part of either of the vessels. Though the collision was unavoidable, it does not follow that the goods need have been lost. If the *Araxes* had stopped her engines and not come into so violent a collision, the consequence to the goods might have been different. The loss was a loss by the perils of the sea, and so the learned Judge should have directed the jury. There is nothing unreasonable in a shipowner contracting with the owner of the goods that if the vessel be lost under circumstances which would make the underwriter liable, the shipowner should not be liable for the loss of the goods—*Carr v. the Lancashire and Yorkshire Railway Company* (7 Exch. Rep. 707; s. c. 21 Law J. Rep. (N.S.) Exch. 261). *The Great Northern Railway Company v. Morville* (21 Law J. Rep. (N.S.) Q.B. 319), and *Austin v. the Manchester, Sheffield and Lincolnshire Railway Company* (10 Com. B. Rep. 454; s. c. 21

Law J. Rep. (N.S.) C.P. 179) shew that carriers may by express contract be exonerated in certain cases from liability. Now, if this had been an action on a policy of insurance, the loss would have been by perils of the sea, according to *Sadler v. Dixon* (8 Mee. & W. 895; s. c. 11 Law J. Rep. (N.S.) Exch. 435) and *Smith v. Scott* (4 Taunt. 126), as there is no continuing warranty of competency of crew; then why is it to be different in this action? With respect to the case of *Phillips v. Clark* (2 Com. B. Rep. N.S. 156; s. c. 26 Law J. Rep. (N.S.) C.P. 168), which has been referred to, it is submitted that that is distinguishable from this, as what was complained of there was bad stowage, and the exception as to leakage did not extend to what had been brought about by the defendants' own act, namely, bad stowage. In *Wilton v. the Atlantic Royal Steam Packet Company* (10 Com. B. Rep. N.S. 458; s. c. 33 Law J. Rep. (N.S.) C. P. 369), which was an action for the loss of luggage, the Court gave no opinion whether the negligence of the captain deprived the defendants of their protection under the bill of lading. The case of *Lloyd v. the General Iron Screw Company* (3 H. & C. 284; s. c. 33 Law J. Rep. (N.S.) Exch. 269), which, being an action against the present defendants, and arising out of the same collision between these vessels, has been much relied on by the other side, was, however, decided on demurrer, where it was admitted by the pleadings that the accident had been wholly caused by the gross negligence of the defendants and their servants. Next, assuming the loss not to be within the exception as a loss by the perils of the sea, it is submitted it comes within the exception of barratry. The 296th section of the Merchant Shipping Act states the rule for each vessel meeting, as these were meeting, to port the helm, and section 299. declares the damage arising from the non-observance of such rule to be deemed to have been occasioned by the wilful default of the person in charge of the deck of such vessel. The conduct of those on board the *Black Prince*, in starboarding instead of porting the helm, is made wilful by the statute, and is therefore barratrous. Barratry need not be criminal—*Wilson v. Rankin*.³ Nor is it necessary that there should be an intent to damage the owner, but a wilful wrongful act deliberately done, and to the damage of the owner, will be sufficient to constitute barratry. If the master deviate from his instructions to the damage of his owner, it is barratry. Then, as it is implied that the master is to act according to law, if he does not do so he violates his instructions. Now, in the present case, the rule as laid down by the Merchant Shipping Act was broken without justification, and the damage done thereby is, by the statute, to be deemed to have been caused by the "wilful default of the person in charge of the deck." The following definition, given in *Arnould on Insurance*, 3rd edit., p. 712, note (2), is in the defendant's favour: "The tersest and (perhaps) best definition of 'barratry' is that given by Lord Hardwicke in *Lewen v. Suasso* (*Postlewaite's Dict.* 177, tit. 'Assurance'), viz., that it is an act of wrong done by the master against the ship and goods." In *Earle v. Rowcroft* (8 East, 126), Lord Ellenborough says, "I conceive the trust reposed in the captain of a vessel obliges him to obey the written instructions of his owners where they give any, and where his instructions are silent he is at all events to do nothing but what is consonant to the laws of the land." Again, in *Heyman v. Parish* (2 Campb. 149), his Lordship held that it was not necessary to shew fraud. In 3 *Kent's Commentaries*, 305, it is said that whether the act be induced "by motives of advantage to himself, malice to the owner or a disregard of those laws, which it was the master's duty to obey and which the owners relied on him to observe. It is equally barratry." It does not follow that, because fraud is necessary to make some acts barratrous, that other acts are not so without. As to *Phyn v. the Royal Exchange Insurance Company* (7 Term Rep. 505), all that case amounts to is, that a deviation which may be innocent, if it be fraudulent, may be barratrous. If it had been

(3) 34 Law J. Rep. (N.S.) Q.B. 62: affirmed in error, 35 Law J. Rep. (N.S.) Q.B. 87; s. c. 1 Law Rep. Q.B. 162.

found "wilfully done in contravention of a known rule of navigation," it would clearly have been barratrous. Then the statute does away with the necessity of any inquiry as to the wilfulness of the act by declaring that if a collision occurs and there be not obedience to these rules, this is to be considered wilful. If there had been damage by fire, would its having arisen by the negligence of a sailor make any difference?

[WILLES, J.—The 26 Geo. 3. c. 86. s. 32. regulates fire in ships; and as to land, *Lord Canterbury v. the Attorney General* (1 Ph. 306) and *Filliter v. Phippard* (11 Q.B. Rep. 347; s. c. 17 Law J. Rep (N.S.) Q.B. 89) are at variance.]

So if damage by machinery, there is an absolute contract. Again, where bad stowage, the same may be said. Next, the learned Judge ought, according to the issue raised by the replication to the third plea, to have left it to the jury whether the loss was not caused by "gross" negligence of those in charge of the *Black Prince*. There is a difference between negligence and gross negligence—*Coggs v. Bernard* (1 Smith's Lead. Cas. 5th edit. 179), *Hinton v. Dibbin* (2 Q.B. Rep. 646; s. c. 11 Law J. Rep. (N.S.) Q.B. 113) and *Beal v. the South Devon Railway Company* (3 H. & C. 337). Lastly, the depositions taken under the commission were improperly received in evidence. The Commissioner is directed to put the cross-interrogatories which were sent out with the commission. He did not do so, and the evidence was therefore not properly taken according to the commission. Mr. Tagliavia was only a ship-broker, and not qualified to examine witnesses; and it is submitted that he was not the defendants' agent for that purpose, and had no authority to act for the defendants so as to bind them by any consent to take the evidence *viva voce*.

WILLES, J.—I am of opinion that this rule should be discharged. With respect to the admission of the depositions, I should regret if it turned out that any objection, going merely to the irregularity of the proceedings, and not to the merits, could be taken; but in this case I am not satisfied that any irregularity has taken place. The complaint consists in this, that whereas the commission was obtained by the plaintiff for an examination on interrogatories of witnesses on his behalf at Messina, and whereas the defendants, though not joining in that commission, furnished cross-interrogatories to be put to those witnesses, one of those witnesses, whose evidence, it is stated would have been important, was not called, whereby the cross-interrogatories were not put to him; and that in respect of others of the witnesses who were called the written interrogatories, prepared and furnished by the defendants, were not exhibited; and that the cross-examination of some of the witnesses consisted only of a series of questions put by Mr. Tagliavia, who was instructed to attend the examination on the part of the defendants, and who got the answers to the cross-interrogatories. The Court has asked in vain to have pointed out any matters that might have been elicited for the benefit of the defendants that were not put forward by the gentleman who represented them, and the fact that they cannot be pointed out shews that, for all practical purposes, the cross-interrogatories, or the substance of them, were administered, though not in a written form, to the witnesses called, and that the defendants have really suffered no detriment whatever. This objection, therefore, has no solid foundation, and only amounts to this, that the questions were put by word or mouth instead of being read from a written paper; and that being so, I think my Lord was right in allowing the depositions to be received in evidence. If it be any satisfaction to the defendants, I should desire to say that, having read the examination by this gentleman, I cannot agree that he shewed any want of commercial law or legal acuteness.

Now we have to discuss the really important questions in the case. The first of them which was reserved is, whether the loss which took place under the circumstances of this case, though a loss in respect of which the defendants would, but for the exemption in the bill of lading, have been answerable to

the plaintiff, was a loss which falls within the exceptions in the bill of lading, either as being a loss caused by a barratry, or by perils of the sea. And first with reference to whether it was a loss by barratry. For the purpose of deciding that question, of course it is necessary for the Court to be satisfied whether the reasonable conclusion from the evidence was that the act by which the loss took place was something barratrous on the part of those on board the *Black Prince*. The *Arazes* appears to have been steering on her right course; there is no proof of any negligence whatever on her part. She appears first of all to have seen the *Black Prince* some five miles off on her starboard bow. Her helm was ported so as to bring the *Black Prince* on her port bow, and in that position they remain till shortly before the collision; the collision being that the *Arazes* ran into the *Black Prince* on her starboard side, about midships, whereupon the *Black Prince* sank, and the goods on board of her belonging to the plaintiff were entirely lost. It must be admitted that the proper view of the conduct of the parties was, that while the *Arazes* was right in porting her helm, the *Black Prince* must at some period have starboarded her helm. There being no circumstances shewn to justify a departure from the rule which requires both vessels to port their helms, necessarily the *Black Prince*, or those on board of her, were in fault. It did not appear what was the extent of that fault. The evidence seems to have come from the people on board the *Arazes*, and no evidence was given by people on board the *Black Prince*. There was no evidence either way of whether what was done was done wilfully or only by default. Under these circumstances, apart from the statute, it would hardly be contended, I suppose, on the part of the defendants, that this was a proof of barratry,—barratry consisting of something done in fraud of the owners. It is not like the cases referred to in the argument, in which it has been held that the master, by using the vessel in smuggling, or for some other unlawful purpose, without leave of the owner, although he intended that the owner should have the benefit of the adventure, was guilty of barratry. Those cases do not at all prove the propriety of the definition contended for, for this simple reason, because nobody has a right to risk the property of another in wilfully doing an unlawful act without his leave, whether his intention be to benefit him or not. It is that sort of intention one sometimes hears of in a case of forgery. A person puts another's name to a bill, and on the part of the prisoner it is urged that he had large expectations of money from some one, and was sure to have the money in his pocket so as to take up the bill, and intended to do so. The answer to which is, that he had no right to incur the risk of his being in funds, and had no right to put his good intentions against the peril to which he exposed the person who took the forged instrument, or the annoyance to which he put the person whose name he thought proper to use. His good intentions are utterly immaterial. That, I take it, is the explanation of why the master, in doing an act which is obviously unlawful, though he chooses to take the risk of being punished, and intends the owner to get the benefit of it, if he has not his leave to incur the risk, does a barratrous act. It must be an unlawful act wilfully done which occasions the injury. Here there is no evidence that the act done was of such a character that it was barratrous.

But it is said that the effect of the statute is to make it by a fiction of law a barratrous act; because the statute says, if damage shall accrue from the non-observance of any of the regulations set down, it is to be deemed to have been occasioned by the wilful default of the person in charge of the ship; and it is said that by reason of that provision it must be taken that the helm was wilfully starboarded by the persons on board the *Black Prince*, and that the collision was therefore caused by an act that was barratrous, because an act contrary to law, and an act which redounded to the interest of the owners. Upon consideration, I am unable to arrive at that conclusion. The statute in question was certainly not passed with a view to determine cases of the description of that now before us,—questions arising upon a contract between

the shipper and the shipowner. That statute was passed with a different intention, namely, for the regulation of ships, and for determining the rights of shipowners *inter se*. It appears from the case of *The Seine* (Swa. Adm. Rep. 411), that it was thought by Dr. Adams that the expression "wilful default" might be construed to mean malfeasance; but it was held in that case, by the learned Judge of the Admiralty Court, that the statute had no such intention as that, and that the words "wilful default," which I think must be admitted are rather unhappily chosen, were used for the purpose of expressing that the ship, on board of which the blunder has been made of not porting the helm, under the circumstances in which the rule applies, was to be considered the ship which was in fault; and that, unless the person on board could explain why he did not port the helm, he must be answerable for the like consequence as if he had wilfully abstained from doing so. That appears to me to be strongly confirmed by the subsequent act, 25 & 26 Vict. c. 63, the 29th section of which enacts, "If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by, or in pursuance of, this act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn, to the satisfaction of the Court, that the circumstances of the case made a departure from the regulation necessary." Therefore, when it was seen what difficulties presented themselves, in the case of *The Seine* (Swa. Adm. Rep. 411), and the legislature came again to deal with the subject, it excluded any doubt, by shewing that the term "wilful default" was not used in the sense which would exclude a negligent one, for which the owner of the vessel was liable. I consider, therefore, that the statute was passed, not for the purpose of altering the rights of parties who were contracting with one another; and I think that "wilful default" is an expression loosely used simply for the purpose of shewing, first that the vessel is in fault, and, secondly, that the person who is on deck is to be called on in any proceedings against him to explain his conduct in not complying with the act, and that he is to be considered as in "wilful default," and punishable as a person who has wilfully neglected his duty, unless he can explain how it was he did not comply with the statutory regulations. That is the whole scope of the enactment, and it appears to me not to affect the question between the parties under the circumstances now brought before the Court.

Then comes the question, the importance of which one could not exaggerate, if it was not that the shipowners have the remedy in their own hands, to exclude, by more precise language, the consequences which it may be said they have entered into. That is the question whether, upon the true construction of the bill of lading in this case, the loss has happened by perils of the sea within the exception of "perils of the sea" in that document. I do not propose to say much on this point, because I conceive that it has been already decided in the Court of Exchequer in *Lloyd v. the General Iron Screw Collier Company* (3 H. & C. 284; s. c. 33 Law J. Rep. (N.S.) Exch. 269), a similar action to the present, and brought in respect of the very same collision. But as reference has been made to the case of insurance as if it was one not sufficiently considered in that case, and not well to be distinguished from the case of an action on a bill of lading, I will say a word upon that. With respect to a policy of insurance, it must be remembered that it is a positive contract to insure against the perils described, and not an exception from liability; and therefore it is only necessary to see whether the perils in respect of which the assured seeks to recover come within the description in the insurance, in point of fact, without reference to whether there is any contract in respect of which the terms would be affected or narrowed by it. Moreover, I should observe that the general words at the end of the specified perils in the policy of insurance, "all other perils that may come to the ship during the voyage," clearly shew that, although the perils to which the ship has been exposed may have been brought about by circumstances not strictly coming

within the description of "perils," yet, if a loss happened by the perils insured against, the words of the policy are satisfied. The action on a bill of lading stands, as it appears to me, on a very different footing. The contract is a contract to carry with reasonable care and safety, unless prevented by certain excepted perils; and therefore, when you prove that the damage is caused by one of the excepted perils, but also prove that there has not been a carrying with reasonable care, by reason of which the goods were exposed to the peril, you have conflicting portions of the contract, which you must choose between. On the one hand, the owner of the vessel promises reasonable care, skill and diligence from his master and mariners; on the other hand, he says, "I am not to be answerable if the accident happens by perils of the sea." How are you to reconcile these? It has been said they may be reconciled by saying that if the accident happens by perils of the sea, but is brought about by want of due care and skill on the part of the master and mariners, you have a breach of the contract before you come to the exception. Whether that is an answer or not, it is unnecessary to consider now, as it is sufficient to say that there is the case of *Lloyd v. the General Iron Screw Collier Company* (3 H. & C. 284; s. c. 33 Law J. Rep. (n.s.) Exch. 269), which so far as I have been able to consider, is supported by the case of *Phillips v. Clark* (3 Stewart & Porter, 135) in this court. It will not require very much diligence to find, on the authorities referred to, and on what has been called the general mercantile law, abundance to shew that this is no new doctrine; and I would make no further remark on this part of the case beyond saying that the same question arose at the trial of the present cause as was raised on the demurrer on which the Court of Exchequer pronounced judgment, with one exception, and that depends on the use of the word "gross" in the replication.

The learned Judge at the trial laid down that with reference to the circumstances of this case gross and ordinary negligence were in effect the same; and although in a portion of the summing up the word "gross" was used, yet it was accompanied by a statement, in which I entirely concur, that there was no distinction at all for the purposes of this case between gross and ordinary negligence; and, indeed, so far as the argument has gone, I have been unable to ascertain what is the injury that is complained of by the defendants in not using the word "gross." I own I entirely agree with the dictum of Lord Cranworth in *Wilson v. Brett* (11 Mee. & W. 113; s. c. 12 Law J. Rep. (n.s.) Exch. 264) that "gross negligence" is ordinary negligence with a vituperative epithet. That was the law laid down in *Wyld v. Pickford* (11 Exch. Rep. 427; s. c. 25 Law J. Rep. (n.s.) Exch. 1), and upheld and recognized in the Exchequer Chamber in the judgment of Mr. Justice Crompton, in *Beal v. the South Devon Railway Company* (8 Mee. & W. 443; s. c. 10 Law J. Rep. (n.s.) Exch. 382). The confusion seems to have arisen in using the word "negligence" as if it was an affirmative word, whereas, in truth, it is a negative word; it is the absence of such care, skill and diligence as it was the duty of the person to bring to the performance of the work which he is said not to have performed. Then if you begin with that, what is the amount of care, skill and diligence which a man ought to bring? In the case of a gratuitous bailment it is said, if you employ a man of no skill to ride your horse, he is bound to use such skill as he possesses, and that you require no more, and that he is liable for gross negligence in that sense. But, if you employ a man to ride your horse who professes to be a groom, he would be answerable unless he had competent skill in horse-riding. Therefore the word "gross" is a word which, as pointed out by Sir Patrick Colquhoun in his summary of the Roman Civil Law, is used as a description, not as a definition. If we have to separate law from fact, and to leave the question of fact to the jury, we could not get nearer to a practical definition of "gross negligence" than such negligence as is actionable. When you are dealing with a bailee for hire as to any act of omission of his in the course of his employment, the want of due care, skill and diligence, if there be any, is

therefore necessarily gross negligence. It is only introducing confusion, and tends to mislead the jury, in my opinion, to use the word "gross," instead of using, as my Lord appears carefully to have done over and over again on this occasion, "want of due care and skill in navigating the vessel." I apprehend that was clearly a correct summing up, and that the introduction of the word "gross" might even have led to complaint on the part of the plaintiff that the jury might have been misled by the use of an epithet to which they might have attributed more weight than it really deserved.

There is only one point remaining, and I think I now clearly understand what is intended to be represented to the Court, which is this, that this not being an action by the *Arazes* against the *Black Prince*, but by the owner of goods on board the *Black Prince*, who undertakes to shew that the damage happened to his goods not by perils of the sea, but by the negligence of the crew, he does not sustain that issue, which rests upon him, by shewing merely that the collision between the two vessels happened by the negligence of the crew on board the *Black Prince*, but he must go further and shew that the collision and other circumstances up to the point of the sinking, by which the goods were lost, were caused by the negligence of the people on board the *Black Prince*, and not with any contributory negligence on the part of the *Arazes*. And the argument went further; it was said that if the *Arazes* could have stopped so as not to impinge with such violence upon the *Black Prince*, though she was not bound to do so, yet, if she had done so, peradventure the collision would not have been accompanied by a loss of the goods. I have taken great pains to understand this point, because of one's difficulty in appreciating it, but I think it comes to this: given there was negligence on the part of the people on board the defendants' vessel, and that if there had not been the negligence, the goods of the plaintiff would not have been lost; still the defendants seek to divide the operation of collision, and so qualify their own wrongful act, and to say that though what took place would not have taken place if there had not been negligence, yet there were other circumstances which might have intervened, and did not, and which, if they had, would have prevented the loss accruing. That either means that the *Arazes* acted wrongly, or it does not. The fact is, there is no evidence of wrong on the part of the *Arazes*. If it was not wrong for the *Arazes* not to back, the fact of her not having done something which she was not wrong in not doing, and which it was not part of her duty to do, cannot qualify the damages which the defendants are to pay for their wrongful act. That brings me to the point, which is perfectly clear, and which is scarcely matter of authority, but for which there is an authority in *Davis v. Garratt* (6 Bing. 716; s. c. 8 Law J. Rep. C.P. 253), that if a man does a wrongful act, and a consequence follows as the ordinary consequence of such act, he cannot get rid of that consequence without shewing that it must have happened if he had not done the wrong. I should say, moreover, that the jury must have understood from the summing up of my Lord that the loss arose from the wrongful acts of the defendants' servants. All the points in this case appear to me, as I have already stated, to be points of great importance; the Court is exceedingly thankful to counsel for the assistance which they have rendered it in the course of the argument; and upon the whole it appears to me that on none of the points ought the rule to be made absolute.

MONTAGUE SMITH, J.—I also think that the rule should be discharged. It is contended that starboarding the helm was in contravention of the positive rule of the Merchant Shipping Act, and, being so in contravention of law, that it was barratry on the part of the master. Section 299. of the act and the evidence fails to establish any such case. It was perfectly consistent with the facts proved that those on board the *Black Prince* were asleep, or that those who ought to have been on deck were asleep below; and it would be strange to say that, though the act of going to sleep may be wilful, yet, if the master or men in charge of the deck are asleep, and an accident is

occasioned thereby, that would be barratry within any definition which has hitherto been given. Take the case of the master getting drunk, which is a more wilful act. If an accident was caused by his want of care, it hardly could be contended that that would be barratry so as to bring the case within the exception in the bill of lading. I entirely agree with my Brother Willes that the words in the statute have not that effect. It is clear to my mind that it was not the object of the legislature to alter the effect of contracts made between the shipowner and merchant; and, looking at the whole scope of the act, it certainly does not seem to have been the intention to relieve the owner of the offending ship from liability.

The next part of the rule relates to the motion for a new trial; and the first ground is, that the Judge ought to have told the jury that the loss was caused by a peril of the sea within the exception of the bill of lading. It seems to me that if he had done so, it would have been directly in opposition to the judgment of the Court of Exchequer, which, though on a demurrer, assumed very much the state of facts which was proved at the trial here; and it is sufficient to say that I think my Lord was bound at *Nisi Prius* by that decision, and that we are bound by it here. It is a decision given upon a case arising out of the very same state of circumstances, and the Court appear to have decided the matter, not upon the pleading, but upon the very point argued here. I wish to give no opinion of my own upon that question, but to confine myself to saying that I think we are bound by the decision of the Court of Exchequer.

The next ground is, that my Lord ought to have left to the jury the question whether there was gross negligence. I conceive my Lord put the case with perfect propriety in the direction that he gave to the jury, and it has not been suggested at the bar in what way he could have put it differently, unless he had used the word "gross," which is found in the replication. I think it is a word which is indefinite in itself, and which, without explaining what it meant, would not have tended to enlighten the minds of the jury as to the question they had to determine. There is no doubt that the expression "gross negligence" is to be found in some of the decisions; but it is only one mode of expressing, perhaps, that in a particular case there is a less degree of care required than there might be in other cases; and when you have to define between "negligence" and "gross negligence," it certainly seems to be more scientific and more intelligible to define what are the degrees of care than to attempt to say what are the degrees of negligence. As I read the replication, it would have stood equally well without the word "gross"; the question is whether there was a want of that due care, skill and diligence which a captain and crew ought to bring to the service of the ship.

The other point of misdirection is, that my Lord ought to have asked the jury whether, although the collision was caused by the negligence of the *Black Prince*, the foundering of the ship and the loss of the cargo were not caused by the negligence of those in charge of the *Araxes*. As I understand the argument for the defendants it is, that although the foundering of the *Black Prince* would not have happened without some negligence of her crew, yet it was not the inevitable consequence of it, and it might have been averted if those on board the *Araxes* had done something which they ought to have done. It seems to me that such argument on that point might prevail if there were facts to justify it; but I think there is an utter absence of facts which would have justified my Lord in putting such a question to the jury. As far as the evidence goes, there was no want of care on board the *Araxes*, and it is matter of pure speculation by the counsel for the defendants to suggest that something might have been done on board the *Araxes* which might have prevented the collision, or might have rendered it less injurious than it was. There was therefore no misdirection.

There is one other question which in this important case one would hardly have expected; that is, whether the depositions were improperly

received by my Lord. Now, my Lord could not have refused to have accepted these depositions, unless they had been taken without authority, and the counsel for the defendants have scarcely contended for so wide a proposition as that. It seems to me that they were taken with authority, and that, if there had been any irregularity in the mode of taking them, the proper method of taking advantage of that would have been to apply to the Court to have them suppressed, certainly not to wait until the trial and then take objection to their admissibility. Upon all these grounds, therefore, I am of opinion that the rule should be discharged.

ERLE, C.J.—I have nothing to add to the observations of my learned Brothers, except that I am authorized by my Brother Keating to say that he concurs in the judgments which my Brothers Willes and Smith have delivered.

*Rule discharged.**

[IN THE COMMON PLEAS.]

June 4, 5, 1866.

BREMNER AND OTHERS v. HULL.

35 L. J. C.P. 332; 1 H. & R. 800; L. R. 1 C.P. 748; 15 L. T. 352;
14 W. R. 964.

Adopted, *Edney v. Smallbones*, 1869, 21 L. T. 506 (Arches). Referred to, *R. v. Green*, 1874, 31 L. T. 543 (Ex. Ch.).

Churchwardens, Election of—Custom—Separation of Part of Parish—Declaration—5 & 6 Will. 4. c. 62. s. 9.—Judgment for one of several Plaintiffs.

CUSTOM. ECCLESIASTICAL LAW.—Down to the year 1848 the parish of P. consisted of six townships, and by custom the churchwardens were chosen as follows: in one township the outgoing churchwarden presented two names to the rector to choose from, in four other townships respectively the parishioners presented two names to the rector to choose from, and in the sixth two names were similarly presented to the rector; and the six persons chosen by the rector became the parish churchwardens. In 1848, by an Order in Council approving of a scheme prepared by the Ecclesiastical Commissioners under 3 & 4 Vict. c. 113, the last-mentioned township was constituted a separate rectory, and from that time in the old parish the five remaining townships only presented names to the rector, and there were only five churchwardens elected for the parish:—Held, that the separation of the one township did not affect the custom in the remaining five, and that the five persons chosen thereunder were lawfully churchwardens of the parish.

In an action for money had and received, by such five persons against a defendant who, wrongfully claiming to be churchwarden of one township, had therein collected money due under a church-rate, it appeared that one plaintiff had not made any declaration under the 5 & 6 Will. 4. c. 62. s. 9, but his predecessor, who had made a declaration for the previous year, was willing to be substituted:—Held, that, on such substitution being made, it was no valid objection that such predecessor had made no fresh declaration, inasmuch as he remained in office under his declaration till he had a properly constituted successor.

On the argument of a special case, stated after the trial in such action,

(4) The Court recommended the words "gross negligence" to be struck out of the replication, and the words "want of due and reasonable skill and diligence" inserted in their place; and upon such amendment, leave was granted to appeal on the question of the loss being within the exception in the bill of lading.

the question, for the first time, was raised, whether the action ought to have been brought by all five churchwardens, or only by the churchwarden of the township where the defendant had collected the money:—Held, without deciding that question, that the Court, under the 23 & 24 Vict. c. 126. s. 19, had power to give judgment in favour of one plaintiff only, if necessary.

This was an action brought by the plaintiffs as the churchwardens of the parish of Prestwich, to recover from the defendant all moneys received by him on account of a church-rate for the said parish, under colour and pretence of the defendant being churchwarden of the said parish.

The declaration was for money received by the defendant for the plaintiffs' use and on an account stated, and the defendant pleaded that he never was indebted.

The cause came on to be tried, before Shee, J., at the Spring Assizes, 1864, held at Liverpool, for the southern division of the county of Lancaster, when a verdict was entered for the plaintiffs for 6*l.*, with leave to the defendant to move the Court for a rule to set the verdict aside and have it entered for him, or to have a nonsuit entered on all the points open upon the evidence; the Court to be at liberty to draw any inferences of fact from the evidence received as to the custom.

On the 21st of April, 1864, the Court granted a rule calling on the plaintiffs to shew cause why the verdict entered for them on the trial should not be set aside, and instead thereof a verdict be entered for the defendant, or a nonsuit be entered in this cause pursuant to leave reserved, on the grounds, first, that the plaintiffs were not proved to be duly elected and appointed churchwardens; secondly, that the custom alleged by the plaintiffs was not proved; thirdly, that the plaintiffs had not made the necessary declarations before entering on the office; unless the parties should consent to a special case being stated between them for the opinion of the Court.

On the 13th of June, 1864, the Court further ordered that a special case should be stated between the said parties for the opinion of the Court, to raise all the points and to consist of the evidence given upon the trial of this cause, to be taken from the Judge's notes, supplemented, if necessary, by the shorthand-writer's notes taken at the said trial, and that the parish-books should be produced upon the argument of the said case, and be taken as part of the case; the Court to have all the powers reserved by the Judge before whom the said cause was tried; and that the draft of the said special case should be prepared by the defendant's attorney, and submitted to the attorney for the said plaintiffs; and in the event of any difference between the said last-mentioned parties, then it was ordered that it be referred to Mr. Justice Shee, before whom this cause was tried, to settle the said case.

Pursuant to such order, there was stated the following

CASE.

The plaintiffs in this cause claim to be the churchwardens for the parish of Prestwich, in the county of Lancaster; the plaintiff John Alexander Bremner claiming to be and to act as one of such churchwardens, as representing the township of Prestwich, which forms a part of the said parish; the plaintiff James Royle claiming to be and to act as another of such churchwardens, as representing the hamlet of Unsworth, in the township of Pilkington, which also forms part of the said parish; the plaintiff Richard Denham Walker claiming to be and to act as another of such churchwardens, as representing the townships of Great and Little Heaton, which form other parts of the said parish; the plaintiff Marshall Heaton claiming to be and to act as another of such churchwardens, as representing the townships of Tonge and Alkington, which also form parts of the said parish; and the plaintiff John Lancashire claiming to be and to act as the other of such churchwardens, as representing the hamlet of Outwood, in the township of Pilkington aforesaid.

The defendant also claims to be and to act as churchwarden for the said parish of Prestwich, as representing the said township of Prestwich.

The amount sought to be recovered was received by the defendant, professing to act as such churchwarden, in respect of a certain church-rate of 1d. in the pound laid on the said parish of Prestwich.

It is alleged, on the part of the plaintiffs, that a custom or usage has existed from time immemorial in the said parish of Prestwich for the nomination and appointment of the churchwardens of the said parish, and that such custom is as follows, that is to say, two fit and proper persons are nominated by an annual meeting, held for that and for other purposes, of the ratepayers within the hamlet of Unsworth, in the township of Pilkington, which forms part of the said parish; two by an annual meeting held for that and other purposes of the ratepayers within the townships of Great and Little Heaton, which respectively form part of the said parish; two by an annual meeting held for that and other purposes alternately at Tonge and Alkrington of the ratepayers within the respective townships of Tonge and Alkrington, which respectively form part of the said parish; two by an annual meeting held for that and other purposes by the ratepayers of Outwood, in the said township of Pilkington, which forms part of the said parish; and two by the outgoing churchwardens, in respect of the township of Prestwich in the said parish. And that the rector appoints one of the two nominated by the said meeting of the ratepayers within the said hamlet of Unsworth; one of the two nominated by the said meeting of the ratepayers within the said townships of Great and Little Heaton; one of the two nominated by the said meeting of the ratepayers within the said townships of Tonge and Alkrington; one of the two nominated by the said meeting of the ratepayers within the said hamlet of Outwood; and one of the two nominated by the outgoing churchwardens, in respect of the township of Prestwich. And that each of the persons so appointed is a churchwarden for the whole of the said parish as representing the hamlet or township by or in respect of which he has been nominated.

The defendant, on the other hand, denies such custom as respects the township of Prestwich; and alleges that, even if it has so existed, it is not a good, valid and binding custom, and has been departed from and determined. He further objects that the plaintiffs were not proved to be duly elected and appointed churchwardens, and that they, or some of them, had not made the necessary declaration before entering on office.

The evidence given on the part of the plaintiffs, so far as the same is material for the purposes of the present case, was as follows, that is to say.—The case then set forth at full length the evidence of the witnesses given at the trial, various documents, letters, notices, &c., used thereat, and other the matters which then occurred, and referred to a voluminous appendix of documents, letters, notices, &c. But for the purposes of the decision of the points of law, as distinguished from the point of fact, raised in the case, the following statement is sufficient.]

Previous to the year 1848 the parish of Prestwich, in addition to the townships and hamlets hereinbefore mentioned, had contained the hamlet of Whitefield, in the township of Pilkington, which hamlet also returned a churchwarden for the parish of Prestwich; so that down to that time the number of the parish churchwardens was six instead of five. But by an Order in Council of the 17th of February, 1848, Her Majesty approved of a scheme prepared by the Ecclesiastical Commissioners, under the 3 & 4 Viet. c. 113, whereby Whitefield became a rectory, under the name of the rectory of All Saints' Stand, and from that time ceased to return a churchwarden for the parish of Prestwich, and to contribute to its church-rates. It also appeared that the plaintiff Heaton did not make the declaration required under the 5 & 6 Will. 4. c. 62, s. 9. till after the action commenced, and that for 1863, the year in question, Lancashire had made no declaration; but Heaton's

predecessor, one Butterworth, was willing to be substituted for him in the action, and Lancashire, having been in office the preceding year, had in that year made the declaration.

By a meeting of the parishioners residing in the township of Prestwich, the defendant and one Chadwick were elected as proper persons from whom the rector might select one. Chadwick refused to act; the rector refused to select; but the defendant made the declaration, and, professing to act as churchwarden, had collected in the township 6*l.* for a parish church-rate, made on the 8th of April, 1863, at a meeting of the parishioners of the whole parish.

The rest of the voluminous matter laid before the Court was only material as bearing on the question of fact, before the Court as a jury, whether or not the alleged custom was proved.

The points for the plaintiffs on the special case were: First, that there is sufficient proof of the custom under which the plaintiffs were elected churchwardens and of the election of the plaintiffs as churchwardens according to the custom, so as to entitle the plaintiffs to recover. Secondly, that the separation of the township of Whitefield from the parish of Prestwich, and it being made a separate parish of itself under the authority and according to the provisions of the statutes in such case made and provided, did not destroy the ancient custom of electing churchwardens for the parish of Prestwich, and such custom still continued and subsisted as respected the other townships, although, after Whitefield had ceased to be a part of the parish of Prestwich, the custom could no longer apply to it. Thirdly, that whatever was the custom or lawful mode of electing churchwardens for the parish of Prestwich, the defendant cannot and does not pretend that he was elected a churchwarden of the parish of Prestwich according either to the custom or the Canon Law, and it appears that the defendant received the moneys on account of the church-rate without any colour of right whatever. Fourthly, that both when the church-rate was made and when the defendant received the moneys on account of the church-rate, the plaintiffs were the reputed and acting churchwardens of and for the parish of Prestwich, and were churchwardens *de facto* of the said parish, and that the defendant, who was a wrongdoer in receiving the moneys on account of the church-rate, is not to be permitted to dispute the plaintiffs' right to bring this action.¹

The defendant's points were: First, that the custom set up is bad in law. Secondly, that the custom set up to oust the common right of appointing churchwardens is not made out. Thirdly, that it is not made out to be immemorial or uniform, and that if there ever was a custom it was departed from and lost on the separation of Whitefield in 1847. Fourthly, also that the plaintiffs have no right to sue, for want of their having all made the declaration required by the 5 & 6 Will. 4. c. 62. s. 9.

Temple (Mellish with him), for the plaintiffs.—There is sufficient evidence of the custom of choosing the churchwarden in the township of Prestwich, viz., that two persons should be nominated by the outgoing churchwarden, of whom the rector should select one. The occasions on which this has not been strictly followed are not inconsistent with the custom; they have been when the rector has been desirous that the outgoing churchwarden should continue for another year, and when of course it was not necessary for such churchwarden to go through the needless form of naming another person with himself. Then the law shews that the appointment of churchwardens is regulated by custom. "They are sometimes appointed by the minister, sometimes by the parish, sometimes by both together, as custom directs"—1 *Black. Com.* 394; and *The King v. the Inhabitants of Hinckley* (12 East, 361) shews that by custom there may be only one churchwarden for a parish. The chief objection on the part of the defendant is, that, inasmuch as by the custom set up there were originally six churchwardens for the parish, the custom has been destroyed by the township of Whitefield having been made in 1847 a parish and rectory of itself,

(1) See *Turner v. Baynes*, 2 H. Bl. 560.

by means of which, that township being thus taken out of the parish of Prestwich, there henceforth became only five churchwardens, instead of six, for the latter parish. Whitefield was made a separate rectory by Order in Council, and afterwards it no longer contributed to the rates or had anything to do with the parish of Prestwich. How could its separation from that parish destroy the custom? Another objection was, that one of the plaintiffs, namely, the plaintiff Heaton, had not made the necessary declaration, and therefore was not qualified; but at the trial the plaintiff asked for and obtained leave to amend, if necessary by substituting for such plaintiff the name of the former churchwarden, who consents to his name being so used.

Milward (Sowler with him), for the defendant.—If the custom claimed is properly proved, it is not denied that it is good, so as to regulate the election; but unless it be made out satisfactorily by the evidence, then the common law must prevail, by which the right of choosing churchwardens belongs to the parishioners—*Bac. Abr.* tit. 'Churchwardens' (A). "To give validity to a custom, it must," says Chief Justice Tindal, in *Tyson v. Smith* (9 Ad. & E. 406), "be certain, reasonable in itself, commencing from time immemorial, and continued without interruption." It is for the plaintiffs to make out the existence of such a custom as that which they claim in this parish. They have failed to shew the existence of such a custom "from time immemorial, and continued without interruption." The omission to present two churchwardens for the township of Prestwich, in order that the former churchwarden might remain in office, was a violation of the custom—*Gibbs v. Flight* (3 Com. B. Rep. 581; s. c. 16 Law J. Rep. (N.S.) M.C. 73); and, if the custom was not destroyed, it was not continued to be performed when Whitefield was taken out of the parish. The plaintiffs are setting up here a custom for the election of five churchwardens by shewing a custom for the election of six. By 58 Geo. 3. c. 45, power is given to create a district parish, which would be a separate parish; but there is, in this case, no evidence of a district being attached; the Order in Council merely calls the church a rectory, without professing to give a district. But even if this were not so, still the election of churchwardens of the mother parish would not be affected, for by sections 24. and 73. these new districts churchwardens are churchwardens merely for church purposes. So 59 Geo. 3. c. 134, s. 23. provides that they shall not be deemed overseers of the poor. Therefore a churchwarden should still be elected in Whitefield to make up the customary number of six, and all six must be joined in an action like the present. But, further, assuming that five is now the proper number, still one has not made the declaration required by 5 & 6 Will. 4. 62. s. 9. It is true that the outgoing churchwarden is willing to be substituted; but if he acts, he must declare. Thus, in *Stoughton v. Reynolds* (2 Str. 1045), Chief Justice Raymond said, "As to the objection that the plaintiff needeth not a re-swearing, it is otherwise; and, in corporations, when mayors are re-chosen they are always sworn again, though there is a power to hold over."

Temple, in reply.—First, no fresh swearing is necessary; secondly, the custom was independent in each township, and even if foregone in one, the others are not affected; thirdly, the Order in Council was made under the powers given by 3 & 4 Vict. c. 113. s. 72, and Whitefield thereby became a distinct parish.

ERLE, C.J.—I am of opinion that the judgment in this case should be for the plaintiffs. It is an action brought by five churchwardens, representing five townships in the parish of Prestwich, and it is brought against the defendant, who claims to be the churchwarden of one township in the parish of Prestwich, viz., the churchwarden for the township of Prestwich. He claims to be a churchwarden for the township of Prestwich, and to be entitled to collect according to the custom that has been prevalent in Prestwich a church-rate which has been made for the parish, it being clear that, with respect to all the townships, if they acted according to ancient custom, each township would have made a separate collection of the rate, and the sum so collected would go

into the parish purse. The five churchwardens have claimed the money that has been collected by the defendant, and is held by him, claiming that he is the churchwarden of Prestwich.

In reality, the great question to be tried between these parties is the validity of the custom in Prestwich, under which the churchwardens are appointed. The outgoing churchwarden in the township of Prestwich presents the names of two persons to the rector, and the rector appoints one of them. The custom varies in the different townships, but substantially in the other townships the ratepayers nominate two persons, of whom the rector appoints one, and the real substantial matter to be tried is a matter of fact within the cognizance of a jury, but which has been referred to us, viz., whether in point of fact there has been an immemorial custom in the township of Prestwich for the outgoing churchwarden to name two persons, of whom the rector should choose one to be churchwarden.

Now, in respect of the evidence that is laid before us, I can find nothing to put in the opposite scale. There are a great number of instances wherein the outgoing churchwarden has nominated two persons, of whom the rector has taken one; and the real interests that are opposed to one another in this case are, whether the parishioners should name two persons, of whom the rector shall take one, or whether the outgoing churchwarden should do so, and thus, as is contended on behalf of the defendant, have a power which might be perverted to the use of really nominating the succeeding churchwarden, that is to say, by presenting one eligible name to the rector and another so utterly ineligible that the rector would be guilty of an unpardonable breach of duty if he appointed such a man as churchwarden. That is the real contention between the parties. The outgoing churchwarden has presented two names, the rector has chosen one, and the grievance alleged has never taken place. But it has been suggested that in some instances the custom has not been strictly adhered to in form, and that, instead of the churchwarden presenting two names to the rector, the rector has in some instances requested the outgoing churchwarden to continue in the office, in which instances he said, "I will dispense with your presenting any name; I shall appoint you." But in all those cases the right has been kept up in the outgoing churchwarden and in the rector, and there is no single instance of that custom being departed from in the sense contended for by the defendant, viz., by the ratepayers of the township of Prestwich presenting two names to the rector for him to appoint one. It appears to me the custom is really proved by that which has been mainly relied on on the part of the defendant, viz., that which happened in 1826. The opposing interest is the interest of the ratepayers. It is certain that the parishioners have had their minds open to this as their interest for a considerable time. In the year 1826, with ample deliberation, notice was given that they were going to contest this matter between themselves on the one side and the rector on the other. A vestry was called, and names chosen and presented to the rector. But then it appears to me that that is rather a confirmation of the custom than an invalidation of it, because the names that were presented to the rector contained the name of the outgoing churchwarden, and contained the name of the person whom the rector nominated; and, for aught that appears upon the entry in the parish books, the outgoing churchwarden may have nominated him to the rector. Again, there is the evidence of the former rector, going back as far as living memory, saying that in the township of Prestwich the custom has been invariably observed, that is to say, that the outgoing churchwarden and the rector for the time being had in the manner I have described chosen a new churchwarden; and the person who was curate in the parish in 1826, at the very time when the above transaction occurred, and who knew of it (as far as his evidence is to be taken in the case), says that the custom continued in the year 1826, and the nomination was made according to the custom; at least so I understand his evidence. Therefore it is a case, to my mind, entirely without an answer,—a case where there is a great deal of strong affirmative evidence.

where the supposed departure from the custom was entirely reconcilable with it in substance and in essence, where the custom continued, if I may say so, with notice to the parties who had an interest to dispute it, and where, notwithstanding that, down to the year in which this action was commenced, uniformly the ratepayers have not done in the township of Prestwich that which the ratepayers have done in the other townships.

Then, is this custom a valid custom? I do not think it can be gravely argued that it is not a valid custom, if it has been uniformly prevalent in point of fact; and I see that a custom very analogous to it has been twice in litigation in times that have passed, and been recognized as a custom that could not be disputed in point of law, if in point of fact there was the evidence that the custom prevailed. One of the cases is *Catten v. Barwick* (1 Strange, 145), which sets out the usual canon by which churchwardens are to be chosen, one by the parson and one by the parishioners; and then states that in the parish of Bridge the custom is for the parson to appoint one and the two old churchwardens the other, and that, the two churchwardens not agreeing, one named Barwick and the other Catten, and there was a dispute whether Catten was appointed. The particular dispute we have nothing to do with; but there is something of an analogy between the customs set up in that case and in the present one. The present case is also somewhat analogous to the case of *Asile v. Thomas* (2 B. & C. 271). There it appeared that the plaintiffs were the churchwardens of the township of Burton-upon-Trent, in the parish of Burton-upon-Trent, and the defendants were the preceding churchwardens of the same township. It appeared there was another township in that parish which was in the habit of making separate rates, and each township having collected the rates, they all went into a common purse, as Chief Justice Abbot calls it, a parish purse—collected in each separate township, but belonging to the parish purse. Then the churchwardens of the separate township having brought an action against the outgoing churchwardens for that township for collecting the rate and not paying it over, the objection was made, as partly made here, that the churchwardens are a corporation, and the churchwardens of the other townships ought to have joined in the action;—held by the Court, the contrary, because the money which got into the parish purse is the money of the separate township from which it is levied, and the parties who have an interest in that money of the separate township are the parties to bring the action to enable them to get it into their hands, before it takes the ultimate step of going into the parish purse, as Chief Justice Abbot calls it, and therefore the churchwardens of the township interested in the fund had a right to bring that action alone, and the other churchwardens who belonged to the parish were not necessarily joined. I only refer to those cases on this part of the case to shew that custom is very much sanctioned and supported when it is clearly proved, and is not to be set aside as invalid on the ground of any notion of fancied convenience.

Another main question to be tried is, whether the custom is entire for the six townships. In the course of the increase of the population and the application of the Church Commissioners Acts, the township of Whitefield has been either wholly or in part taken out of the six townships and created, in the words of the Order in Council, a rectory by itself. I do not stop to inquire what the effect of those words in the Order in Council might be. Certain I am that the effect must be ascertained by reference to the statutes under which the Queen in Council made the order, and I take it that the Queen in Council could create a parish, and the effect of those statutes, I think, would be to authorize the Queen in Council to do so, and the general presumption, *omnia presumuntur rite esse acta*, I think, would apply here. I assume there is nothing to shew the contrary, and that that Order in Council was a valid Order in Council, and Whitefield township was in fact for certain purposes separated from the other townships in the parish of Prestwich, but I do not think that that destroys the custom that existed in respect of the other townships. There is no reason that I can see why they should not be permitted to continue to choose their

churchwardens. There is nothing in the least degree to affect Prestwich or the other townships that are named because one of the townships has gone from the six. They all would have the same interest. Whatever induced the parties originally to establish this custom, the custom is entirely unaffected, as far as I can see, by the one township being taken out and the other five remaining. Nay, if it is destroyed, it is destroyed absolutely for the whole parish; and if the separation of Whitefield put an end to the custom altogether, it seems to me to follow that the parishes would be remitted to the former right at common law,—a proposition, which has not been contended seriously before us, which would be adverse to the claim of the defendant, and which, in my opinion, could not be sustained if it had been brought forward.

Then, that being so, the substance is in favour of the plaintiffs. The objection that one of the churchwardens has not made his declaration, and so is incompetent to act, is remedied, because, if he was not capable of acting, the result is that the former churchwarden continues in office, as is perfectly well known in the law relating to churchwardens. A churchwarden is appointed for the year and until a successor is appointed, and there is no reason for saying that a churchwarden whose office continues probably against his own will, because a valid successor is not appointed, should make a new declaration. He has declared once for all, and the same declaration continues until he goes out of office. The statute shews no sign of there being a necessity for his making the declaration during every year he may continue in office, and the case cited from *Strange* is entirely irrelevant, because there the outgoing churchwarden was chosen again. He did not continue because he had been in office and no successor was appointed by the parish exercising the right of appointing a new churchwarden; but in the year in question he was elected a churchwarden anew for the ensuing year, and if he comes in by a fresh election, though the late churchwarden, he must go through the same forms to qualify himself as a stranger who is selected for that office. That declaration which qualified him for the office he took by the former election has nothing to do with his making a declaration upon the new election. That makes the words of the Chief Justice perfectly relevant. The churchwarden cannot rely upon making the declaration under the statute in respect of his former year of office. The mayor who is elected for the second year, according to the rights of the corporation, is just as much called upon to take the oath and to qualify himself for the second year as he was for the first year: that is because he took a new office by a new election, and the churchwarden taking a new office by a new election is within the analogy which the Chief Justice there pointed out. If he does not take a new office by a new election, if his old office continues, the qualification for entering on the beginning of that old office would qualify him to hold it until the law relieved him from it, that is, on a valid successor being appointed. If there be anything in the objection of too many being joined, all may be struck out except the one representing the township; if too many are joined there is power of remedying that, and all those powers which are reserved will be put in force if the case should come before any other tribunal in consequence of any objection being made to there being too many joined on the record or to the right parties not suing. As at present advised, I think the plaintiffs are entitled to the money which the defendant has collected.

WILLES, J.—I am of the same opinion. With reference to the question of misjoinder, I say nothing upon that, because, under the Common Law Procedure Act of 1860, I apprehend we have power to give judgment in favour of such of the plaintiffs as should appear to be entitled to it. But, with regard to the other question, this is an action brought by the churchwardens of Prestwich appointed under the custom, against a person who has professed to act as churchwarden for the Prestwich township, treating the custom as being an invalid custom, either by reason of its not having been established in the action, or by reason of what has taken place under the Order in Council with respect to Whitefield having displaced the custom, if it ever legally existed.

Now, with respect to the first matter, that is one of fact; and having carefully gone through the evidence in the case, I find, for a long number of years, I may say for nearly two centuries, it appears there has been a course pursued in the parish which is other than the course of the canon or common law or common right. The general course of proceeding has been precisely described, and, to a certain extent, and a very large extent, that custom must be treated as a valid custom. With respect to the special custom affecting the township of Prestwich, I find that there has been a substantial conformity or adherence to the custom throughout, and that, in the instance in which a variation took place, there were circumstances which rather make that variation a confirmation of than an objection to the evidence of the existence of the custom. I specially refer to what took place in 1826, which rather seems to shew that the custom was objected to, that the matter was looked into by persons who desired that it should not continue, that they found they were wrong, and that the custom went on; or it may be that for one year the incumbent may have been satisfied to allow the township to have their own way, but that, upon reflection, he thought it his duty to adhere to the ancient custom of the parish, and to return to that which had been the ordinary, usual and continuous course, which we must attribute to legal origin, by which legal origin there has been a custom going back to the time of prescription. That being so, what is the character of the custom in other respects? In the first place, it must be borne in mind that, while the parish is an ecclesiastical division, and whilst the churchwardens, although lay persons, are ecclesiastical officers, the township is a temporal division, and has nothing whatever to do with the ecclesiastical division. Now, if there were no custom, if the custom either did not exist or had been destroyed, the proper course would be that the rector and the parishioners should agree if they could upon appointing two persons, or if they could not agree, then the rector should appoint one and the parishioners appoint another. That being the state of things, we find that in the separate temporal division of the parish there has been unquestionably from time to time an appointment of a separate churchwarden to act with the churchwardens of the other townships in respect of the whole parish. Nothing can be a stronger departure from what is called the common right or common law than that, and it must be admitted that, as respects the election being separate and distinct in a township instead of being entire, at a meeting of the parishioners of all the townships together, there has been in this case a custom. Then you find in the townships other than Prestwich there was a course followed, by which the inhabitants of the townships elected two persons, out of whom the rector was to choose one; and I find that in Prestwich there was an arrangement that the outgoing churchwarden should present two, out of whom the rector should appoint one. The result of that is this: there is unquestionably a custom altering the course of the common law affecting this parish, in very material particulars. With respect to the township of Prestwich, there has been a long series of elections of churchwardens in the way in which it is alleged the custom would operate, that mode of election differing not in kind, but differing in degree from the elections which are customary, and which must be admitted to be established by custom in the other townships. Whether the township appointed two of whom the rector was to choose one, or whether they have allowed themselves from time to time to be represented by the churchwarden, in each case you have the township submitting to the judgment of the minority of the township.

The case referred to of *Catten v. Barwick* (1 Strange, 145) is a case in which the Court, at a time when questions of this kind were more thoroughly understood, and perhaps more litigated than they are now, treated a custom for the two outgoing churchwardens to present as a valid custom. It therefore appears to me that the custom is well established in point of fact, and that it is a legal custom. And the case referred to of *Astle v. Thomas* (2 B. & C. 271) shews there is no difficulty as to parties.

I must further add, however (because were I not to do so, it might seem I did not concur in what has fallen from my Lord on the subject), a few observations as to a matter which I cannot help thinking is well worthy of the consideration of the parish and of the townships composing it. Assume, for one moment, it was made out that this particular custom in Prestwich was an invalid custom, was not established: assume that was so, what would be the effect? The effect would be, not that the township of Prestwich would assume the custom of the other townships, because in each of them the custom is as valid, because it is supposed to have existed since the period of living memory,—the effect would be that Prestwich must return to the mode under the Canon, or what is called the common right, that is, that the rector and the people must appoint; that would be impossible, because there is only one, and the consequence is, that the custom would be entirely destroyed, as to all the townships; that is the only alternative, and you must have a meeting for all the townships, at which the parishioners shall agree, or the rector shall appoint one, and the parishioners another, under the Canon, and the whole system which has been going on in these townships may be destroyed, and the parties get into interminable difficulty by litigation, which would not be calmly submitted to by those who do not like it, and who are of a different opinion. But that only arises here as a by-point, and I only mention it because the case would not be complete without it, and that would lead to a state of things hardly desirable. Again, referring to that case of *Catten v. Barwick* (1 Strange, 145), in that particular case, the churchwardens could not agree what was to be done. The decision of the Court was, the Canon or the common right must prevail.

With respect to the suggestion that the creation of a new ecclesiastical district, consisting of one parish, or part of it, has the effect of destroying the custom, I cannot bring myself to think that that is at all a difficulty, because, as I have already observed, the parish is an ecclesiastical division, and the township is a temporal division, and therefore the custom must consist and stand simply upon the convenience of the inhabitants of the several townships electing churchwardens to represent them in the parish or among the parish officers. If you take away the cure of souls in a portion of a district over which the parish extends, you do not alter the identity of the parish; you leave the cure of souls of the rest, and you leave the rector of the parish just as much parson as he was before; therefore the custom relating to the election of the ecclesiastical officers, to serve under him in respect of the church, must necessarily remain unaffected. To put an illustration: I think the effect of removing a portion of the inhabitants of a parish out of the cure of souls of the parish would no more destroy a custom existing in the remaining parish than driving a canal through the waste of a manor would destroy the custom of the commoners to have common rights over what was left unoccupied. That being so, and we having power under the third Common Law Procedure Act to give judgment to such of the plaintiffs as may appear to be entitled, I have no difficulty in saying that I think the judgment of the Court ought to be for the plaintiffs.

KEATING, J.—I am quite of the same opinion. There are two questions really submitted to us: whether there is a custom clearly proved in fact; and next, whether, if it was proved, it was invalidated by the removal of Whitefield from the rest of the parish of Prestwich. It was proved, and in fact the evidence seems to me all one way, and I entirely agree with my Lord and my Brother Willes, that the alleged exceptions, in truth, prove the rule as to the existence of the custom from time immemorial. Then, is it invalid in point of law? I think the position assumed by the defendant is almost suicidal, because he seeks to, in truth, claim himself under a custom which would have been equally invalid by the removal of Whitefield from the rest of the parish, if the custom he assails was so invalid; but, for the reasons which have been already pointed out by my Lord and my Brother Willes, I am clearly of opinion that the removal of Whitefield does not, in any degree, invalidate, in point of law, the custom

proved to have existed from time immemorial in the township of Prestwich. These are really the substantial questions upon which we have to decide. With reference to the other point raised by Mr. Milward, I quite agree with my Lord and my Brother Willes, that, for the reason stated by them, there is no difficulty whatever in giving judgment for the plaintiffs.

MONTAGUE SMITH, J.—I am of the same opinion. The main point, and the only point on which the township is really interested is, whether the custom of choosing the churchwarden which is set up by the plaintiffs is proved or not. I entirely agree with the rest of the Court that it is proved. The evidence is very strong and uniform. And the fact that there are certain variations, which have been pointed out, in the entries, does not at all, to my mind, shake the reliance which I place upon the substantial uniformity of the custom; and in the case of *The Duke of Beaufort v. Smith* (4 Exch. Rep. 450; s. c. 19 Law J. Rep. (N.S.) Exch. 97), a claim of 4d. per way of all coal gotten within the manor and seignior, and exported to sea, was supported by evidence of the uniform payment of that toll for three centuries, although there were several intervals of time when it was not paid, and notwithstanding there were considerable variations in the entries describing the payment. With regard to the other point, viz., whether the separation of Whitefield has destroyed the custom, so as to disable the five remaining churchwardens from suing, or the churchwarden of the township of Prestwich alone from suing, I think that the power of the remaining churchwardens is not destroyed, but that it remains in them. Churchwardens do not form a corporation in the strict sense of the term, so that the loss of an integral part of the corporation destroys the whole, but they are rather an aggregate of individuals, who, in some sense, form a joint corporation, but not in the strict sense of the term; and in the case of an aggregate of individuals, the death of some of those individuals does not destroy in those corporations the right of the remainder to sue. The other points are really points of form, and do not go to the substance of the case; and upon them I entirely agree with the rest of the Court.²

[IN THE COMMON PLEAS.]

June 7, 8, 1866.

THE DUKE OF BEAUFORT v. CRAWSHAY.

35 L. J. C.P. 342; 1 H. & R. 638; 14 L. T. 729; 14 W. R. 989; 12 Jur. N.S. 709.

Evidence—Deposition taken under 1 Will. 4. c. 22.—Permanent Sickness of Deponent—Reviewing Decision of Judge at Trial—Affidavit of Medical Man.

EVIDENCE.—*The statute 1 Will. 4. c. 22. s. 10, which requires, before depositions taken under it should be read in evidence, that it should appear to the satisfaction of the Judge that the deponent is unable from permanent sickness to attend the trial, does not mean that the sickness should be incurable, but that it should be of that degree of permanency as to make it last beyond the then impending trial.*

The decision of the Judge at the trial that the deponent whose deposition has been taken under that act is unable from permanent sickness to attend the

(2) After the Court had delivered the above judgments, a discussion arose as to the substitution of the old churchwarden, Butterworth, and as to whether judgment ought to be for the churchwarden of the township of Prestwich alone. The Court held they had power not only to allow the substitution, but also, if necessary, to give judgment, under 23 & 24 Vict. c. 126, s. 19, for one plaintiff, and gave leave to the plaintiffs to substitute or strike out as they thought proper.

trial, is subject to review by the Court in Banco, but the Court will not exercise such jurisdiction unless satisfied that the Judge has been misled by a fraudulent representation, or that injustice would otherwise be done.

Quære—whether an affidavit of a medical man is admissible to satisfy the Judge as to the illness of the witness?

Action to try the right to a fishery in the river Usk.

At the trial of this cause, before Blackburn, J., at the last Spring Assizes for the county of Brecon, the counsel for the defendant tendered in evidence the deposition of one Samuel Hawkins, who was of the advanced age of seventy-nine, and whose evidence had been taken under a commission under the 1 Will. 4. c. 22.

The 10th section of that act enacts, that “no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the Judge that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial; in all or any of which cases the examinations and depositions shall be received and read in evidence.”

In order to shew the inability of the witness Hawkins to attend the trial, which took place on Saturday the 24th of March last, the commission day being Tuesday, the 20th, the clerk to the defendant's attorney was called, who stated that, in company with Dr. Bullar, he saw Mr. Hawkins on Monday, the 19th of March last; that he was in bed, and appeared to be so ill as to be unable to move; and on cross-examination the witness stated that Hawkins's face was drawn up in agony. It was objected, on the part of the plaintiff, that this was not sufficient evidence, in the absence of medical testimony, that the witness Hawkins was unable to attend from permanent sickness or infirmity. The learned Judge said he was satisfied with such evidence, and decided on receiving the deposition.

The counsel for the defendant tendered an affidavit of Dr. Bullar, the medical man who had seen Hawkins; the learned Judge expressed some doubt about receiving it, but said he would take it in addition, so that the Court might judge whether it was admissible.

That affidavit, which had been sworn on the 19th of March, 1866, was as follows, viz.: “I, Joseph Bullar, of the town of Southampton, doctor of medicine of Edinburgh, make oath and say, that I regularly attend Samuel Hawkins, of Marwell Lodge, near Winchester, in the county of Hants, Esq., who has been examined by commission in this action, as his medical adviser; that I have seen the said S. Hawkins to-day; that the said S. Hawkins is unable from permanent sickness to attend the trial of this action at the Assizes for the county of Brecon, to be holden at Brecon in this present month; that the permanent sickness from which the said S. Hawkins suffers is chronic gout, and at the present time he is confined to his bed with an acute attack of gout in both feet and knees, and is unable to move.”

The deposition of Hawkins was then read, and a verdict having been found for the defendant, a rule *nisi* was afterwards obtained for a new trial, on the ground that the evidence of S. Hawkins ought not to have been admitted.

Against this rule,

Manisty, Dowdeswell and H. Allen shewed cause.—In a matter of this kind, the Judge is the supreme and sole judge, and the Court will not interfere. Thus the Judge at the trial is the sole judge as to discharging the jury—*Winsor v. the Queen* (35 Law J. Rep. (N.S.) M.C. 161; s. c. 1 Law Rep. Q.B. 390); and in granting a certificate for costs the Court will not review his opinion—*Barker v. Hollier* (8 Mee. & W. 513; s. c. 10 Law J. Rep. (N.S.) Exch. 474), *Merrick v. Wakley* (11 Law J. Rep. (N.S.) Q.B. 249), *Twagg v. Potts* (4 Dowl. P.C. 266), *Bury v. Dunn* (1 Dowl. & L. 141; s. c. 12 Law J. Rep. (N.S.) Q.B. 351, nom. *Perry v. Dunn*), and *Cann v. Facey* (4 Ad. & E. 68; s. c. 5 Law J.

Rep. (n.s.) K.B. 1). The Court cannot go into the question whether the illness was of such a character as to prevent the witness attending the trial; but if they can do so, then, it is submitted, there was sufficient satisfactory evidence of it. There is here even no affidavit to shew that the witness could have attended. In the 17th section of the 11 and 12 Vict. c. 42, which relates to depositions in criminal cases taken before a magistrate, it is provided that before such depositions can be read in evidence, it must be proved that the person whose deposition is proposed to be read is dead, or so ill as not to be able to travel; and in *Stephenson's case* (Leigh & Cave, 165), the Court of Criminal Appeal held that the question whether the illness proved is or not within that statute is a question for the determination of the presiding Judge, and that the Court ought not to interfere with his decision. There was, moreover, the affidavit of the medical man, which clearly shewed such permanent disability as would justify the Judge in deciding, as he did, to receive the deposition. Such affidavit was admissible in order to satisfy the Judge. In *Pitt Taylor on Evidence*, 4th edit. p. 474, a case is mentioned of *Knight v. Campbell*, in which Chief Baron Pollock, at the Guildford Summer Assizes, 1848, received an affidavit of a medical man as sufficient proof of the permanent illness of a deponent to let in his deposition.

Grove, H. Giffard and G. Hughes, in support of the rule.—The decision of the Judge can be reviewed by the Court, which has always a general jurisdiction to review what a Judge does, unless it has been expressly taken away by statute. In *Pitt Taylor on Evidence*, 4th edit. p. 34-36, the general doctrine is stated that the Judge in deciding cases respecting the admissibility of evidence, where the admissibility depends on a disputed fact, must alone adjudicate on the evidence both to prove and disprove that fact, and various instances are given in which the Judge must alone exclusively decide the preliminary question of admissibility; and yet the Court reviewed those decisions—*Doe d. Jacobs v. Phillips* (8 Q.B. Rep. 158; s. c. 15 Law J. Rep. (n.s.) Q.B. 47), *Doe d. the Earl of Shrewsbury v. Keeling* (11 Ibid. 884; s. c. 17 Law J. Rep. (n.s.) Q.B. 199), *Bartlett v. Smith* (11 Mee. & W. 483; s. c. 12 Law J. Rep. (n.s.) Exch. 287), *Doe d. Jenkins v. Davies* (10 Q.B. Rep. 314; s. c. 16 Law J. Rep. (n.s.) Q.B. 218), *Reece v. Walters* (3 Mee. & W. 527; s. c. 7 Law J. Rep. (n.s.) Exch. 138), *Boyle v. Wiseman* (11 Exch. Rep. 360; s. c. 24 Law J. Rep. (n.s.) Exch. 284), and *Sharples v. Rickard* (2 Hurl. & N. 57; s. c. 26 Law J. Rep. (n.s.) Exch. 302). The provision in the Common Law Procedure Act, 1854, section 31, that no new trial shall be granted by reason of the Judge ruling that the stamp is sufficient, impliedly shews that but for that enactment his ruling on that point could be reviewed. In *Cleave v. Jones* (7 Exch. Rep. 421; s. c. 21 Law J. Rep. (n.s.) Exch. 105) Martin, B. says, "Whenever an objection is taken to the admissibility of evidence, the Judge is bound to try any collateral issue on which it depends, and to determine the law arising from the facts proved, in the same manner as a jury decides matters of fact. In *Wright v. Doe d. Tatham* (7 Ad. & E. 313; s. c. 7 Law J. Rep. (n.s.) Exch. 340) a preliminary question of that kind arose, and the Judge came to a certain conclusion; but that was subject to review in a Court of error, like any other matter of fact, though in one sense it was a matter of law." The meaning of the words "to the satisfaction of the Judge," in section 10. of 1 Will. 4. c. 22, is only that the jury have nothing to do with the matter. It is not the same as saying the decision of the Judge shall be final. *Stephenson's case* (Leigh & Cave, 165) is upon a very different statute, and the Court of Appeal in criminal cases is limited in its jurisdiction to questions of law and not of fact. Then the learned Judge had no evidence apart from that of the affidavit on which he should have decided that the depositions could be received—and the affidavit was certainly not admissible. The case referred to in *Taylor on Evidence*, where Pollock, C.B. received such affidavit, is questioned as an authority by Mr. Taylor. In *The Queen v. Riley* (3 Car. & K. 116), Patterson, J. ruled that to allow a deposition to be read under 11 & 12 Vict. c. 42, the surgeon should be called, if there be one attending the witness, in order to prove the illness.

ERLE, C.J.—I am of opinion that this rule should be discharged. It was a motion for a new trial on the ground of the improper reception of the evidence of a witness of the name of Hawkins, which had been given on depositions, and the learned Judge at the trial admitted the depositions upon oral evidence, from which it appeared to his satisfaction that Hawkins was unable from permanent sickness or permanent infirmity to attend the trial. The messenger who was sent down to see him stated the symptoms on which the learned Judge acted, and it is said that the Judge acted on evidence that ought not to have satisfied him, and that we therefore ought to grant a new trial. The first point to be determined is, whether we have jurisdiction to review the decision which the learned Judge arrived at. The words of the statute are,—“ Unless it shall appear to the satisfaction of the Judge that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial,” the Judge is not to admit the depositions. It was said with a good deal of force and clearness, that the statute had intrusted the decision of that point entirely to the Judge, made him supreme in the matter, and given no other tribunal power to consider what the Judge had done. But as to that part of the argument, Mr. Grove and those who are with him have satisfied me that that is not the construction of the statute. The Judge at Nisi Prius sits as a member of the Court, and his opinion is subject to review by the Court in Banco from which the record has come. The words of the statute in question do not take away the ordinary jurisdiction of the Court; the Judge at the trial must satisfy his own mind, but the conclusion he comes to is subject to be reviewed by the Court from which the record issues.

Then, having jurisdiction in that general way, it is said that we ought to exercise it by holding that the learned Judge made a mistake, and that a new trial ought to follow. I think upon that part of the case the argument has failed. The strong presumption is, that the Judge at the trial has better and greater means of deciding than we have, because he has the evidence of his own eyes to see the witnesses, and the evidence of his own ears to hear what they say; whereas we have only the account of what passed before him. Moreover, I am of opinion that we ought not to exercise the jurisdiction which we have as a last resource, unless we are clear that injustice will be done if we do not interfere. If we could see that the Judge had been misled by a fraudulent mis-statement, that there had been anything like a resort to falsehood on the part of those who had got the deposition read, there would have been an end of the matter, and we both ought to and should have interfered. But I do not see the least ground for thinking that anything of the sort has taken place here. I do not see any sign of fraud or falsehood; neither do I find any reason for coming to the conclusion that injustice has been done as to a mistake of the facts, for I do not see now that Mr. Hawkins could have attended the trial. Then, does the witness come within the section? He would be clearly within the section if the words had been only “ unable to attend the trial.” The words are, “ unable from permanent sickness or other permanent infirmity ”; and the great stress of the argument has been, was he unable from permanent sickness or permanent infirmity to attend? What is the meaning of permanent sickness? There is, no doubt, a large class of human beings who have been ascertained to be incurable. I do not think the statute meant that, or anything approaching in degree to that, looking at the whole of the context. The examination is to be read if it appear to the satisfaction of the Judge that the examinant is beyond the jurisdiction of the Court. If the examinant was just across the Tweed, or had gone to Dublin or to Calais, he would be beyond the jurisdiction of the Court; and it is clear that the Judge would be bound to receive his depositions, though shortly after the trial the man might be in England walking about the town of Brecon. I agree with Mr. Grove, that the great thing is to prevent a witness from being exempted from cross-examination; but it is impossible to prevent illness, and the statute evidently means that the illness must have such a degree of permanence about

it as must make it morally sure that there is no chance of the witness being able to attend at those assizes. I would not attempt the impossible task of defining the degree where there is nothing to compare it with; but it ought to be a disease of a serious or grave nature. Now, in the present case, to say nothing of the examinant being beyond threescore years and ten, he had carried chronic gout about with him for some time, and at that particular season an acute attack of gout had supervened. Then there is a witness who swears that he believes the examinant is unable to attend the trial. Is that an exaggerated account of the state of this person? I am at a loss to find any piece of ground on which to rest a decision that the learned Judge who presided made a mistake in receiving the depositions. For anything I can see, Mr. Hawkins may be afflicted with chronic gout and other disease at this moment; at all events, I cannot say that the learned Judge was wrong, and unless I could clearly see that he was, I should not feel myself authorized to overrule the conclusion at which he arrived.

WILLES, J.—I am of the same opinion. As regards the question as to the admissibility of the affidavit, as at present advised I am far from agreeing with Mr. Taylor, in his work on *Evidence*, that the ruling of the Lord Chief Baron in the case at Guildford was an erroneous ruling; and I should require very great consideration before I could bring myself to differ from the opinion of that learned Judge, who unquestionably has had very considerable knowledge of what was the practice in respect of admitting such depositions. And any doubt I might feel in overruling the decision of the Lord Chief Baron would be fortified by what took place in the case of *The Queen v. Ryle* (9 Mee. & W. 29; s. c. 11 Law J. Rep. (N.S.) Exch. 234), which was a commission to inquire as to the existence of certain Crown debts for the purpose of putting the fact on the record; and on the trial before a jury an affidavit of debt was the only evidence that was given. The Court of Exchequer was applied to to set aside the inquisition, on the ground of the admission of improper evidence. There it was said by Lord Wensleydale that the rule as to not admitting an affidavit as evidence had grown up as a matter of practice, not as a matter of common law; and he goes on to say, in language appropriate to the present statute, that the jury were to satisfy themselves of the existence of the debt, upon all such evidence as would lead them to find the truth; and that for that purpose they were not confined to the examination of witnesses upon oath; and accordingly it was held that the jury might find the existence of the debt on the sole evidence of an affidavit, and the case of *The King v. Hornblower* (11 Price, 29) was overruled. I refer to this case for the purpose of shewing that it was quite a mistake to suppose, as has been sometimes suggested, that at a trial at Nisi Prius you must necessarily have the witness to cross-examine. I am, therefore, far from saying that the Lord Chief Baron ruled wrongly when he said that the Judge must satisfy himself by any means which ought to satisfy his conscience. What weighed most on my mind of what was urged on the contrary was the suggestion of Mr. Grove that evidence of this kind might be open to fabrication; and, no doubt, it is true that, owing to the absence of cross-examination, evidence of that kind is more open to fabrication than evidence which is given *viva voce*. On the other hand, it is quite open to a person who complains of false suggestions made for the purpose of inducing the Judge to admit evidence by depositions to make inquiry and to inform the Court of the falsehood, upon doing which he would obtain the redress of a new trial, and also obtain an indemnification for all the expenses to which he had been unjustly put. The next question is, with regard to the meaning of "permanent" illness in the statute. As to that, I entirely agree with my Lord, and do not propose to add a word to what he has said, for I think that if it were intended that "permanent" should have the sense of "incurable," the word "incurable" would have been introduced into the statute. Then comes the question, what is the meaning of "proved to the satisfaction of the Judge"? Apart from the considerations which I have already discussed as

to the media of proof that the Judge ought to have before him, I apprehend that if there is evidence upon which the person acting might honestly come to the conclusion that the evidence was receivable, the Court ought not to interfere simply because it is not proved to their satisfaction, for that would be to contradict the statute, and to substitute the satisfaction of the Court for the satisfaction of the Judge at the trial. Look at what would be the effect if the Judge were not satisfied at the trial, and were to reject the depositions, would it be competent to the Court to say, though they had not seen the witnesses, and had not the same means of knowing what weight should be given to their evidence, that they were satisfied, and that, therefore, there ought to be a new trial? That is impossible; therefore the Court have no such means of interfering. But the Court is not therefore powerless to prevent injustice, because there is a general jurisdiction by which we may prevent an abuse of our process of any kind whatever, and in this jurisdiction is included the power of setting aside a verdict in cases in which it appears to the Court that justice has not been done at the trial. The true result to my mind, therefore, appears to be, that unless this was the proper subject-matter of a bill of exceptions, the jurisdiction of the Court in granting a new trial, even if we were dissatisfied with what satisfied the Judge, ought not to be exercised unless it is made out that injustice has been done. Now this may sound vague, but in practice it has been found precise enough, and it has abundance of authority and illustration in its favour. First of all, there is the case which has been referred to of a Judge at the trial ruling who was the proper party to begin. It has been settled that the Court will not in such a case interfere by granting a new trial, unless it appear that substantial injustice has resulted from a mistake of the Judge. That was laid down in *Brandford v. Freeman* (5 Exch. Rep. 734; s. c. 20 Law J. Rep. (N.S.) Exch. 36); and *Black v. Jones* (6 Ibid. 213; s. c. 20 Law J. Rep. (N.S.) Exch. 152) is similar, where the learned Judge, in addressing the jury, stated the law erroneously, and a motion was made for a new trial, and the Court of Exchequer, consisting of Lord Chief Baron Pollock, Mr. Baron Parke and Mr. Baron Alderson, stated that no bill of exceptions would lie to the ruling of a Judge upon a collateral point; but that Court went on to observe, "that if at any time the Court should feel that great injustice had been done by an erroneous statement of a point of law, though purely collateral, no doubt it would, in the exercise of its sound discretion, give relief." I need not pursue the authorities further. I have cited enough to shew that the Court does nothing unprecedented in saying that, with respect to a ruling of this description, which is to be to the satisfaction of the Judge, the Court ought not to interfere unless injustice has been done. If that be so, then what is the injustice that should be proved to have been done, and was proved here? I was at first struck by Mr. Grove's manner of putting it, that injustice is necessarily done by putting in the evidence of a witness who might peradventure be produced in court for cross-examination. Upon consideration, I think that argument must be treated as a fallacy, because the legislature has overruled that objection by allowing the witness, under circumstances to be made out to the satisfaction of the Judge, to be examined without being exposed to cross-examination. Therefore it really is begging the question to say that that is sufficient injustice to induce the Court to interfere, and I am led to the conclusion that the injustice must be such as where by inquiries since the trial, as to the real state and condition of the man, whose depositions were put in, it is proved that the Judge acted on an untrue suggestion; the untruth of the suggestion on which the Judge acted is the only injustice that I can make out at present which should induce the Court to interfere. But no such case has been presented to the Court. There is not any attempt to shew that the conclusion which the learned Judge at the trial came to was an unjust one, or that the same conclusion would not have been arrived at upon more full information if a new trial were to take place. Upon this latter ground I own I think that the Court is bound not to interfere, and that the rule ought to be discharged.

BYLES, J.—I am of the same opinion. I certainly did entertain some doubt as to the question whether or not the decision of the Judge was not final, until I heard the argument of Mr. Grove; but he has abundantly satisfied me that the Court has power to supervise what has been done, on the general principle that there is in this Court, as well as in every other superior Court, a jurisdiction to supervise all proceedings before the Judges in actions in this court, as well as the proceedings of inferior officers. The observation of the learned counsel for the plaintiff was very strong, that if the statute had meant to exclude that, the legislature might very easily have added the words “whose decision shall be final.” The statute has not said so, and therefore I consider that what has been done is capable of review by this Court; but still the *onus probandi* is now shifted; it lies upon those who impeach the decision of the Judge intrusted by the statute with the decision of this question, to satisfy us that the Judge was wrong, and possibly to go further and shew that some injustice has been done. At all events, one or the other must be done. We ought either to see that he was wrong in point of law—as, for example, that he had no materials, or that there was fraud, or that some injustice had been done. I do not think one of those three matters is made out on the present occasion. That being so, the decision of the Judge must stand. I cannot help observing, though not at all dissenting from what my Brother Willes said on the subject of the affidavit, that as regards that question the Judge decided to admit the examination of the witness before the affidavit was read. That being so, he decided upon the testimony of the person who was examined and cross-examined on oath, and whatever interpretation is put upon the word “permanent,” there was some evidence from the testimony of this person, looking at the age of the individual, as well as at the nature of his infirmity, that he was not able to be present. I agree with what has been said by my Lord and my Brother Willes, as to the meaning of the word “permanent,” that it is not necessary to define it, and that it would be exceedingly difficult to define it. Possibly the word “permanent” may receive different meanings under different circumstances. Suppose, for instance, that a witness was examined at the coming sittings at Nisi Prius in a special jury cause, and there were no more sittings at Nisi Prius until next December: if it be shewn that he will not be alive, or that he will be unable to attend next December, is not his examination to be read? Suppose the same cause to be tried before the sheriff of London, who sits every fortnight, does “permanent” there mean the same thing? It is not necessary to decide that question; but the word “permanent” may possibly receive different constructions, according to the circumstances of the particular case. I have only one other observation. Speaking for myself, it must not be considered that I am putting any construction whatever on the statute of the 11 & 12 Vict. c. 42, which is in very different language, relative to criminal proceedings, where the words are, “If it shall be proved by the oath or affirmation of a credible witness that a person is so ill,” and so on. Nothing, so far as I am concerned, in the opinion I have given on this case, has any application whatever to the other statute.

WILLES, J.—I entirely agree with my Brother Byles in that observation, and would wish to guard myself in the same way.

MONTAGUE SMITH, J.—I am of the same opinion. I agree in the observations with reference to the general jurisdiction of the Court as to the trial of issues out of its own court, and as to the conduct of the presiding Judge; but I think the Court ought not to review his decision under the statute in the sense of substituting their discretion for his, and allowing their decision to prevail. The statute enacts, that no deposition shall be read unless it appear to the satisfaction of the Judge that the deponent is unable to attend. It is the mind of the Judge that is to be satisfied; and I think the Court ought not on light grounds to assume to itself the power of putting its mind in the place of his, and saying it is not satisfied upon that evidence which satisfied him. If it was proved that there was perversity, or mistake, or fraud on the part

of those who put forward the depositions, then the power of the Court exists to look into the conduct of the trial, and say that it is not to its mind satisfactory. In this case I can find nothing which the Judge has done which he was not perfectly entitled to do. He had oral evidence upon the question whether or not the witness was affected with permanent sickness so as to be unable to attend the trial; and the evidence which was given before him satisfied his mind that the witness was suffering from permanent sickness and unable to attend the trial. Therefore, his mind was satisfied. It was not a case where he acted on his own judgment alone; he acted upon the testimony of a witness. The utmost that can be said is, that two views may be taken of the evidence of the witness; his testimony might not have satisfied some minds that the deponent was suffering from permanent sickness, while other minds it might have satisfied. Certainly the Judge who heard the witness is much better able to decide on the effect of the testimony than any one can be who merely reads a report of the evidence, which, however faithful it may be, does not often give full effect to the bearing of the evidence. Then, upon the construction of the statute, the words "permanent sickness" certainly appear to me to imply something more than sickness which would prevent his attending that particular trial. I agree with my Brother Byles that those words may be applied to different circumstances in different ways; but they certainly appear to me to mean some sickness of an enduring character which may last beyond the then impending trial. It is unnecessary to decide whether the Judge could have received an affidavit, because I understand from the report that he had decided to admit the depositions before the affidavit was tendered to him, and he received the affidavit and added it to his note, that in case a motion was made here, and we undertook to review his decision, he might have the benefit of the affidavit if we thought it was admissible. I think it is unnecessary in this case to consider whether the affidavit was admissible or not; but I am also very far from saying that the Lord Chief Baron was not quite right in the decision he is reported to have given in the case referred to. This is a matter which does not concern the jury; it is a matter where evidence is wanting to satisfy the mind of the Court if it were a trial at bar, or the mind of the presiding Judge in a trial at Nisi Prius, and I am by no means satisfied that an affidavit is not perfectly legitimate evidence for that purpose. Upon the whole, I agree with the rest of the Court that the rule should be discharged.

Rule discharged.

[IN THE COMMON PLEAS.]

June 7, 1866.

THORP v. FACEY AND ANOTHER.

35 L. J. C.P. 349; 1 H. & R. 678; 12 Jur. N.S. 741.

Ejectment—Mortgagor in Possession—Statute of Limitations.

LIMITATIONS (STATUTES OF). MORTGAGE.—*In an action of ejectment by a mortgagee against a mortgagor, to recover a house, the plaintiff gave in evidence the mortgage-deed, (which included the house and some other property,) and judgment in ejectment for the mortgaged property obtained in 1847; and shewed that a paper (suggested to have been the declaration in ejectment) was, in that year, served on the mortgagor, and that from 1847 the mortgagor, who had till then been in possession of all the property, only held the house:—Held, that there was no evidence of possession by the mortgagee, or of the creation of a new*

tenancy under him in 1847, so as to prevent the operation of the Statute of Limitations.

Locke v. Matthews (32 Law J. Rep. (N.S.) C.P. 98; s. c. 13 Com. B. Rep. N.S. 753) distinguished.

This was an action of ejectment to recover a dwelling-house in the city of Exeter.

At the trial the plaintiff put in indentures of lease and release, dated the 4th and 5th of January, 1836, by which one Hugh Facey mortgaged certain freehold property, including the house in question, to Henry Thorp; the probate (the statutory notice having been given) of the will of Henry Thorp (who died in 1857), devising the property to him, and an examined copy of a judgment obtained in 1847, in an action of *Doe, on the demise of Henry Thorp, v. Roe*. He also shewed that, previous to 1847, Hugh Facey was in possession of all the mortgaged premises; that in that year a paper (which it was suggested was the declaration in the old action of ejectment) was served on Hugh Facey, and that some little time after the date of the judgment Henry Thorp was in possession of all but this house, in which Hugh Facey continued to reside till his death, and his son, Charles Facey, the defendant, or his tenants, ever since. A verdict was found for the defendants, with leave to the plaintiff to move to enter the verdict for her, on the ground that the evidence adduced by her was sufficient to make out her case.

A rule *nisi* was obtained pursuant to such leave; and no one appearing to shew cause, the Court called on

Lopes, in support of the rule.—The fair result of the evidence is, that in 1847 the old tenancy of the mortgagor was determined, and a new tenancy created as to the house—*Locke v. Matthews* (32 Law J. Rep. (N.S.) C.P. 98; s. c. 13 Com. B. Rep. N.S. 753); and that being so, the Statute of Limitations has not run.

ERLE, C.J.—I am of opinion that this rule should be discharged. This is an action of ejectment, brought by a mortgagee against a mortgagor, for premises included in the mortgage-deed. There has been no entry and no payment of rent, to shew the right, within twenty years. But it is said that in the case of mortgagor in possession and mortgagee, the former stands in the relation of tenant at will to the latter; if that position were made good, perhaps the plaintiff would be entitled to succeed, because, in 1847, part of the land was taken, and if there were a tenancy at will and an entry on part of the land, this, perhaps, would make a new tenancy as to the residue, just as in *Locke v. Matthews* (32 Law J. Rep. (N.S.) C.P. 98; s. c. 13 Com. B. Rep. N.S. 753). But the defect here is, that there is nothing like the agreement in that case. A paper was ordered to be served on the occupier, which, perhaps, was a declaration in ejectment, and probably the premises were taken under it. But all that was shewn was that the mortgagor of the entirety remained in possession of part of the premises, and the relation of mortgagor and mortgagee does not make a tenancy at will; for it is clear from the learned note of Mr. Smith, in the case of *Keech v. Hall* (1 Smith's L.C. 290), that a mortgagor in possession is not a tenant at will to the mortgagee.

WILLES, J.—I am of the same opinion. The act is decisive, for section 7, which enacts, that where a person is in possession or in receipt of the profits of land, as tenant at will, the right of the person entitled, subject thereto, to enter or bring an action to recover the land, shall be deemed to have first accrued at the determination of the tenancy or expiration of one year from its commencement, expressly provides that no mortgagor shall be deemed to be tenant at will, within the meaning of the section, to his mortgagee; and by section 10. mere entry is not to be deemed possession. Therefore, assuming that if the statute were out of the way, this would be the same case as that of an entry on a tenant at will, or an entry by a landlord for a forfeiture; and, as in the cases put in

Co. Litt. 15a, 15b, 252b, the entry on part would be an entry on the whole, still the statute says, that this shall not be so in the case of mortgagor and mortgagee; and that where there is no special contract to the contrary, then, unless there has been possession of the land or receipt of interest within twenty years, the mortgagee is barred. As to the case of *Locke v. Matthews* (32 Law J. Rep. (N.S.) C.P. 98; s. c. 13 Com. B. Rep. N.S. 753), that case was rightly decided on the facts; there was evidence of a tenancy at will of a house and land, and of an agreement whereby part of the land was given up, and the tenant was to remain in possession of the house and residue of the land as tenant at will, and the question was, whether the time was to run from the tenancy of the whole or of the residue, and as it was clear that there was a new tenancy, the Court held that the latter was the case. As to the declaration in ejectment, its utmost effect is that of an entry; and a mere entry, by section 10, has no effect; the judgment does not give possession unless it be executed.

BYLES, J.—I am of the same opinion. The mortgagee was not in possession; and the statute says an entry is not possession; nor was he in receipt of the rents; therefore there is nothing to displace the statute.

MONTAGUE SMITH, J.—It is plain that the defendant is entitled to keep the verdict. The land was mortgaged in 1836, to secure a debt, and the mortgagor remained in possession, but not as tenant. An action of ejectment was afterwards brought, and the mortgagee took possession of most of the land. This was all that was proved at the trial. The mortgagee may have taken what he did as an equivalent of his debt, and left the rest of the property in the power of the mortgagor. The statute is a defence to the action.

Rule discharged.

[IN THE COMMON PLEAS.]

June 21, 1866.

LIEVESLEY v. GILMORE.

35 L. J. C.P. 351; 1 H. & R. 849; L. R. 1 C.P. 570; 15 L. T. 386; 12 Jur. N.S. 874.

See *Conolan v. Leyland*, [1885] E. R. A.; 54 L. J. Ch. 128; 27 Ch. D. 682; 51 L. T. 895 (Ch. D.).

Arbitration—Action on Award—Order of Reference.

ARBITRATION, REFERENCE AND AWARD.—*By a Judge's order, made by consent of both the plaintiff and the defendant, an action of trespass and other matters in difference were referred, and, by the like consent, the parties were ordered to perform the award of the arbitrator. Afterwards an indorsement was made on the order by both parties agreeing that the arbitrator should have power to order what the parties, or either of them, should do to prevent a repetition of the trespass complained of. The arbitrator, by his award, ordered a wall to be built by the defendant:—Held, that the Judge's order and indorsement embodied an agreement by the parties to do what the arbitrator should so order, and that an action lay for its breach in not building the wall as ordered.*

The case of Hookpayton v. Bussell (10 Exch. Rep. 24; s. c. 23 Law J. Rep. (N.S.) Exch. 267) distinguished.

Declaration, that before and at the time of the order hereinafter mentioned the plaintiff had commenced an action in this court against the defendant, and the declaration had been delivered, containing various counts in trespass for alleged trespasses by the defendant upon land of the plaintiff adjoining land of the defendant, and also for a certain trespass alleged to have been committed by the defendant, by pulling down, removing and destroying a certain fence

which separated the said land of the plaintiff from the said land of the defendant, and which fence belonged to the plaintiff and the defendant as tenants in common. That thereupon, by an order, made in the said action, by one of the Judges of this Court, with the consent of the plaintiff and the defendant, it was ordered that the action, and all matters in difference between the parties, should be referred to the award of J. W, so as he should make and publish his award, &c.; and by the like consent, the Judge did further order that the said parties should in all things abide by, perform, fulfil and keep such award so to be made as aforesaid; that J. W, in pursuance of the order, took upon himself the reference; that by an indorsement on the said order, under the hands of the plaintiff and the defendant, it was agreed between them that the arbitrator should have power to order what the parties, or either of them, should do to prevent a continuance or repetition of the injuries complained of; that the arbitrator duly made and published his award in writing respecting the matters referred to; and thereby, with reference to the authority given to him by the said indorsement on the order under the hands of the plaintiff and the defendant to order and determine what he should think fit to be done by either of the parties to prevent a continuance or repetition of the injuries complained of in the declaration, and for the settlement of all matters in difference between the parties as aforesaid, the arbitrator, amongst other things, did order, determine and direct that the defendant should forthwith erect, or cause to be erected, in a good and workmanlike manner, a continuous wall of brick of the uniform thickness of nine inches, set in good lime mortar, so as to divide the premises of the defendant, which adjoined the premises of the plaintiff, referred to in the declaration, from the premises of the plaintiff, and such wall to be built in a certain line, &c. Breach, that the defendant built the wall, but it was not built in a good and workmanlike manner, and was not a continuous wall of brick, and not of the uniform thickness, &c.

Demurrer and joinder.

C. Crompton, in support of the demurrer.—The question is, whether an action will lie for not performing an award made pursuant to a Judge's order. It is submitted that the order, though made by consent, gives no such right of action. The proper remedy to enforce the award would be by attachment, whereas this action would raise an inconvenient question for the jury to determine, whether the award has been performed, and that it would be particularly so in this case, where the award is not simply to pay a sum of money, but to do a certain work, namely, to build a wall of a certain thickness, and according to other particularities. The declaration states, it is true, that the Judge's order was made by consent, but that consent would only give the Judge jurisdiction to make the order, and there is no agreement averred to have been made between the parties to perform the award, for the breach of which agreement an action might have been brought. Without, however, such an agreement, it is submitted no such action as this will lie. It was expressly held by the Court of Exchequer in *Hookpayton v. Bussell* (10 Exch. Rep. 24; s. c. 23 Law J. Rep. (N.S.) Exch. 267) that an action does not lie for disobedience to a Judge's order, whether made by consent or not. In that case, the defendant having been arrested in respect of a debt, from which he was protected by an order of the Insolvent Court, applied for his discharge to a Judge at chambers, when the following order was made: "Upon hearing the attorneys or agents on both sides, I do order that, upon payment by the defendant of 5*l.* forthwith, the defendant be discharged, the defendant hereby undertaking to pay the rest of the debt and costs." And it was held that a declaration for breach of this agreement was bad, although it stated that the order was made with the consent of the plaintiff and the defendant. The Court of Exchequer in that case, on being referred to what was said by Mr. Justice Parke in *Wentworth v. Bullen* (9 B. & C. 840; s. c. 9 Law J. Rep. (N.S.) K.B. 33), to the effect that, where a Judge's order is made by consent, and is founded on a binding agreement, an action will lie on such agreement stated, that that was only a *dictum*, and that it did not meet with assent.

[MONTAGUE SMITH, J.—In the notes to *Williams's Saunders*, vol. 2, p. 62 b, it is said, "so assumpsit will lie upon a submission by rule of Nisi Prius—5 *East*, *Bonner v. Charlton*. So on a submission by a Judge's order—4 *Camp*. 19, *Still v. Halford*."]]

The case of *The Thames Iron-Works and Ship-Building Company v. the Patent Derrick Company* (1 J. & H. 93; s. c. 29 Law J. Rep. (N.S.) Chanc. 714) was one in which Vice Chancellor Wood decided that a Judge's order made by consent, whereby it was ordered that proceedings in an action should be stayed upon certain conditions, does not amount to an agreement to perform those conditions, and that a bill for a specific performance would not lie.

Holker, contra, was not heard.

ERLE, C.J.—I am of opinion that our judgment should be for the plaintiff. The declaration sets out an action brought by the plaintiff against the defendant, and a Judge's order to refer such action, and all matters in difference, and it states that such order was made by mutual consent, and that, by the like consent, it was ordered that the parties should abide by and perform the award. There was then an agreement that the cause and all matters in difference should be referred, and that the award should be performed; and, besides this, there was the Judge's order, for disobeying which an attachment would lie. Afterwards, on a meeting before the arbitrator, an indorsement was made by mutual consent on the Judge's order, giving the arbitrator power to order what the parties, or either of them, should do to prevent a continuance or repetition of what had been complained of. Now, I am of opinion that that indorsement, being on an agreement to refer, and to abide by and perform the award of the arbitrator, constituted an agreement that the arbitrator, should have power to order what should be done, and that the parties should perform what he should order. I am therefore of opinion that the action lies. It is said that such an action is inconvenient, and that an attachment would be the proper remedy. I think that an action in which damages may be recovered for not performing the award, is a more convenient remedy than an attachment and the putting a party in prison for disobedience. But Mr. Crompton says that no action will lie; and certainly the case of *Hookpayton v. Bussell* (10 Exch. Rep. 24; s. c. 23 Law J. Rep. (N.S.) Exch. 267), in terms, supports his argument; but I think when that case is looked at it will be found that the order there did not contain an agreement to perform the order. The defendant by the order in that case "consenting that, in default of payment of either of the said instalments, the plaintiff be at liberty to issue execution by *feri facias* or *capias ad satisfaciendum*." That was all the defendant there consented to, which is very different from an agreement to do anything. The other case which was cited, of *The Thames Iron-Works, &c. Company v. the Patent Derrick Company* (1 J. & H. 93; s. c. 29 Law J. Rep. (N.S.) Chanc. 714), in like manner provided a particular penalty in case the defendants made default in performing the terms of the order. The judgments were right in both those cases, though they were expressed in terms wider than was necessary; and I must say that the opinion of Mr. Justice Parke, in *Wentworth v. Bullen* (9 B. & C. 840; s. c. 9 Law J. Rep. (N.S.) K.B. 33), is perfectly sound where he says, "But in considering the terms of this order, I am inclined to think there is evidence of a mutual agreement between the parties upon good consideration to forego the action for charging the plaintiff in execution for too much." "Now, though there is no remedy for disobedience of a Judge's order as such by one of the parties against another by action, but by attachment merely; yet if it be made by the consent of both and is founded on a binding agreement, an action will not the less lie upon that agreement, though it have also the additional sanction of a Judge's order. The contract of the parties is not the less a contract and subject to the incidents of a contract, because there is superadded the command of the Judge."

BYLES, J.—I am of the same opinion. There are many authorities to shew

that an order of reference by consent implies an agreement to perform the award. We were much pressed by the argument of the inconvenience which might arise where an action was brought in a case like the present, if the action should be again referred, and so a series of actions created. But if an action should be improperly brought, and there should be such an abuse of the process of the Court as has been suggested, I have no doubt there is power in the Court to provide a remedy for it.

MONTAGUE SMITH, J.—I think the action will lie on an agreement embodied in the Judge's order. Here the particular agreement was not in the order but indorsed on it, and apparently without the Judge's consent; but it was an agreement between the parties, and for the breach of it an action would lie at common law. Then, how is that right of action ousted? It is said it is because the parties impliedly promise not to bring an action, and that the only remedy should be by attachment. Now, I do not think that there is any such implied promise; neither do I feel pressed by the argument as to inconvenience. It seems to me that where an act is to be done, as was here, to build a wall, the performance of that can be better ascertained by a jury or another arbitrator than by the Court on affidavits. With regard to authority, the cases are strong to shew that we are not deciding anything as law for the first time. There are the cases I have already referred to in the notes to 2 *Wms. Saund.* 62b, and also the case of *Wharton v. King* (1 Moo. & R. 96), where the precise point was taken which has been now contended for, and overruled by Lord Tenterden.

Judgment for the plaintiff.

[IN THE QUEEN'S BENCH.]

Nov. 10, 1865.

HAZELGROVE v. HOUSE.

35 L. J. Q.B. 1.

Debtor and Creditor—Composition Deed under Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192.—Release in general Terms restrained by the Words of the whole Deed.

BANKRUPTCY.—*In a trust deed, expressed to be made between a debtor and his creditors, the debtor covenanted to pay his creditors a composition upon the amount of their respective debts. The creditors, in consideration of the covenant, &c., released the debtor "from all cause and causes of action and suit, contracts, damages, claims and demands whatsoever, which they then had, or at any time or times thereafter should or might have or be entitled to against the debtor, by reason or on account of any debt or debts, sum or sums of money, bills, bonds, notes, securities for money, contracts, provisoes, agreements, reckonings, accounts, dealings, or transactions whatsoever, from the beginning of the world to the date of the deed":—Held, that the release must be restrained by the words of the whole instrument, and would apply only so as to relieve the debtor from debts and provable claims which had accrued at the time of the execution of the deed; and therefore that the deed was not unreasonable.*

Declaration on a guarantie for the price of goods sold by the plaintiff to one Richard House, with the common count on accounts stated.

Sixth plea to the declaration, except as to the costs of the action up to the pleading of the plea—That after the commencement of the action (the defendant being indebted to divers persons, and unable to pay his debts in full) a deed was made and executed by the defendant, and the following is a copy

thereof, excluding certain schedules, (that is to say)—This indenture, made the 12th day of April, 1865, between John House, of Thornton Road, in Bradford, in the county of York, boilermaker, of the first part; Richard Lord and Thomas Robertshaw, both of Thornton Road, in Bradford aforesaid, engineers, of the second part; and all the several creditors of the said John House of the third part: Whereas the said John House is unable to pay his creditors the full amount of their respective debts, and hath proposed to his creditors to pay them a composition of five shillings in the pound, and to secure the distribution amongst them of the sum of 160*l.* as hereinafter mentioned, which they have agreed to accept and take upon the amount, and in full satisfaction of, their respective debts, in the manner and at the times hereinafter mentioned: Now this indenture witnesseth that, in consideration of the premises and of the release hereinafter contained, the said John House doth hereby, for himself, his heirs, executors and administrators, covenant and agree with each and every of the several creditors of him, the said John House, their respective executors and administrators, in manner following, (that is to say)—That he, the said John House, his heirs, executors or administrators, shall and will, on the 24th day of April instant, pay or cause to be paid to them, the several creditors of him, the said John House, respectively, or their respective executors, administrators or assigns, the sum of 2*s.* 6*d.* in the pound upon the amount of their respective debts, and that he, the said John House, his heirs, executors or administrators, shall and will, on the 24th day of July next, pay or cause to be paid to them, the several creditors of him, the said John House, respectively, or their respective executors, administrators or assigns, the further sum of 2*s.* 6*d.* in the pound upon the amount of their respective debts, without any deduction whatsoever.—Then followed a covenant by the trustees, in consideration of the assignment thereafter contained, to pay to the creditors such a dividend or sum of money upon the amount of their respective debts as the sum of 160*l.* would pay and realize if divided rateably and proportionably amongst all of them, and a mortgage to the trustees by the debtor of certain goods and effects specified in a schedule to the deed for securing to them the said sum of 160*l.*—The deed then witnessed that, in pursuance of the said recited agreement, and in consideration of the covenants thereinbefore contained, and of the premises, they the said several persons and corporations, parties thereto of the third part, for and on behalf of themselves and their several and respective partners, did, and each and every of them did, by those presents absolutely remise, release, and for ever quit claim unto the said John House, his heirs, executors and administrators, all and all manner of action and actions, suit and suits, cause and causes of action and suit, contracts, damages, claims and demands whatsoever, which the said parties to the deed of the third part, or any or either of them, either alone or jointly with their respective partners, or which they or either of their respective partners then had, or which they or either or any of them, or any or either of their respective partners, the respective heirs, executors or administrators of them or their respective partners at any time or times thereafter could, should, or might have or be entitled to, from, upon, or against the said John House, his heirs, executors, or administrators, by reason or on account of any debt or debts, sum or sums of money, bills, bonds, notes, securities for money, contracts, provisoes, agreements, reckonings; accounts, dealings, or transactions whatsoever, owing for, or made upon, or entered into by the said John House to or with them the said parties to the deed of the third part respectively, either alone or jointly with their respective partners, or transacted, done, or pending between them respectively from the beginning of the world to the day of the date of the deed, save and except the covenants and agreements therein contained.—The deed concluded with a proviso that it should not operate unless executed, or in writing assented to by the statutory majority of creditors. The plea alleged compliance with the formal requirements of the statute as to registration, &c., and that the plaintiff was a creditor of the defendant within the meaning of the Bankruptcy Act, 1861, and became and was bound by the deed.

Demurrer, and joinder in demurrer.

Mellish (*Waddy* with him), in support of the demurrer.—The plea is bad. The release contained in the deed relied upon by the defendant is expressed in terms so wide that it makes the deed itself unreasonable. Those bound by the deed lose the benefit of all contracts, claims and demands which they now have or hereafter may have against the debtor. It is admitted that the case of *Payler v. Homersham* (4 M. & S. 423) may be somewhat opposed to this view. There, in an action on a bond, a release, in which the plaintiff had joined, was pleaded, by which the defendant was released from all claims which the parties then had or thereafter might have against him. It was held, that a replication that the money secured by the bond was not included, or meant to be included, in the sum set opposite to the plaintiff's name or in the release, was good. In the argument, a case of *Knight v. Cole* (1 Show. 150) was cited, where Lord Holt declared that the general words of a release could only be limited where the releasor was an executor, and afterwards brought his action in a different right. Lord Ellenborough, it is true, dissented from this opinion, saying that the general words of a release may be restrained by the particular recital, and that to construe an instrument truly you must have regard to all its parts and its particular words. But it is submitted that the view of Lord Holt was the more correct one. By the 153rd section of the Bankruptcy Act, 1861, the damages arising from a breach of contract may be proved in bankruptcy, though it has been decided that the breach must precede the bankruptcy. But in this case the debtor obtains greater relief than in bankruptcy, for he is released now or hereafter from all claims arising out of "contracts."

[LUSH, J.—This deed can only affect creditors, and not those who are merely parties to contracts with the debtor.]

The answer to that is, that a debt may be due to a creditor, and he may also have a claim under an executory contract.

[LUSH, J.—The release must then be taken to apply to the debt, and not to the claim under the contract.]

Quain, for the defendant.—The deed appears to be made with creditors only, and not with those whose claims are unliquidated. The composition is to be paid on the amount of their respective debts. (He was then stopped.)

COCKBURN, C.J.—The defendant is entitled to judgment. The release, when qualified by the particular language of the deed, is not unreasonable. The word "contracts" is the only part of the instrument upon which the argument of Mr. Mellish is founded. He has urged that that word might embrace contracts broken after the date of the deed, from the consequences of which the debtor ought not to be protected. But the answer to that, as pointed out by my Brother Lush, is, that the deed is made between the defendant and his creditors, a class to which such contractors would not belong.

MELLOR, J.—I am of the same opinion. I am satisfied that we ought to hold that the release is restrained and confined by what appears in the rest of the deed.

SHEE, J. and LUSH, J. concurred.

Judgment for the defendant.

[IN THE QUEEN'S BENCH.]

Nov. 10, 1865.

BUVELOT v. MILLS.

35 L. J. Q.B. 3; L. R. 1 Q.B. 104; 13 L. T. 321; 14 W. R. 98.

Referred to, *Hickmott v. Simmons*, [1866] E. R. A.; 35 L. J. Ch. 580; L. R. 2 Eq. 462 (M.R.).

Debtor and Creditor—Bankruptcy Act, 1861, (24 & 25 Vict. c. 134. s. 192.)—Composition Deed—Composition payable to Scheduled Creditors only—Equitable Plea.

BANKRUPTCY.—A debtor executed a deed expressed to be made between himself, of the first part, and the several persons whose names and seals were thereunto subscribed and set, being severally creditors in their own right, or partners or agents or attornies of creditors, and all other persons being creditors of the debtor, of the second part. The deed recited an agreement to pay the parties to the deed of the second part a composition of 5s. in the pound on the amount of their respective debts, and contained a covenant by the debtor to pay them the several sums of money placed opposite to their respective names in the third column of the schedule to the deed, being the amount of the composition of 5s. in the pound. And it was declared that until failure in the performance of the contract for payment of the composition the debtor should not be sued for or by reason or on account of the debts specified in the second column of the schedule. The defendant (the debtor), not knowing that his acceptance had been indorsed to the plaintiff, did not insert him or the amount of his claim in the schedule:—Held, that the deed could not be pleaded as an equitable defence to an action by the plaintiff, as by the words of the covenant for payment, and those of the covenant not to sue, the right to a composition was expressly limited to scheduled creditors; and that the description of the sums of money to be paid was material and could not be rejected.

Quære—Whether in order to give effect to an equitable plea, promissory notes or other paper securities can be brought into court.

Declaration against the defendant as the acceptor of a bill of exchange indorsed to the plaintiff.

Plea, for defence on equitable grounds, that after the drawing and accepting of the bill of exchange in the declaration mentioned, and after the bill had been indorsed to the plaintiff as in the declaration mentioned, the defendant was indebted to the plaintiff and divers other persons, and thereupon the deed, hereinafter particularly set forth, bearing date the 9th of November, 1864, was made and entered into by and between the defendant (the person therein named Henry Mills) of the first part, and the several persons whose names and seals were thereto subscribed and set, being severally creditors in their own right, or in copartnership, or being agents or attornies of creditors of the said Henry Mills, and all other persons being creditors of the said Henry Mills of the second part, which said deed, with the schedule thereto annexed, was and is in the words and figures following, that is to say:

This indenture, made the 9th of November, 1864, between Henry Mills, of the Radnor Tavern, Holborn, in the county of Middlesex, licensed victualler, of the first part, and the several persons whose names and seals are hereunto subscribed and set, being severally creditors in their own right, or in copartnership, or being agents or attornies of creditors of the said Henry Mills (and all other persons being creditors of the said Henry Mills) of the second part:

Whereas the said Henry Mills being indebted to the said several parties hereto of the second part respectively, and being unable to pay his debts in full, proposed to pay to the said persons a composition of 5s. in the pound on their said respective debts, in the manner and upon the terms hereinafter

expressed, which proposal was accepted by a majority in number representing three-fourths in value of the said creditors whose debts respectively amount to 10*l.* and upwards, as appears by the respective hands and seals of such majority signed and set in the first and fourth columns of the schedule hereinafter written :

Now, this indenture witnesseth that, in pursuance of the premises, he, the said Henry Mills, for himself, his heirs, executors and administrators, doth hereby covenant with the said persons parties hereto of the second part, and each of them, their and each of their executors, administrators and assigns, in manner following, that is to say, first, that he, the said Henry Mills, his heirs, executors, administrators or assigns, shall and will pay, or cause to be paid, unto the said persons respectively, their respective executors, administrators, or assigns, the several sums of money placed opposite to the respective names of the said persons in the third column of the said schedule, being the amount of the said composition of 5*s.* in the pound, which same several sums shall be paid without any deduction whatsoever, by two equal instalments of 2*s.* 6*d.* in the pound in manner following, namely, the first of such instalments at the expiration of three calendar months from the day of the date hereof, and the second of such instalments at the expiration of six months from the day of the date hereof; and, secondly, that he, the said Henry Mills, shall and will forthwith make and deliver to the said persons respectively, their respective executors, administrators and assigns, his promissory notes payable at three calendar months and six calendar months from the day of the date hereof for the amount of the said several instalments. And it is hereby declared, that until the said Henry Mills, his heirs, executors, administrators or assigns, shall fail to perform the covenant hereinbefore on his part contained, the said persons parties hereto of the second part respectively, their respective heirs, executors, administrators or assigns, shall not commence or bring any action, suit, or proceeding at law or in equity against, or make any claim or demand upon or in anywise molest the said Henry Mills, his heirs, executors or administrators, or his or their estate or effects for or by reason or on account of the said debts specified in the second column of the said schedule. Provided always, and it is hereby declared, that nothing herein contained shall make void, invalidate, or prejudicially affect any mortgage, charge, lien, security, or right which any of the said persons, parties hereto of the second part, have upon or affecting any specific property of the said Henry Mills for or in respect of any of the said debts specified in the second column of the said schedule, or any bond, bill, note, or liability given or payable by or affecting any person or persons other than the said Henry Mills for or in respect of any of the same debts, so that every such mortgage, charge, lien, security, or right, so far as the same concerns the property comprised therein or subject thereto, but not as concerns the said Henry Mills personally, and every such bond, bill, note or liability, so far as the same concerns any person or persons other than the said Henry Mills, but not as concerns the said Henry Mills, shall and may remain available both at law and in equity, in as ample a manner as if these presents had not been made.

At the foot of the deed was written a schedule of the names of creditors, with the amount of their debts. The plaintiff's name, however, was not included amongst them.

The plea, after alleging that the deed had been assented to by the statutory majority of creditors, and shewing compliance with the formal requirements of the trust-deed sections of the Bankruptcy Act, 1861, stated that at the time of the execution of the deed the bill of exchange had been, though unknown to the defendant, indorsed to the plaintiff, and the plaintiff was then, though unknown to the defendant, a creditor of the defendant in respect of the claim therein pleaded to, within the meaning of the Bankruptcy Act, 1861; and by reason of the defendant being, as he was, till the commencement of this suit wholly ignorant of the indorsement of the bill to the plaintiff, and wholly

ignorant who the holder of the bill then was, and wholly ignorant of the plaintiff being a creditor of the defendant, or who was a creditor of the defendant in respect of the bill, the defendant was unable to insert the amount of the bill opposite the name of the plaintiff or opposite the name of any creditor in the second column of the schedule, and was unable to tender the deed to the plaintiff for the insertion of the amount or for execution, and was unable to tender to the plaintiff the promissory notes in the deed mentioned; and the defendant, after he discovered that the plaintiff was the holder of the bill, was at all times ready and willing to tender and offer, and within a reasonable time after the commencement of this suit tendered and offered to the plaintiff, the deed for subscription and execution by the plaintiff, and that the amount of the bill should be placed opposite to the name of the plaintiff in the second column of the schedule, and to give the plaintiff the promissory notes; but the plaintiff wholly refused to subscribe his name to the deed and to execute the same, or to allow of the amount of the bill being placed opposite to his name in the second column of the schedule, or to receive the promissory notes. And all conditions having been performed and all things having happened necessary in that behalf, the plaintiff became and was, and is, bound by the deed as if he had been a party thereto and had duly executed the same.

Demurrer to the plea, and joinder in demurrer.

(Replication, that the plaintiff never executed or assented to the deed, and the debt sued for never was specified in the second column of the said schedule.

Demurrer to the replication, and joinder in demurrer.)

J. Brown, for the plaintiff.—The plea is bad, since the debtor only covenants to pay a composition to his scheduled creditors, and the name of the plaintiff is not included in the schedule.

[*SHEE, J.*—There is a contract with all his creditors. May not the words “the sums of money placed opposite the names of the persons in the third column of the schedule” be rejected as *falsa demonstratio*?]

They are express words of limitation. Even if the covenant does include the plaintiff, it has not been performed, and he is at liberty to sue.

Macnamara, for the defendant.—The plea is good, as the covenant is to pay the composition to the whole of the creditors, and is for their benefit. The allusion to the sums placed opposite to their names in the schedule is simply to define the amount to be paid, which is only a matter of calculation. In the case of *Clapham v. Atkinson*, in the Exchequer Chamber (34 Law J. Rep. (N.S.) Q.B. 49), it was objected, that the deed was made only with the creditors executing it; but it was said by *Williams, J.* that this objection must fail, for all the creditors had the option of coming in and signing.

[*COCKBURN, C.J.*—If the debt of a creditor had been inaccurately stated in the schedule, could he have sued for a larger amount?]

Undoubtedly, if the argument that the words “in the schedule” are mere matter of description, is a valid one. In *Harrhy v. Wall* (1 B. & Ald. 103) a composition-deed expressed to be made with the creditors, whose names were subscribed and debts set against their names, had been placed before a creditor. He executed the deed, but did not insert the amount of his debt. It was held, that he could maintain no action for his original debt, as his execution was good for whatever might be the amount of his debt. There the creditor signed: here he is in the same position as if he had. It is a fraud on the other creditors for the plaintiff to sue—*Chitty on Contracts*, 7th edit., 615. In *Reeves v. Lambert* (4 B. & C. 214) the acceptor of a bill in passing through the Insolvent Court described in his schedule the drawer as the holder of the bill, though it had previously been indorsed to the plaintiff. It was held, that the insolvent had sufficiently described his debt, and had a good defence to an action by the plaintiff. *Whitmore v. Turquand* (3 De Gex, F. & J. 107; s. c. 30 Law J. Rep. (N.S.) Chanc. 345) decided that where a composition was made payable to those

who signed the deed within a certain time, this condition would not exclude creditors who afterwards assented to the deed.

[COCKBURN, C.J.—*Clapham v. Atkinson* (34 Law J. Rep. (N.S.) Q.B. 49) cannot apply here, for the creditor would be in no better position by signing, as his debt could not be scheduled after the deed became operative.]

The question remains, is the reference to the schedule material? Then as to the covenant not to sue. It is true that in *Ray v. Jones* (19 Com. B. Rep. N.S. 416; s. c. 34 Law J. Rep. (N.S.) C.P. 306) it was held that such a covenant was no defence to an action at law. But, as was suggested in that case, it may be good as an equitable plea.

J. Brown, in reply.—The covenant not to sue cannot be pleaded as an equitable plea, as in this case. Equity would only grant an injunction upon the condition that the promissory notes were delivered to the plaintiff. In *Wood v. the Copper Miners' Company* (17 Com. B. Rep. 561; s. c. 25 Law J. Rep. (N.S.) C.P. 166), *Wodehouse v. Farebrother* (5 El. & B. 277; s. c. 25 Law J. Rep. (N.S.) Q.B. 18), and *The Mines Royal Society v. Magnay* (10 Exch. Rep. 489; s. c. 24 Law J. Rep. (N.S.) Exch. 7), it was held, that an equitable plea is no defence where the Court of Chancery would only grant an injunction upon terms and conditions which Courts of law have no power of enforcing. According to the practice of the Courts of Westminster, money only, and not paper securities, can be brought into court.

[COCKBURN, C.J.—What is your authority for that proposition? I do not think that such a difficulty as that would induce us to give judgment for the plaintiff.]

At all events, the objections to the form of the deed cannot be got over. If a creditor, who is not scheduled, is entitled to the composition, other creditors may find the calculations which, perhaps, induced them to sign, altogether deranged. Lastly, the covenant not to sue is expressly made on account of the debts specified in the schedule.

COCKBURN, C.J.—I think that the plea is bad, and that there should be judgment for the plaintiff. It is impossible to avoid seeing that the acceptance in question was not taken into account by the debtor when the deed was drawn up. He seems to have altogether forgotten and lost sight of it. The words of the covenant to pay the composition refer solely, as it appears to me, to debts enumerated in the schedule. It is as follows: "That the debtor shall and will pay or cause to be paid unto said persons respectively, their respective executors, administrators and assigns, the several sums of money placed opposite to the respective names of the said persons in the third column of the said schedule, being the amount of the said composition." So that debts only are referred to the amount of which is ascertained. Now, it seems to me that the covenant cannot apply to debts not comprised in the schedule, and that no provision is made for the plaintiff. But, in order to make one of these deeds binding upon creditors who are not parties to it, except by the act of parliament, it ought, I think, to provide for all creditors, assenting or not. Inasmuch, therefore, as no arrangement is made for the case of every debt, and even if the plaintiff had been willing to take the composition, he could not have insisted upon it under this covenant, I think that the deed, so far as this action is concerned, is inoperative.

MELLOR, J.—I am of the same opinion. I confess that although this was the conclusion at which I arrived, after the reading of the deed, yet the ingenious argument of Mr. Macnamara induced me to think that the words "sums of money set opposite the names in the third column of the said schedule," were mere erroneous description. But I now think that we have no right to reject them, and that they bind the parties to the deed. I cannot help thinking that if the covenant not to sue be contrasted with that for the payment of the composition, it will be found to be quite impossible to read the letter as Mr. Macnamara had proposed. I am, therefore, of opinion, on the

ground that the deed ought to be no bar against a creditor for whom it makes no provision, that the plaintiff is entitled to judgment.

LUSH, J.—I am of the same opinion. The whole title of the plaintiff to a composition rests upon the covenant for payment. It is true that here in the recital it is stated that there had been an agreement that the composition should be paid to the creditors upon the amount of their debts. But by the covenant, which is the effective part of the deed, the debtor has only to pay the amounts entered in the schedule. Now, if the schedule were incorporated in terms with the covenant, it would be an engagement to pay to a class of persons certain fixed sums. And I do not see how we can reject any part of this engagement, so as to enlarge the number of persons to be paid, or to increase the amount which they are to receive. The fact that the reservation of remedies against sureties is in respect of debts specified in the schedule, shews that the limitation was not accidental. The result of this is, that the benefit of the covenant is limited to those who are mentioned in it, and the plaintiff, not having the necessary qualification, is excluded. The plea is, therefore, no defence to the action.

Judgment for the plaintiff.

[IN THE QUEEN'S BENCH.]

Nov. 14, 1865.

BOND AND ANOTHER v. WESTON.

35 L. J. Q.B. 7; L. R. 1 Q.B. 169.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134. s. 192.)—Deed of Inspectorship—Reasonable Clauses—Release not restrained by Covenant not to sue.

BANKRUPTCY.—*A deed of inspectorship is not unreasonable because it contains such provisions as the following: That a resolution signed by the majority in number and value of the creditors, parties to the deed or bound by it, shall be binding on all persons parties to the deed or bound by it, and effectual for the allowance and passing of the accounts of the trustees and for discharging them from the trusts of the deed, and all claims and demands in respect of it.—That in case the trustees appointed by the deed, or any of them, or any trustee to be appointed as mentioned afterwards, should die or should refuse or decline or become incapable to act in the matters and things intrusted to them by the deed, a majority in number and value of the creditors present at a meeting convened by circular, sent by any creditor of the debtor by post or otherwise, might nominate or choose such other person or persons as they should think fit to be trustee or trustees in the place of any such trustee or trustees.*

A deed of inspectorship contained, in different parts of the instrument, a general release of the debtor from all claims, &c. (except under the provisions of the deed), and a covenant by the creditors not to sue the debtor for a limited time in respect of any debt or demand provable under the deed, and that if any of them did so the deed should operate and have the effect of an order of discharge under the Bankruptcy Act, 1861, and be pleadable in bar to every such action:—Held, that the release was not restrained by the covenant not to sue.

Declaration on a promissory note, with the common counts.

The defendant pleaded a plea, *puis darrein continuance*, setting out a deed of inspectorship, to which he and all his creditors were parties.

The plaintiff demurred to the plea, and the defendant joined in demurrer.

The following are the only parts of the deed which are material for the purposes of this case: Proviso, that any resolution signed by the majority in number and value of the creditors, parties hereto or bound hereby, shall be binding on all the several parties hereto or bound hereby, and shall be effectual for the allowance and passing of the accounts of the said trustees and for discharging them from the trusts hereof, and from all claims and demands in respect thereof. That in case the said trustees hereby appointed, or any or either of them, or any trustee to be appointed as hereinafter mentioned, shall die, or shall refuse, or decline, or become incapable to act in the matters and things hereby intrusted to them as aforesaid, then and in every such case the major part in number and value of the creditors of the said Edward Weston present at a meeting convened by circular sent by any creditor of the said Edward Weston, by the post or otherwise, may nominate and choose such other person or persons as they shall think fit to be a trustee or trustees in the place or stead of such of the said trustees who shall so die, or refuse, or decline, or become incapable to act as aforesaid.

The deed also contained in its earlier part a covenant by the creditors that they would not until the 17th of April, 1866, or such enlarged time as in the deed mentioned, sue, arrest, prosecute, impede or molest the said Edward Weston in the management of his trade, business or affairs under the control and inspection provided, nor seize nor possess themselves or himself of, or attach or intermeddle with the goods, chattels, estates, property or effects of the said Edward Weston or the hereditaments, tenements, goods, chattels, effects and premises hereinbefore conveyed and assigned, or any part thereof, in respect of any debt or demand provable under these presents; and that in case any of them, or any person bound by the deed, or the executors, administrators, partners or principals, or any of them, should act contrary to the agreement lastly hereinbefore contained, these presents and the provisions herein contained should operate and have the same effect as an order of discharge of the said Edward Weston would have under the Bankruptcy Act, 1861, in case the said Edward Weston had been adjudicated a bankrupt, and that in every such case these presents might be pleaded in bar to all and every such debts, claims, demands, actions, suits and proceedings in like manner and with the same effect as such order of discharge might be pleaded and used, in case the said Edward Weston had been adjudicated a bankrupt, in respect of any of the said debts, claims and demands of the person or persons who, or whose partners or principals, should act contrary to the said agreement, and had obtained his discharge under the said adjudication. The deed concluded with a release of the said Edward Weston "from all manner of debt and debts, sum and sums of money, bills, bonds and notes, accounts, reckonings, judgments, executions, actions, suits, claims, and demands whatsoever, which they, the releasing parties, or any or either of them, or any or either of their partner or partners, then had or thereafter might have against the said Edward Weston, his heirs, executors, or administrators, for or in respect of any debt, transaction, matter, or thing up to the day of the date hereof, save and except under the provisions in the deed contained, or the rights thereby reserved to them the said releasing parties, or any of them."

Hannen, in support of the demurrer.—The plea is bad, as the deed upon which it relies ought not to bind a dissenting creditor. The principal objections to the deed are the powers given to the inspectors and the mode of appointing fresh trustees. The proviso, that in case of the death of a trustee, or his refusal to act, or incapacity, the major part in number and value of the creditors present at a meeting convened by circular, sent by any creditor, may nominate and choose another as they think fit, and that the trustees so appointed are to be indemnified from the consequences of all transactions and engagements connected with the business of the estate, is unreasonable. The statutory majority of creditors ought not to be allowed to delegate their powers to a smaller number.

[LUSH, J.—The proviso does not say a majority of the assenting creditors. Any creditor would be at liberty to attend the meeting.]

Again, the clause providing that a resolution, signed by the majority in number and value of the creditors parties to the deed, shall be binding and effectual for the passing of the accounts, is unreasonable. Any one creditor ought to be at liberty to question the accounts.

[LUSH, J.—It is a majority of the creditors bound by the deed—that is, of the whole creditors.]

The deed provides that it shall operate and have the effect of an order of discharge in bankruptcy. But it also contains a general release by the creditors. These provisions are contradictory unless their effect is to restrain the release.

[Field, for the plaintiff, pointed out that the release excepted claims under the provisions of the deed.]

That does not reconcile the words of the deed.

Field and Macnamara, in support of the plea, were not called upon.

COCKBURN, C.J.—I think that the clauses which have been noticed by Mr. Hannen cannot cause any inconvenience. The release is not inconsistent with the clause providing that the deed shall have the effect of an order of discharge in bankruptcy. This clause was probably introduced for the better protection of the debtor. As to the powers for appointing new trustees and dealing with the accounts, they are necessary for the effectual working of the deed.

MELLOR, J., SHEE, J. and LUSH, J. concurred.

Judgment for the defendant.

[IN THE QUEEN'S BENCH.]

Nov. 14, 1865.

THE EUROPEAN CENTRAL RAILWAY COMPANY v. WESTALL.

35 L. J. Q.B. 9; 6 B. & S. 970; L. R. 1 Q.B. 167; 14 W. R. 177.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134. s. 192)
—Deed of Assignment by Partnership Firm—Separate Creditor.

BANKRUPTCY.—*In an action against a shareholder for calls, the defendant pleaded, as an equitable defence, that he, jointly with two others, all members of the same partnership firm, executed a deed, by which they conveyed to trustees all their estate and effects absolutely, to be applied and administered for the benefit of their creditors "as if they had been at the date of the deed duly adjudged bankrupts." The deed (which was set out in the plea) contained no clause of release. The plea alleged that the deed had been duly assented to by the statutory majority of creditors of the debtors, and that the formal requirements of the Bankruptcy Act, s. 192, had been complied with:—Held, that the plea was bad, as the deed upon the face of it could operate only for the benefit of the partnership creditors, and could not therefore avail the defendant in an action by a separate creditor.*

Declaration for calls payable by the defendant as a shareholder in the company of the plaintiffs.

Third plea, for a defence on equitable grounds, that after the accruing of the alleged causes of action, and after the Bankruptcy Act, 1861, commenced and took effect, to wit, on the 21st day of October, 1864, the defendant was indebted to the plaintiffs and divers other persons respectively, and thereupon

an indenture was made in the words and figures following, that is to say, "This deed, made the 21st day of October, 1864, between William Bury Westall, Jonathan Westall and James Bury Westall, all of White Ash Mills, near Church, in the county of Lancaster, cotton manufacturers and co-partners, and also carrying on business in the city of Manchester, as merchants and commission agents and co-partners, under the style or firm of Westall Brothers, of the one part; Lewin Barned Mozley, of Liverpool, in the said county of Lancaster, banker, R. C. Richards, of Kirkham, in the said county, cotton-spinner, and John George Thomas Child, of Manchester aforesaid, accountant, on behalf and with the assent of the undersigned creditors of the said William Bury Westall, Jonathan Westall and James Bury Westall, of the other part; witnesseth, that the said William Bury Westall, Jonathan Westall and James Bury Westall hereby convey all their estate and effects to the said Lewin Barned Mozley, R. C. Richards and John George Thomas Child, absolutely, to be applied and administered for the benefit of the creditors of the said William Bury Westall, Jonathan Westall and James Bury Westall, in like manner as if the said William Bury Westall, Jonathan Westall and James Bury Westall, had been at the date hereof duly adjudged bankrupts. In witness whereof, the said parties hereto have set their hands and seals the day and year first above written."—Averment of compliance with the formal requirements of the Bankruptcy Act, 1861, s. 192, as to registration, &c., and that the plaintiffs, before and when the said deed was made, were creditors of the defendant in respect of the causes of action in the declaration mentioned, and had had due notice of the deed, and been requested to execute the same, and might and could have executed the same had they been so minded, and still might execute the same, and the deed was in full force and effect, and all things on the defendant's part had been done and happened to render the deed as valid, effectual and binding upon the plaintiff as if they had been parties to and had actually executed the same; whereby and by force of the said deed, and according to the form and effect of the Bankruptcy Act, 1861, the defendant had been and was released and discharged from the alleged causes of action and this action.

Demurrer, and joinder in demurrer.

Rew, in support of the demurrer.—It has been already decided that a plea, such as the one in question, is not good at law. In *Clarke v. Williams* (3 Hurl. & C. 508; s. c. 34 Law J. Rep. (N.S.) Exch. 60) it was argued that the plea might be good by way of accord and satisfaction; but the Court gave judgment against it, saying that the only way in which a deed of this kind could be pleaded as a bar would be by shewing that the statute had given it that effect and operation.

[COCKBURN, C.J.—Suppose that a debtor conveys the whole of his estate, and that each creditor is bound as if he had actually signed, will not equity restrain an action by a creditor?]

No; equity will only interfere if the creditor has actually signed. Again, by the 198th section of the Bankruptcy Act, 1861, no process is to be available against the person or property of a debtor who has executed a valid deed, without the leave of the Court, that is, of the Court of Bankruptcy. Equity would therefore refuse to interfere, on the ground that the estate was under the control of the Court of Bankruptcy. In *The Ipstones Park Iron Ore Company v. Pattinson* (2 Hurl. & C. 828; s. c. 33 Law J. Rep. (N.S.) Exch. 193) it was held, that the only remedy of a debtor who has executed a deed according to the form given in schedule D. to the last bankruptcy act, is to apply to the Court of Bankruptcy to stay proceedings—and the case of *Eyre v. Archer* (16 Com. B. Rep. N.S. 638; s. c. 33 Law J. Rep. (N.S.) C.P. 296) is to the same effect.

[LUSH, J.—How could the Court of Bankruptcy interfere to protect a debtor who had executed one of these deeds?]

By the Bankruptcy Act, 1861, section 1, the Court of Bankruptcy shall have and exercise for the purposes of the act all the powers and authorities of the superior Courts of law and equity. This confers upon the Court of Bankruptcy the power which the Lord Chancellor possessed of restraining a creditor who had elected to prove. If the legislature did not intend that the statutory form of deed should be pleaded as a bar, it cannot be made to have that effect by setting it up as an equitable defence. Moreover, this is a deed by partners, who assign their joint estate to be administered as in bankruptcy. No provision is therefore made for the plaintiffs, who appear to be a separate creditor. The consequence is, that the deed is not within the words of section 192. of the late act, as it is not on the face of it a deed for the benefit of all the creditors of the defendant—*Walter v. Adcock* (2 Ves. & B. 253). The deed is expressed to be between the firm and a trustee on behalf of the undersigned creditors. But it does not appear that any of the creditors have signed. They have only assented in writing.

C. H. Hopwood, in support of the plea, was requested to confine his argument to the question, whether the deed provided for all the creditors of the defendant, or only the partnership creditors.—The plea shews that the defendant has surrendered the whole of his property for the benefit of his creditors, and that a majority of the creditors of every description have assented to it; under these circumstances, the plaintiffs are bound by the deed, and are in the position of creditors who have proved, and therefore equity would restrain this action. In *Ex parte Woolley* (2 Ves. & B. 253) the Lord Chancellor declared that a creditor who had proved thereby relinquished his action. In *Ex parte Diack* (2 Mont. & Ayr. 675) it was said that the Court of Review would issue a perpetual injunction to restrain an action by a creditor who had proved; and in *Ex parte Glover* (1 Glyn & J. 270) the Vice Chancellor stayed proceedings at law by a creditor who had applied to prove. In *Walker v. Neville* (3 Hurl. & C. 403; s. c. 34 Law J. Rep. (N.S.) Exch. 73), where a deed executed by a partnership firm was pleaded, and the plea stated that a majority of the creditors and *each* of them assented, it was held that this was a sufficient averment that a majority of each class, that is, of the joint creditors and the separate creditors, had assented. If it be necessary, the defendant will ask leave to amend his plea in accordance with this decision.

Rew, in reply.—The words “each of them,” upon which the Court of Exchequer relied in the case of *Walker v. Neville* (3 Hurl. & C. 403; s. c. 34 Law J. Rep. (N.S.) Exch. 73), make all the difference, for they shewed that provision was made for the separate creditors. This is not a case for amendment, as the objection is one to the form of the deed.

[COCKBURN, C.J.—Suppose the firm had six joint creditors and each member twenty separate creditors, could the creditors of one member prevent the composition from taking effect?]

That shews the nature of the objection.

COCKBURN, C.J.—The plea certainly cannot be supported. The deed which it sets up deals with a class of creditors to which the plaintiffs do not belong, and they would have no right to execute the deed.

MELLOR, J., SHEE, J., and LUSH, J., concurred.

Judgment for the plaintiffs.

[IN THE QUEEN'S BENCH.]

Nov. 16, 1865.

WOOD AND OTHERS v. DUNN.

35 L. J. Q.B. 11; L. R. 1 Q.B. 77; 13 L. T. 403; 14 W. R. 84; 12 Jur. N.S. 338: reserved, 36 L. J. Q.B. 27; 7 B. & S. 94; L. R. 2 Q.B. 73; 15 L. T. 411; 15 W. R. 180 (Ex. Ch.)

Debtor and Creditor—Trust Deed—Effect of Order for Payment of Debt under Garnishee Sections of Common Law Procedure Act, 1854—12 & 13 Vict. c. 106, s. 184, and 24 & 25 Vict. c. 134, ss. 192, 197.

ATTACHMENT. BANKRUPTCY.—*In an action, by the plaintiffs, as trustees under a deed of assignment, according to the Bankruptcy Act, 1861, s. 192, for non-payment of money due to the assignor, the defendant pleaded that by a garnishee order, under the Common Law Procedure Act, 1854, he was directed forthwith to pay to secured judgment creditors of the assignor the amount of the debt; that the order was served on the defendant before he had notice of the trust-deed, and that, in order to avoid execution being levied upon him, he paid to the judgment creditors the amount of the debt, and was thereby discharged from the claim of the assignor and of the plaintiffs:—Held, that the plea was bad, as it did not shew that the payment to the judgment creditors was made before notice of the deed. That the plaintiffs, according to the Bankruptcy Act, 1861, s. 197, were entitled, as against third persons, to the rights and powers of assignees in bankruptcy, including those given by the 12 & 13 Vict. c. 106, s. 184; and that their title was therefore to be preferred to that of a judgment creditor, founded only upon an order for payment of a debt under the garnishee clauses of the Common Law Procedure Act, 1854, which had not been complied with at the date of the registration of the deed.*

Semle—That payment, under the Judge's order, even before notice of the registration of the deed, would have afforded no defence.

Declaration—by the plaintiffs—(trustees on behalf of the creditors of Randal Stap, a debtor, under a deed or instrument made and entered into between the said Randal Stap and certain of his creditors and the plaintiffs, as trustees as aforesaid, relating to the debts and liabilities of the said Randal Stap, and his release therefrom, according to the clauses of the Bankruptcy Act, 1861, relating to trust-deeds for benefit of creditors, and under which said deed or instrument, all things necessary in that behalf having happened and been done, all the property comprised in the said deed or instrument, including the causes of action hereinafter mentioned, were and are vested in the plaintiffs as such trustees as aforesaid)—against the defendant, as clerk to the local board of health for the district of the township of Darlington, upon a deed made between the local board and Randal Stap, by which Stap, in consideration of the sum of 8,610*l.*, to be paid to him by the local board, covenanted to do certain work for them according to certain plans and specifications, with power for the architect of the board to direct alterations or additions to the works, the difference to be added to or deducted from the sum of 8,610*l.*; and the local board agreed to pay to Stap the sum of 8,610*l.* by instalments, the balance (less 350*l.*) to be paid on completion of the works, the said sum of 350*l.* to be kept in hand by the board until six months after the completion of the works to meet contingencies. **Averment**—That Stap performed the said works contracted for, and certain additions and alterations thereto, under the directions of the architect; and that the sum to be paid to him for the works amounted to 9,884*l.* 13*s.* 10½*d.*, and that all conditions were performed and all things happened, and all times elapsed necessary to entitle the plaintiffs, as such trustees, to receive payment from the local board

of the balance of the sum of 9,884*l.* 13*s.* 10½*d.* Breach—That the local board, although they had paid to the said Randal Stap the sum of 9,282*l.* 18*s.* 10*d.*, part of the sum of 9,884*l.* 13*s.* 10½*d.*, had not paid the residue of the sum of 9,884*l.* 13*s.* 10½*d.*, or any part thereof, and the same remained due and unpaid.

The declaration also contained the common counts for work done and materials provided, and money paid by and money due on accounts stated with Randal Stap before the making of the deed.

Fourth plea, as to so much of the first count as relates to 171*l.* 12*s.* 8*d.* (other than 80*l.* 2*s.* 6*d.* paid into court), that after Randal Stap had performed the works, additions, and alterations in the first count mentioned, and there was due and payable to him in respect thereof by the local board, over and above the 350*l.* so to be kept in hand as in that count mentioned, a sum of money far exceeding the sum of 171*l.* 12*s.* 8*d.* in the introductory part of the plea mentioned, certain creditors of Stap, named William Russell the elder, William Russell the younger, and Simeon Russell, obtained two judgments against him, for the sums of 67*l.* 4*s.* 6*d.* and 104*l.* 8*s.* 2*d.* respectively, and by two orders of Shee, J., dated the 25th of August and the 27th of August, 1864, respectively, all debts owing or accruing from the local board to Randal Stap were attached, to answer the said judgment debts; and it was also ordered by the same orders that the local board, their attornies or agents, should attend before the said Judge, to shew cause why they should not pay to the said William Russell the elder, William Russell the younger, and Simeon Russell, so much of the debt due to Randal Stap as might be sufficient to satisfy the judgment debts. The plea went on to state that the orders were duly served upon the defendant and the local board on the 26th and 29th of August, 1864, respectively, and the local board not knowing of any cause to shew why they should not pay the two sums of 67*l.* 4*s.* 6*d.* and 104*l.* 8*s.* 2*d.*, or either of them, to the said William Russell the elder, William Russell the younger, and Simeon Russell, and not knowing of the trust-deed, or that the causes of action in the declaration mentioned had been assigned, did not, nor did the attornies or agents, appear before the said Judge, or upon either of the orders or the summons to attend (therein contained), and thereupon, by two other orders of the said Judge, bearing date respectively the 2nd of September, 1864, and the 7th of September, 1864, the said Judge ordered that the local board should forthwith pay to the said William Russell the elder, William Russell the younger, and Simeon Russell, so being such judgment creditors, the said debt due from the local board to Randal Stap, or so much thereof as was sufficient to pay the respective judgment debts of 67*l.* 4*s.* 6*d.* and 104*l.* 8*s.* 2*d.*, and that in default thereof execution might issue for the same, each of which last-mentioned orders was thereupon, on the 13th of September, 1864, and before the defendant or the local board had any notice or knowledge of the trust-deed served upon the defendant and the said local board, and payment of the judgment debts, amounting to the said sum of 171*l.* 12*s.* 8*d.*, was demanded under the orders by and on behalf of the said William Russell the elder, William Russell the younger, and Simeon Russell, and the local board, in compliance with the orders, and in order to avoid executions for the same being levied on their goods and chattels, and because they could not otherwise have avoided such executions for the sums so ordered to be paid as aforesaid, paid the same to the said William Russell the elder, William Russell the younger, and Simeon Russell, as such judgment creditors as aforesaid, and were thereby discharged from all claims of Randal Stap, and of the plaintiffs, as such trustees as aforesaid, in respect of the sum of 171*l.* 12*s.* 8*d.* in the introductory part of this plea mentioned, being the amount of the judgment debts so paid as aforesaid.

Seventh plea, to the money counts, so far as the same relate to 171*l.* 12*s.* 8*d.* (other than the sum of 80*l.* 2*s.* 6*d.* paid into court.) This was a special plea of payment, repeating the facts stated in the fourth plea.

Replication to the fourth and seventh pleas—That the deed or instrument in the declaration mentioned to have been made between Randal Stap and his creditors was registered according to the provisions of the Bankruptcy Act, 1861, before payment by the said local board to the said William Russell the elder, William Russell the younger, and Simeon Russell, or the said sums of money or either of them, or any part thereof, in the said fourth and seventh pleas, or either of them, mentioned.

Demurrer to the replication, and joinder in demurrer.

Rew, in support of the demurrer.—The replication is bad. The pleadings, which are rather intricate, shew that the defendants paid the money in order to avoid execution being levied upon them.

[MELLOR, J.—Ought you not to have averred that the money was paid before the registration of the deed?]

By the Common Law Procedure Act, 1854, s. 61, a Judge may, upon an *ex parte* application, at once order debts due to the judgment debtor to be attached.

[LUSH, J.—The plea does not say that when you paid the judgment creditor you had no notice of the deed.]

The payment would be a good defence even if made after notice of the deed, though it cannot be assumed that the defendants knew of the deed when they paid the money.

[LUSH, J.—Suppose that there had been an actual bankruptcy. It has been held that, if an act of bankruptcy is committed between the seizure and sale under an execution; payment after notice of the proceeds of the sale to the judgment creditor cannot be justified—*Notley v. Buck* (8 B. & C. 160). Now, by section 197, of the Bankruptcy Act, 1861, trustees such as the plaintiffs are to have all the rights of assignees in bankruptcy.]

The order is absolute, and must be obeyed. It is not conditional, like that in *Holmes v. Tutton* (5 El. & B. 65; s. c. 24 Law J. Rep. (N.S.) Q.B. 346). The defendants are stated to have paid the money in order to avoid execution being levied upon them. It might be different if they had had time in order to inquire whether the deed was valid.

Warton (*Barnard* with him), in support of the replication.—The plaintiffs rely upon the case of *Holmes v. Tutton* (5 El. & B. 65; s. c. 24 Law J. Rep. (N.S.) Q.B. 346). There debts owing to the judgment debtor were attached under the Common Law Procedure Act, 1854; ss. 61, 62, and 63. On the day when the order was served, but after service, the judgment debtor signed a declaration of insolvency, and was next day adjudicated bankrupt. It was held, that although the defendant was bound so that the garnishee could not pay the original creditor or any one claiming under him, yet the binding must be considered as subject to the provisions of the Bankruptcy Acts for the distribution of property; and Lord Campbell, in his judgment, says, that the expression “bind” in the garnishee clauses has no stronger effect than the operation of a common law judgment. *Magrath v. Hardy* (4 Bing. N.C. 782; s. c. 7 Law J. Rep. (N.S.) C.P. 299) strongly resembles this case. There, in an action for money had and received, there was a plea of payment under an attachment in the Lord Mayor’s Court. A replication that there was no execution executed was held good, as the custom set up in the plea provided that after execution executed the garnishee should be discharged as against the judgment debtor. In *Westoby v. Day* (2 El. & B. 605; s. c. 22 Law J. Rep. (N.S.) Q.B. 418) payment in the Mayor’s Court by the garnishee, who had notice before the proceedings that the defendant, or judgment debtor, had parted with his interest in the debt, was held not to be justifiable. And in the late case of *Tilbury v. Brown* (30 Law J. Rep. (N.S.) Q.B. 46), where an order under section 63. directed the garnishee to pay to the plaintiff the debts due to the defendant, subject to an award for ascertaining their amount, and an award was made, but before payment of the sum awarded the defendant became bankrupt, Crompton, J. held, that there was no distinction for this

purpose between orders under sections 61. and 63, and that the plaintiff was not entitled to the money. These cases shew that the effect of a conditional order is not under these circumstances different from that of an order absolute.

MELLOR, J.—I think that the plea is bad, and that our judgment must be in favour of the plaintiffs, although Mr. Rew has supported his view of the case with much ingenuity. The facts as disclosed by the pleadings appear to be these: The defendant, as clerk to a local board of health, was indebted to the judgment debtor. The judgment creditor obtained the usual garnishee order, attaching debts due from the defendant. In the interval between the order *nisi* and the order for execution to issue, everything was completed necessary to make the plaintiffs trustees under a deed duly registered within the meaning of the Bankruptcy Act, 1861. The defendant avers that the order was made absolute and served upon him before he had notice of the trust-deed; but he omits to aver that when he paid the money he had no notice of the deed. And I am certainly disposed to think it essential, in order to make this a good plea, that notice or want of notice at the time of payment should be averred. Therefore, if there is any distinction between payment before and after notice, we must take it that payment was made after notice of the deed. Now I have come to the conclusion that the words of the 197th section of the Bankruptcy Act, 1861—[His Lordship read the section]—are wide enough to shew that trustees under a deed such as this (if valid) are placed in the same position as assignees under an ordinary bankruptcy. This has the effect of making provisions as to acts of bankruptcy apply to the administration under a trust-deed. Therefore, as the payment was after notice of the registration, it is not sufficient to say that it was made in order to avoid execution under the garnishee order. I do not think, as the defendant's counsel contended, that the order bound the defendant personally; I think that he is absolved by payment to the judgment debtor. It may be that the debt was not payable out of any particular fund, but the defendant could have applied to a Judge at chambers to have execution stayed. It is a hardship which often arises in cases of bankruptcy, and we must give effect to the bankrupt law where the order of attachment is absolute, in the same way as where it is only an order *nisi*.

SHEE, J.—I am of the same opinion. The plea does not allege that the defendant did not have notice of the registration of the deed till after payment. Can such a plea under any circumstances be good? I think that it does not shew a complete defence to the action; for I am disposed to think that the effect of the act of parliament is to place trustees on the same footing as assignees in bankruptcy. As, therefore, the title of the trustees was completed before the payment, the discharge from claims by the judgment debtor, which the plaintiffs allege that they have obtained, cannot avail them in this action. The 197th section of the last act provides that trustees shall have the same powers as against third persons as assignees in bankruptcy. This makes the decisions in *Holmes v. Tutton* (5 El. & B. 65; s. c. 24 Law J. Rep. (N.S.) Q.B. 346) and *Tilbury v. Brown* (2 El. & B. 605; s. c. 22 Law J. Rep. (N.S.) Q.B. 418) authorities in favour of the plaintiffs, whom I think entitled to recover.

LUSH, J.—I am of the same opinion. The plea, in my judgment, is bad, because it does not aver a legal obligation to pay the money to a third person. It has been held that if bankruptcy intervenes before the garnishee has paid under the order, the judgment creditor must come in with the other creditors. Now, the 197th section of the last Bankruptcy Act, 1861, is in these words:—[His Lordship read the section]. The effect of this section is, therefore, to give the plaintiffs the rights of creditors' assignees under a bankruptcy. Now the defendant's plea does not shew that payment was made under a garnishee summons prior to the registration of the deed, that is, prior to what, in the present instance, is equivalent to a bankruptcy. It has been contended that

payment after registration, without notice of the deed, would be good. I should be inclined to decide against that proposition, but it is not necessary to consider it in order to give judgment against the defendant.

*Judgment for the plaintiffs.*¹

[IN THE QUEEN'S BENCH.]

Nov. 4, 1865.

JENNINGS v. THE GREAT NORTHERN RAILWAY COMPANY.

35 L. J. Q.B. 15; L. R. 1 Q.B. 7; 12 Jur. N.S. 331; 13 L. T. 254; 14 W. R. 28.

Carriers by Railway—By-Law—Refusal to shew Ticket.

CARRIERS.—Where a by-law of a railway company imposes certain duties on passengers, and lays correlative duties on the company, the company must have strictly complied with the by-law on their part to entitle them to enforce it against the passenger.

A by-law provided that no passenger would be allowed to travel upon the railway without having first paid his fare and obtained a ticket, and that each passenger, on payment of his fare, would be furnished with a ticket, which ticket such passenger was to shew and deliver up when required by the guard or other authorized servant. A passenger, having three servants with him, paid his own and their fares, and was furnished with four tickets, for a certain train. He took his seat, with the tickets in his possession, in one part of the train, and the servants entered another part. The train was divided into two parts by the company, and the servants were thus separated from their master. The part of the train in which the master was seated was first despatched, and before leaving he shewed the tickets for himself and servants. Afterwards, when the second part of the train was about to be despatched, a duly authorized servant of the company demanded the tickets of the passenger's servants, which they were unable to shew, and, thereupon, were not allowed to travel by the train, which was despatched without them:—Held, that the company could not justify their refusal to carry the servants, inasmuch as the company had given the tickets to the master, and by the division of the train separated him from his servants.

This was an action brought to recover damages from the defendants, as common carriers, for the unlawful detention of the plaintiff's servants and horses. The first count of the declaration was for not carrying certain race-horses which the defendants had received from the plaintiff for carriage from Lincoln to Peterborough, by a certain train, for which they were received, by reason whereof the horses arrived by a later train, and were separated from the plaintiff and his servants. And the second count of the declaration alleged that the defendants were carriers of passengers by trains from Lincoln station to Peterborough station, for reward to the defendants in that behalf, and that thereupon, in consideration that the plaintiff paid to the defendants, at their request, a certain reward for the carriage of himself and certain servants of the plaintiff, by a certain train from Lincoln to Peterborough, and, at the request of the defendants, he himself became a passenger, and at the request of the defendants, caused his servants to become passengers, to be carried by the said train from Lincoln to Peterborough, for the said reward, the defendants

(1) Cockburn, C.J. was absent through indisposition.

promised the plaintiff to carry him and his servants by the said train from Lincoln to Peterborough, and all things were done and happened to entitle the plaintiff to have the defendants carry his servants as aforesaid; yet the defendants did not nor would carry his said servants; but wholly refused so to do, whereby the plaintiff lost the services of his servants, and alleging further damage. The third count was for an assault upon Charles Salmon his servant and imprisonment of him, whereby the plaintiff lost his services. And the fourth count was for wrongfully preventing certain servants of the plaintiff travelling by the railway.

The defendants pleaded, fifthly, to the second count, that by one of the by-laws of the said company, duly made under and by virtue of an act of parliament before the making of the promise in the second count mentioned, and of which the plaintiff had due notice, it was ordered as follows: "No passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, without having first paid his fare, and obtained a ticket. Each passenger, on payment of his fare, will be furnished with a ticket, specifying the class of carriage and the distance for which the fare has been paid, which ticket such passenger is to shew when required by the guard in charge of the train, and to deliver up before leaving the company's premises, upon demand, to the guard or any other servant of the company duly authorized to collect tickets." And the defendants further say, that the said servants of the plaintiff had not obtained tickets, and could not produce the same pursuant to the said by-laws, wherefore the defendants refused to carry the said servants. And for the seventh plea, the defendants, as to the third count, say, that the said Charles Salmon was unlawfully in the said railway train (being a railway train of the defendants), and could not produce or shew a ticket, pursuant to the said by-law, and refused to leave the said train when requested so to do, wherefore the defendants, by their servants in that behalf, gently laid their hands on the said Charles Salmon, and removed him from the said railway train, doing no unnecessary damage and using no unnecessary violence. And for a ninth plea the defendants, as to the fourth count, say, that the conveyance in that count mentioned was the conveyance of the defendants, and that they were lawfully possessed thereof, and because the said servants of the plaintiff were unlawfully, and without the consent of the defendants, about to enter the said conveyance, and were not lawfully entitled to travel as passengers therein, the defendants prevented their travelling by the said conveyance, and compelled them to quit the same, as they lawfully might, for the cause aforesaid.

The plaintiff was a trainer and owner of race-horses, and being about to leave Lincoln, on the last day of the races there, on the 25th of February, 1865, for Peterborough and Newmarket, took a ticket for himself, first class, and for three stable-boys, third class, and for three horses, by the 6 o'clock p.m. train. The boys were to travel with the horses in the horse-box, according to the usual practice permitted by the company, when third-class tickets for them had been previously taken. When the train was about to start, it was found that it was too long and too heavy, and it became necessary to divide it into two trains. The first division containing the passengers, amongst whom was the plaintiff, was despatched a few minutes after 6 o'clock; the latter division, containing the horse-boxes and the boys, started at 6.35 p.m. The plaintiff had taken his seat in the train before the division was made, and had in his possession the tickets for the boys, and shewed them, along with his own, to the ticket examiner, before his part of the train started; and when the latter division of the train was about to start, the company's servant, duly authorized, called upon the plaintiff's boys, amongst the other occupants of the horse-boxes, to shew their tickets. They said their master had them; but this the company's servant refused to believe, and they were accordingly refused permission to go by the train, which, thereupon, started without them, and they were left behind at Lincoln.

The action was tried, before Erle, C.J., at the Summer Assizes for Cambridge, when the jury found that there was a contract by the defendants

to carry the plaintiff and his servants and horses by the 6 o'clock train, and that the defendants had broken that contract. The plaintiff had a verdict for 5*l.* 12*s.*, but the learned Judge gave the defendants leave to move to set aside that verdict, and to enter a verdict for them on the fifth plea, on the ground that there was no evidence to go to the jury to entitle the plaintiff to a verdict on the fifth plea, and that there was evidence upon which the jury should have found for the defendants.

Keane (*Markby* with him) now moved for a rule pursuant to the above leave. (They also moved to have the verdict set aside, and entered for them on the seventh and ninth pleas, and on the further grounds that the verdict was against evidence, and of the misdirection of the learned Judge. The argument, however, only turned on the second count and fifth plea.)—The defendants were justified under their by-law in refusing to allow the plaintiff's servants to go with the horse-boxes in the second part of the train. They did not produce their tickets when called upon by a person duly authorized. In *Woodard v. the Eastern Counties Railway Company* (30 Law J. Rep. (N.S.) M.C. 196) a similar by-law was enforced.

[*SHEE, J.*—The by-law only applies where the company furnishes each passenger with a ticket; it does not apply where they furnish tickets for several persons to one passenger.—*COCKBURN, C.J.*—You must make out a contract by which the stable-boys are always to have the ticket ready to be produced; here the contract was that the master should take and keep the tickets and the boys to travel with the horses in the horse-box.]

It must be admitted that the fare of the boys was paid, and a ticket provided for them; but it is submitted that it was the duty of the master to have handed the tickets over to the boys, so that they could have produced them when required.

[*COCKBURN, C.J.*—Was it not the duty of the company's servant to go to the master for the tickets under the circumstances? The company by dividing the train put it out of their power to inquire of the master.]

No doubt, if the train had not been divided, the present difficulty would not have arisen; but since it has arisen, the company are entitled to stand upon their by-law. Because a by-law is not always enforced by the company, it is no reason that they should entirely lose their power of putting it in force—*Rhymney Valley Company* (30 Law J. Rep. (N.S.) Chanc. 482, per the Master of the Rolls).

COCKBURN, C.J.—I think there should be no rule. It is unnecessary to determine whether, if the company had delivered a ticket to each stable-boy himself, and he had not produced his ticket when demanded, they could have turned him out of the train. I decide on the ground that the by-law is a by-law for the protection of the company, and if they seek to enforce it, they must keep themselves in a condition to enforce it; they have not done so, because they gave the tickets to the master for the boys, and the boys were to go by the same train. But the company unfortunately broke their contract in not sending the boys with their master. It was a misfortune that the master and boys were separated, but neither are the boys or the master to be responsible for that; and the company have failed to bring themselves within the by-law, in that they have not given a ticket to each person.

MELLOR, J., SHEE, J. and LUSH, J. concurred.

*Rule refused.*¹

(1) See *Dearden v. Townsend*, 35 Law J. Rep. (N.S.) M.C. 50.

[IN THE QUEEN'S BENCH.]

Nov. 4, 1865.

ASHER AND WIFE v. WHITELOCK.

85 L. J. Q.B. 17; L.R. 1 Q.B. 1; 11 Jur. N.S. 925; 13 L. T. 254; 14 W. R. 26.

Referred to *Paine v. Jones* [1874] E. R. A.; 43 L. J. Ch. 787; L. R. 18 Eq. 320; 30 L. T. 779; 22 W. R. 837 (V.C.); *Mussammatt Sundar v. Mussammatt Parbati*, L. R. 16 Ind. App. 186 (P.C.); *Perry v. Clissold*, [1907] E. R. A.; 76 L. J. P.C. 19; 1907 A.C. 73; 95 L. T. 890 (P.C.).

Ejectment—Limitation Act, 3 & 4 Will. 4. c. 27. s. 2.—Encroachment—Possession for less than Twenty Years—Devisable Interest—Estoppel.

EJECTMENT. ESTOPPEL.—*The mere possession of land for less than twenty years confers upon the possessor a prima facie heritable and devisable interest in fee therein good against all the world, but the true owner of the soil, and the devisee in fee of such possessor, may maintain ejectment against any person whose title is founded merely on subsequent adverse possession for less than twenty years.*

Semble—Where a widow takes under a devise durante viduitate, with remainder to another in fee, and marries, her husband, who enters after the marriage into possession of the same land and continues to occupy it with her, is estopped from denying the title of the devisor to the land.

This was an action of ejectment brought to recover possession of a cottage and garden, tried, at the Bedfordshire last Lent Assizes, before Cockburn, C.J., when a verdict was taken for the plaintiffs, with leave for the defendant to move to enter a verdict for him as to the whole or part of the land in dispute.

The plaintiff, Rebecca Asher, was the wife of the co-plaintiff John Asher, and was heir-at-law to Mary Ann Williamson. Mary Ann Williamson was the daughter of Thomas Williamson. Thomas Williamson in 1842 inclosed a piece of land from the waste of the manor¹ adjoining the highway at Keysoe, in Bedfordshire. About 1850 he built a cottage upon it and took in another piece adjoining. He lived in this cottage and occupied the land until 1860, when he died. He left a will, by which he devised the cottage and land to his wife *durante viduitate*, and after her death or second marriage, which should first happen, to his only child, Mary Ann Williamson, in fee. The widow continued to occupy the cottage and land after the testator's death, and the daughter lived with her. The widow subsequently married the defendant in April, 1861, who thereupon went to live in the cottage and had since continued to live there. The daughter lived in the cottage with them till she died, in February, 1863, being then eighteen years of age. Her mother, the defendant's wife, died in May, 1863.

Merewether, on a previous day, had obtained a rule, pursuant to the leave reserved at the trial, calling upon the plaintiffs to shew cause why the verdict obtained for them should not be set aside and a verdict entered for the defendant instead thereof, on the ground that no title in the plaintiff, Rebecca Asher, was shewn to either portion of the land inclosed. Against this rule

Markby now shewed cause.—Upon this rule the plaintiff is entitled to recover for the whole of the land, if he can shew that he is entitled to either portion. The only difference as to the rights respectively affecting them is, that as to the parcel first inclosed the owner of the soil is barred by twenty years' possession (3 & 4 Will. 4. c. 27. s. 2), and as to the latter he may yet come in. The defendant relies on his possessory title, and the question is, whether

(1) There was some evidence at the trial of the ownership of the manor, which *Markby*, for the plaintiffs, objected to as insufficient, but Cockburn, C.J. ruled to be sufficient for that purpose; but no mention was made of this in the argument.

a person dying in possession of land to which his only title is possession for less than twenty years, has any power to choose his successor, or whether the succession must be left to chance. *Doe d. Pritchard v. Jauncey* (8 Car. & P. 99) is an authority in favour of the plaintiffs. In that case the father inclosed a piece of land, occupied it for seventeen years, and then died intestate. The widow occupied it for twenty-nine years after his death, conveyed it in fee to the defendant, and died. The lessor of the plaintiff was the son of the person who inclosed it, and the jury found that the widow occupied it by his assent, and the plaintiff as heir-at-law was held entitled to recover from the defendant, notwithstanding that his ancestor's title was founded only on seventeen years' possession of the land before his death. The ruling, it is true, in that case, was only at Nisi Prius; but it has never been questioned.

[COCKBURN, C.J.—It is clear that under the old law of disseisin the disseisor during his lifetime might be entered upon by the disseisee; but upon the death of the disseisor such right of entry was tolled, and the disseisee was put to his writ of right against the heir of the disseisor. Applying that to the present case, there would seem to be a heritable right, and if there is a heritable right, there would therefore be a devisable one.]

Just so. *Doe d. Carter v. Barnard* (13 Q.B. Rep. 945; s. c. 18 Law J. Rep. (N.S.) Q.B. 306) is consistent with this view. There the plaintiff was nonsuited. Her title was founded on her husband's possession of the land for eighteen years before and up to his death, and her own possession for thirteen years subsequent to that event and until a short time before the action. The defendant had entered as mortgagee of the owner of the land, whose title was said to be barred by being kept out of possession during the possession of the husband, and the lessor of the plaintiff after him. It was, no doubt, there held that the lessor of the plaintiff could not recover, but that was because she could not tack her own possession on to her husband's so as to give her a title; and the reason given was, that she was unable in fact to connect her possession with that of her husband by descent, will or conveyance, and that when she proved the possession of her husband and that he died in possession leaving children, it was *primâ facie* evidence that the right in which she claimed had passed to his heir, against which her own possession for thirteen years could not prevail, and so she proved the title under which she claimed to be in another. This reasoning, therefore, shews that less than twenty years' interest confers a heritable and devisable title.

Next, the defendant was estopped in this case from denying the plaintiff's title. He took possession under the will, inasmuch as he entered and occupied by reason of his marriage with the widow of the devisor and of her previous possession thereunder, and therefore he cannot set up a title inconsistent with the will—*Doe d. Willis v. Birchmore* (9 Ad. & E. 662; s. c. 8 Law J. Rep. (N.S.) Q.B. 108). He also referred to *Andrews v. Hailes* (2 El. & B. 349; s. c. 22 Law J. Rep. (N.S.) Q.B. 409).

Merewether, in support of his rule.—The defendant is not estopped, inasmuch as he did not enter under the will, but upon his marriage with the widow he took independent possession of the cottage along with her in spite of the will. The daughter's title under the will accrued at the moment of the marriage, and she might have claimed, and therefore his entry into the cottage afterwards was in spite of her.

[SHEE, J.—The daughter was living in the house with them: was there not, therefore, continued possession under the will?]

She went to live with them, but did not take possession under the will, and the defendant's possession was independent of her.

[COCKBURN, C.J.—The widow kept actual possession after the marriage, as she had before it. Her possession was rightful before, but became wrong after. She was estopped at the time of her marriage, and she would not be the less estopped after marriage has put an end to her estate. The husband got actual possession with her; then how can he be less estopped than she was?]

It is submitted that the husband did not get possession with the wife, but independently of her and the will.

[COCKBURN, C.J.—There was nothing to disconnect the possession of the wife from that of the husband; and then, it seems to me, there is this dilemma, either the possession of the husband and the wife is not adverse to the devise in fee, and so there is a tenancy at will, and the husband is estopped, or it is adverse, and then we have it that a person in possession has died and devised the land to the daughter, through whom the plaintiff claims, which shews a better title than the defendant's.]

Next, the devisor must have had an exclusive right as against all the world to enter and possess the land at the time of his death in order to give him a devisable interest. It is submitted that if a person gets open possession of land (whether for one year or for nineteen years makes no difference), he cannot be ejected by a person who can only shew a right by prior possession for less than twenty years.

[COCKBURN, C.J.—So that a person who has entered for one year upon a prior and lawful possessor, except as against the real owner, for nineteen years, can, by keeping possession for that one year, at the end of the year bar both the real owner and the other person?]

Yes. *Dixon v. Gayfere* (No. 1) (17 Beav. 421; s. c. 23 Law J. Rep. (N.S.) Chanc. 421) is relied upon by the defendant in support of the proposition that mere possession against the true owner for a period of less than twenty years confers no right to the land which the possessor can enforce against a person who subsequently gets into possession without title. The Master of the Rolls there puts the case of a series of trespassers, each adverse to one another and to the rightful owner, who take and keep possession of an estate in succession for various periods, each less than twenty years, but exceeding in the whole twenty years, and says that at law, no doubt, "if the legal estate could not be shewn to be in either of them, the last possessor—that is, the person actually in possession—would hold the property, not by reason of his own title, but by reason of the infirmity of the title of the claimants."

[COCKBURN, C.J.—The decision in that case may be right in equity, but is wrong in law.]

In *Doe d. Hughes v. Dyeball* (Moo. & M. 346) the lessor of the plaintiff shewed only one year's possession, and that was deemed sufficient to support an ejectment against a person who had come in and turned him out.

COCKBURN, C.J.—I am of opinion that this rule must be discharged. The defendant is in a dilemma; either the possession was adverse to the devisee or it was not. If the possession was not adverse to the devisee under the devise of the inclosed land, then it was a continuance of the possession of the widow, which she should have given up upon her marriage; and in that case she and her husband both became tenants of the devisee, and estopped from denying her title. But if the possession was adverse to the rights of the devisee, then was that possession of such a nature as to operate to divest her right? In order to shew that her right is destroyed, Mr. Merewether must contend that once possession is acquired against the rightful owner, it does not operate to keep out the rest of the world, except the owner. I take it to be established by authority that possession is good against all the world except the person who can shew a better title than the one in possession. *Doe v. Dyeball* (Moo. & M. 346) shews that possession, even for a year, is sufficient against a mere subsequent possession. The whole law of disseisin was founded upon the principle that the disseisin gives title to the disseisor against all the world but the disseisee. Supposing the original possessor had been expelled by having a person take possession, and saying that he (the original possessor) had no right to take this land, and that he (the new comer) would take it from him, the man originally taking possession, if he were turned out, could have maintained ejectment; then how is the state of a devisee different from his? The devisor devises to his wife during her widowhood, and to the daughter in fee upon the marriage

of the widow. The daughter, therefore, takes upon the latter event. The devisor had a right to devise that interest which the law gives him against all the world save the true owner. The defendant, however, intercepts the rights of the devisee, and gets into possession. The defendant and the widow take possession, but as they could not have interfered with the devisor's possession in his lifetime, so they could not with the daughter's in her lifetime. She dies, but her heir has the same right to recover that she had; therefore, I think, the action is well brought, and the plaintiff entitled to recover. The devisor, if he had been alive, might have brought ejectment, and as the right to take possession passed to the daughter, that right passes also to her heir, the defendant having acquired no right to possession. I think there should be no breaking in upon a sound salutary provision such as that which protects possession from disturbance. It is well known that encroachments on the waste of a manor have been made by poor people are permitted by the lord of the soil to occupy without interference; we cannot permit it to be asserted that, by law, it is in the power of any person who may so choose to deprive those left by the lord in possession.

MELLOR, J.—I am of the same opinion. Possession is *primâ facie* evidence of seisin in fee. The possession here is the possession of the disseisor. I quite agree with my Lord that it would be dangerous to allow every one to require a man to shew a possession for twenty years. The law gives credit to the first possession—*Doe v. Dyeball* (Moo. & M. 346). The person who takes, therefore, under the devisor need not shew a twenty years' possession; it is enough to shew simple possession. In *Doe d. Carter v. Barnard* (8 Car. & P. 99) the lessor of the plaintiff, in shewing her own title, shewed that some one else had a better title. Again, in an action of ejectment, no one claiming under a will need do more than shew the will and a receipt for rents, and need not shew a reception of rents for twenty years. The defendant, therefore, in this case, cannot set up a title against the heir-at-law of the daughter. I agree with my Lord on the importance of keeping up the protection to quiet possession.

LUSH, J. concurred.

Rule discharged.

[IN THE QUEEN'S BENCH.]

Nov. 4, 1865.

EDMUNDS v. BUSHELL AND JONES.

35 L. J. Q.B. 20; L. R. 1 Q.B. 97; 12 Jur. N.S. 332.

Not applied, *In re Adansovia Fibre Co.; Miles's claim*, [1874] E. R. A.; 43 L. J. Ch. 732; L. R. 9 Ch. 635; 31 L. T. 9; 22 W. R. 889 (L. JJ.). Referred to, *Yorkshire Banking Co. v. Beatson*, [1879] E. R. A.; 48 L. J. C.P. 428; 4 C.P. D. 204: affirmed [1880] E. R. A.; 49 L. J. C.P. 380; 5 C.P. D. 109; 28 W. R. 879 (C.P. D.). Referred to, *Watteau v. Fenwick*, [1893] 1 Q.B. D. 346; 56 J. P. 839; 67 L. T. 831; 41 W. R. 222 (Q.B.D. Div.).

Principal and Agent—Partners—Ostensible Principal—Liability of Principal for Acts of Agent.

PRINCIPAL AND AGENT.—*The principal in a business who holds out an agent to the world as ostensible principal, and carries on the business under the management of and in the name of such agent, is bound by all such acts and contracts of the agent as are incidental to the ordinary conduct of the business, and such liability as to the rest of the world cannot be restricted by any private arrangement between them.*

This was an action brought by the plaintiff Edmunds, as one of the

registered public officers of the Birmingham and Midland Banking Company, against Joseph Bushell and Charles Jones, to recover 184*l.* 7*s.*, for principal and interest due on a bill of exchange, dated the 1st of February, 1865, at four months, for 184*l.* 2*s.*, drawn by one Britten and accepted by "Bushell & Co.," and indorsed by Britten to one Taylor, and by Taylor, a customer of the bank, to the banking company. The writ of summons was indorsed according to the Common Law Procedure Act, 1852, and the Summary Procedure on Bills of Exchange Act, 1855. The defendant Bushell did not appear to the writ, and judgment was accordingly signed by the plaintiff against him. The defendant Jones obtained leave to appear and defend the action, and pleaded a denial of the acceptance of the bill sued upon.

The action came on to be tried, at Croydon, at the last Summer Assizes, before Crampton, J.

It appeared that the defendant Jones was a straw-hat manufacturer at Luton, in Bedfordshire, and that he had a branch establishment in London, under the name of "Bushell & Co." Bushell was employed by Jones as his manager of the branch establishment, under an agreement made between them, and dated the 22nd of December, 1863; which agreement stated that,— "Whereas, for the considerations hereinafter mentioned, the said Joseph Bushell agrees with the said Charles Jones, that he, the said Joseph Bushell, shall and will henceforth be and so continue until this agreement shall be determined by either party, by notice as hereinafter mentioned, the manager of the said Charles Jones in the branch establishment of his trade and business of a straw hat and bonnet manufacturer, to be henceforth carried on by the said Charles Jones under the name or style of Bushell & Co., upon certain premises lately taken by him, and known as No. 36, Milk Street, Cheapside, London, and shall and will during the continuance of this agreement give up his whole time and attention to the same, in managing, conducting, superintending and improving the same, to the utmost of his power and ability; and also shall and will during the continuance of this agreement do and perform all such acts, matters or things in the said trade or business as the said Charles Jones shall from time to time direct; and also shall and will during the continuance of this agreement be just and faithful to the said Charles Jones in all his business dealings and transactions whatsoever, and shall and will keep such books of account as shall be necessary, wherein he shall fairly write and enter all monies received and paid, and all goods in the said trade which shall be bought or received, sold or delivered out, upon credit or otherwise, and the price and prices at which the same shall be bought or sold, and all other matters and accounts which shall be necessary to manifest the state of the said trade, which said books or book of account shall always remain and be kept in the usual place of carrying on the said trade; and shall and will, whenever the monies received by him in respect of the said trade or business shall exceed in amount the sum of 5*l.*, forthwith pay the same into the London and County Bank, London, to the credit of the said Charles Jones or otherwise, as he may from time to time direct. And in consideration of the agreement hereinbefore contained on the part of the said Joseph Bushell, he, the said Charles Jones, agrees that he shall and will, during the continuance of this agreement, find and provide the stock-in-trade and sufficient capital necessary for the due and proper carrying on of the said trade or business, and also shall and will pay to the said Joseph Bushell every quarter during the continuance of this agreement, or in the event of the determination of this agreement during the currency of any quarter than a proportionate part thereof, so much money by way of remuneration for his services as will amount or be equivalent to one-half part of the clear gains or profits arising from the said trade or business so to be carried on by the said Joseph Bushell as manager, after deducting the rent of the said premises, 5*l.* per centum per annum interest on the capital from time to time employed by the said Charles Jones therein, and all other debts or dues which shall be paid or payable in respect of the said trade or business, and also all losses and damages which shall happen to the said trade by reason

of bad debts or otherwise. And it is hereby declared and agreed by and between the parties hereto, that it shall be lawful for either of them, the said Charles Jones or Joseph Bushell, at any time to determine this agreement, upon giving unto the other of them three calendar months' notice thereof in writing; and on the expiration of the said three months and the payment of what shall be due unto the said Joseph Bushell, every article, clause and agreement herein-before mentioned shall cease and be void, anything herein contained to the contrary in anywise notwithstanding."

Bushell's name was over the door of the branch establishment. Bushell had no authority from Jones to accept bills on his behalf. Prior to the acceptance sued on, it had been brought to the knowledge of Jones, in July, 1864, that bills had been accepted by Bushell for payment of goods supplied to him, and Jones then remonstrated with Bushell for accepting bills without authority, and Bushell promised Jones not to do so for the future.

The banking company when they took the bill had no knowledge of the defendants or their mode of carrying on business. The acceptance of the bill now sued on was in Bushell's handwriting. It did not appear whether any consideration had been given for the bill originally, but the banking company had given full consideration to Taylor, who indorsed the bill to them.

A verdict was found for the plaintiff for 185*l.* 17*s.*, with leave to the defendant Jones to move to set aside that verdict and to enter a verdict for himself, if there was no evidence upon which the jury could reasonably find a verdict for the plaintiff.

J. Brown now moved accordingly.—Jones is in the position of a person who has held out Bushell as a partner; but his liability cannot be more than that of a nominal partner. The plaintiff was a total stranger to Bushell & Co. He was the public officer of the bank, and took the bill in payment of a debt from Taylor, a customer of the bank. But a nominal partner's liability to the responsibilities of a real one is imposed, in order to prevent those persons being defrauded or deceived who may deal with the firm, of which he holds himself out a member, on the faith of his apparent responsibility; but where the person dealing with the firm has never heard of him as a component part of it, that reason no longer applies—*Waugh v. Carver* (1 Smith's Lead. Cas. (5th edit.), 818, 843). In *Young v. Axtell* (Ibid. 827), which was an action to recover 600*l.* and upwards for coals sold and delivered by the plaintiff, a coal-merchant, an agreement between the defendants was given in evidence, stating that the defendant, Mrs. Axtell, had lately carried on the coal-trade, and that the other defendant did the same; that Mrs. Axtell was to bring what customers she could into the business, and that the other was to pay her an annuity, and also 2*s.* for every chaldron that should be sold to those persons who had been her customers, or were of her recommending. The plaintiff also proved that bills were made out for goods sold to her customers in their joint names; and the question was, whether Mrs. Axtell was liable for the debt. Lord Mansfield said, "he should have rather thought that Mrs. Axtell would be liable, not on account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not at the time of dealing know that she was a partner, or that her name was used." But this ruling extends the nominal partner's liability too far. In *Dickenson v. Valpy* (10 B. & C. 140) Park, J. says, "If it could be proved that the defendant held himself out—not to *all the world*, for that is a loose expression—but to the *plaintiff himself*, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and *believed him* to be a partner, he would be liable." So a man cannot be charged as a partner by one who when he contracted was in ignorance that the nominal partner's name had been used, and so no false impression could have existed on his mind at all—*Carter v. Whalley* (1 B. & Ad. 11).

[COCKBURN, C.J.—The question here is one of agency, and not of nominal partnership. The defendant holds a man out in a position which gives him

credit which he would not otherwise have obtained. He puts Bushell in a position to carry on the business as ostensible owner: does not that impliedly give him authority, as respects the world, to do all things ordinarily necessary to carry on that business?]

COCKBURN, C.J.—I think that there should be no rule. The defendant carries on business at Luton, in Bedfordshire, and also in London, but in London in the name of Bushell & Co. At the same time he employs Bushell as his manager, who became, therefore, his agent, but who was held out to all the world as a principal in London. The case, therefore, comes within the principle that if you employ a person as agent, in some particular agency which involves a peculiar authority, you cannot divest him of that authority as against the world by a private arrangement. Bushell therefore must have whatever authority is incidental to the character of a principal in such a business as the defendants'. It is incidental to the character of that business to accept bills to meet liabilities incurred in the course of it; therefore, Bushell cannot, as to the rest of the world, be deprived of that authority by a private arrangement between Jones and Bushell.

MELLOR, J.—I am of the same opinion. I think this case differs from those where one member of a partnership holds out another as partner. Here the defendant Jones is owner of the business, and the question is, whether Bushell was allowed to appear to the world as a principal by the owner of the business. I think it would be dangerous to allow one person to carry on a business by and in the name of another, and at the same time permit him secretly to deprive that other of the authority necessary to carry on that business, and bind him as to the rest of the world.

SHEE, J.—I am of the same opinion. The leave to move in this case is a special leave. I think there was reasonable evidence to sustain a verdict for the plaintiff, and by so holding, I do not think that we are in danger of discrediting the rule which requires that an agent through whom it is sought to make the principal liable must be shewn to have been held out by the principal as having such authority.

Rule refused.

[IN THE EXCHEQUER CHAMBER.]

(*Appeal from the Court of Queen's Bench.*)

Nov. 27, 1865.

MORGAN v. THE VALE OF NEATH RAILWAY COMPANY.*

35 L. J. Q.B. 23; 5 B. & S. 736; L. R. 1 Q.B. 149; 13 L. T. 564; 14 W. R. 144: affirming, 33 L. J. Q.B. 260; 5 B. & S. 570 (Q.B.).

Referred to, *Tunney v. Midland Railway Co.*, 1866, L. R. 1 C.P. 291; 12 Jur. N.S. 691 (C.P.); *Feltham v. England*, [1867] E. R. A.; 36 L. J. Q.B. 14; L. R. 2 Q.B. 33; 15 W. R. 151 (Q.B.). Followed, *Warburton v. G.W.R.*, [1867] E. R. A.; 36 L. J. Ex. 9; L. R. 2 Ex. 30; 15 L. T. 361; 15 W. R. 108 (Ex.). Referred to, *Smith v. Steele*, [1875] E. R. A.; 44 L. J. Q.B. 60; L. R. 10 Q.B. 125; 32 L. T. 195; 23 W. R. 388 (Q.B.); *Lavell v. Howell*, [1876] E. R. A.; 45 L. J. C.P. 387; 1 C.P. D. 161; 34 L. T. 183; 24 W. R. 672 sub nom. *Lovell*, 1 C.P. D. & 24 W. R.). Followed, *Woodley v. Metropolitan District Railway*, [1877] E. R. A.; 46 L. J. Ex. 521; 2 Ex. D. 384; 36 L. T. 419 (Ex. D.). Referred to, *Swainson v. North-Eastern Railway*,

* *Coram*, Pollock, C.B., Erle, C.J., Willes, J., Bramwell, B., Channell, B., Byles, J., Keating, J. and Pigott, B.

[1878] E. R. A.; 47 L. J. Ex. 372; 3 Ex. D. 341; 38 L. T. 201; 26 W. R. 413 (Ex. D.). Followed, *Charles v. Taylor*, 1878, 3 C.P. D. 492; 38 L. T. 773; 27 W. R. 32 (C. A.). Referred to, *Murphy v. Wilson*, [1883] E. R. A.; 52 L. J. Q.B. 524; 48 L. T. 788 (Q.B. Div.); *The Petrel*, [1893] E. R. A.; 62 L. J. P. 92; [1893] P. 320; 70 L. T. 417 (P.). Applied, *Coldrich v. Partridge, Jones & Co.*, [1909] E. R. A.; 78 L. J. K.B. 452; [1909] 1 K.B. 530; 100 L. T. 314 (C. A.): affirmed, [1910] E. R. A.; 79 L. J. K.B. 173; [1910] A.C. 77; 101 L. T. 835 (H.L.).

Master and Servant—Negligence of Fellow Servant—Common Employment.

MASTER AND SERVANT.—*The rule which exempts a master from liability to his servant for injury arising to such servant from the negligence of his fellow servant employed with him for a common object, is not confined to a common immediate object, but embraces all cases where the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which are to be considered in his wages.*

A carpenter employed to do work for a railway company, and amongst other things paint a shed at their station, is so necessarily brought into contact with the traffic of the line that risk of injury from the carelessness of porters employed to turn carriages on the turn-tables on the line is naturally incident to such an employment and within the rule.

The facts of this case were shortly these: The plaintiff was employed by the defendants as their servant to do work as a carpenter and joiner on their station whilst the railway traffic was being carried on in it by the servants of the defendants. In the course of painting an engine-shed at the station the plaintiff got upon a ladder which was placed near to one of the turn-tables. The servants of the defendants who were engaged in shifting a carriage, allowed it to project so far beyond the turn-table that in turning it the end of the carriage struck against the ladder, and the plaintiff was thrown off and injured. Those who were shifting the carriage were guilty of negligence, and there was no contributory negligence on the part of the plaintiff.

At the trial the verdict in the action was directed for the defendants, with leave to move to enter a verdict for the plaintiff for 250l., on the ground that there was no common employment between the defendants' servants and the plaintiff, such as to exempt the defendants from liability.

The rule to enter a verdict for the plaintiff was discharged by the Court of Queen's Bench.¹

Macnamara (*Hughes* with him), for the appellant, the plaintiff in the action.—The plaintiff would be entitled by the general rule to recover against the defendants for the injuries he has sustained if it were not for the exemption grafted on the general proposition that in the absence of personal negligence on the part of the master he is not liable for an injury sustained by one servant through the negligence of a fellow servant engaged in a common work or employment with him. The question in this case therefore is, whether the plaintiff and the servants employed 'in turning the carriage on the turn-table were engaged in a common work or employment. In order to define common work or employment, it is necessary to look for the reason of the exception, which is that the servant contracts with the master with reference to the risks he knows or expects to be involved in the service which he undertakes. If he suffers injury from one of the risks he could have known or contemplated on making the contract, he has no cause of action against his master, in the absence of personal negligence in the latter; but if his injury arises from a cause he could not have anticipated, he ought not to be deprived of his remedy against his master. In all the cases where the master has been held

(1) See the report of the argument and decision below, 33 Law J. Rep. (N.S.) Q.B. 260.

exonerated the servants have clearly been engaged in a common work. In *Bartonshill Coal Company v. Reid* (3 Macq. Scotch App. Cas. H.L. 295) Lord Cranworth says, "The driver and guard of a stage-coach, the steersman and rowers of a boat, the workman who draws the red hot iron from the forge and those who hammer it into shape, the engineman who conducts a train and the man who regulates the switches or the signals, are all engaged in a common work. And so in this case, the man who lets the miners down into the mine in order that they may work the coal, and afterwards brings them up together with the coal which they have dug, is certainly engaged in a common work with the miners themselves. They are all contributing directly to the common object of their common employer in bringing the coal to the surface." In *The Bartonshill Coal Company v. M'Guire* (3 Macq. Scotch App. Cas. H.L. 308) Lord Chelmsford said, "The Lords of Session in the case of Reid decided that Shearer and the deceased were not collaborateurs, because Shearer had the superintendence of the machinery for lowering and raising the men and the materials for the mine. A superintendence which took his duties altogether from common employment with the men below, and the deceased's business was to excavate coal from the pit, a line of business entirely different from that of the engineman. But, my Lords, it appears to me that the deceased and Shearer were engaged in one common operation, that of getting coals from the pit. The miners could not perform their part unless they were lowered to their work, nor could the end of their common labour be attained unless the coal which they got was raised to the pit's mouth, and, of course, at the close of their day's labour, the workmen must be lifted out of the mine. Every person who engaged in such an employment must have been perfectly aware that all this was incident to it, and that the service was necessarily accompanied with the danger that the person intrusted with the machinery might be occasionally negligent and fail in his duty." Lord Cranworth, at page 277 of *Reid's case* (3 Macq. Scotch App. Cas. H.L. 295), says, that a servant undertakes the service with reference to the risks he runs from fellow-servants "engaged with him in the common occupation," or, as the same learned Lord calls it in page 282, "common work." And at page 284 he says, "When the workman contracts to do work of any particular sort he knows, or ought to know, to what risk he is exposing himself; he knows if such be the nature of the risk that want of care on the part of a fellow-workman may be injurious or fatal to him, and that against such want of care his employer cannot by possibility protect him." Again, at page 293, after considering *Gray v. Brassey* (15 Court of Sess. Cas. 2nd ser. 135) and the judgment of the Lord President therein, his Lordship said, "He considered the question to turn on what is to be regarded as common service. He intimated that it is not enough that the servant injured and the servant causing the injury should be servants of the same master—they must be employed on the same work; and he observed, truly, that if a gentleman's coachman were to drive over his gamekeeper the master would be just as responsible as if the coachman had driven over a stranger. . . . The opinions thus enunciated are, I conceive, in strict accordance with the doctrine of the English cases."

[POLLOCK, C.B.—Do you say that the gamekeeper would have an action against his master, supposing that on the occasion of a shooting party, as he went in the drag with the party to the covers, the coachman who drove them drove so negligently that the gamekeeper was thrown out and driven over?]

On the cases, it is submitted, he would, unless he were a volunteer, or it was part of his employment.² In *Maguire's case* (3 Macq. Sc. Cas. 300)

(2) From the following case, which has occurred in America, it would seem that no action would lie in such a case as that put by the Lord Chief Baron. In *Gilshannon v. the Stony Brook Railroad Corporation* (10 Cush. Rep. 228) (1852), the plaintiff was a common labourer employed in repairing the defendants' road-bed, at a place several miles from his residence. Each morning and evening he rode with other labourers to and from the place of labour on the gravel train of the defendants. This was done with the consent of the company and for mutual

Lord Chelmsford, after referring to the prior cases on this subject, says, at page 307 of the report, "In the consideration of these cases it did not become necessary to define with any great precision what was meant by the words 'common service' or 'common employment,' and perhaps it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case to ascertain whether the servants are fellow-labourers on the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him." At page 311 of the same judgment he comments on *M'Naughton v. the Caledonian Railway Company* (19 Court. of Sess. Cas. 271), and says, that case "may be sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work; the deceased being a joiner or carpenter who, at the time of the accident, was engaged in repairing a railway carriage, and the persons by whose negligence his death was occasioned, the engine-driver and the person who arranged the switches." In *M'Naughton v. the Caledonian Railway Company* (19 Court of Sess. Cas. 271), M'Naughton was employed as a carpenter or joiner in repairing a railway carriage on a siding, and was killed by a collision caused by an engine driving violently into the siding, and the defendants were held liable. The judgment of the Lord Ordinary in the above case is given in *Smith's Master and Servant*, 2nd edit. 145: "It may be that the two persons, viz. the wrongdoer and the injured, though both at the time servants of one master, are engaged in different operations and in distinct departments of work. A dairymaid is bringing home milk from the farm, and is carelessly driven over by the coachman. A painter or slater is engaged at his work on the top of a high ladder, placed against the side of a country-house, and is injured by the carelessness of the gardener, who wheels his barrow against the ladder and upsets it. . . . In such and similar cases it could hardly be contended that the rule laid down in *Priestly v. Fowler* (3 Mee. & W. 1; s. c. 7 Law J. Rep. (N.S.) Exch. 42) would apply." It is submitted, therefore, in this case that whilst the carpenter may know the risks of bad scaffolding, the danger of tools and the risks he runs from the carelessness of other carpenters, he can know nothing of turn-tables, or when or how they should be used or the dangers attaching to them. The railway porters may know all about such matters, but the carpenter cannot be expected to know anything about them. Nor, in fact, is there anything in common between the work of a carpenter in or about the sheds or platform and that of the porters who are engaged in working the trains and attending to the passengers. Neither is the one work a continuance of the other, as in the case of the miners and the engineman employed to take them up and down the pit. The carpenter acts without and independently of the porter, and *vice versa*.

[POLLOCK, C.B.—The railway is a large concern, and, for the purpose of

convenience; no compensation being paid directly or indirectly by the labourers for the passage, and the company being under no contract to convey the labourers to and from their work. While thus on their way to their work on one occasion a collision took place with a hand car on the track, through the negligence of those having charge of the gravel-train, and he was thrown off and run over by the gravel-train, for which injury the action was brought; and it was held, that the defendants were not liable, and the nonsuit of the plaintiff stood. And Mr. Justice Dewey, in delivering judgment, says, "How does this case differ from that suggested at the argument of the counsel for the defendants, who supposed a case where the business for which the party is employed is that of cutting timber or standing wood, and the servant receives an injury in his person on the way to the timber lot by the overturning of the vehicle in which he is carried by the negligence or careless driving of another servant? There is no liability on the part of the master in such a case."

conducting its business, the carpenter's work and the iron work must be kept in good order.]

He referred to *Priestly v. Fowler* (3 Mee. & W. 1; s. c. 7 Law J. Rep. (N.S.) Exch. 42), *Hutchinson v. the York, Newcastle and Berwick Railway Company* (5 Exch. Rep. 343; s. c. 19 Law J. Rep. (N.S.) Exch. 296), *Wigmore v. Jay* (Ibid. 354; s. c. 19 Law J. Rep. (N.S.) Exch. 300), *Waller v. the South-Eastern Railway Company* (2 Hurl. & C. 102; s. c. 32 Law J. Rep. (N.S.) Exch. 205). In *Holmes v. Clark* (31 Law J. Rep. (N.S.) Exch. 356; s. c. 2 Hurl. & C. 102) Mr. Justice Byles, in his judgment, asks—"Why may not the master be guilty of negligence by his manager or agent whose employment may be so distinct from that of the injured servant that they cannot with propriety be deemed fellow servants?" *Scarle v. Lindsay* (11 Com. B. Rep. N.S. 429; s. c. 31 Law J. Rep. (N.S.) C.P. 106) was an action by the third engineer of a steam-vessel against the owners for injuries he suffered when working at a winch, in consequence of the handle of the winch, by which the screw was worked, coming off through the want of a nut or pin to secure it, which the chief engineer ought to have seen in its place. He was nonsuited, and the nonsuit upheld; but there Mr. Justice Keating, in his judgment, lays stress upon the fact that the plaintiff was an engineer and knew the danger of working the winch in an imperfect state.

[BRAMWELL, B. referred to *Wiggett v. Fox* (11 Exch. Rep. 832; s. c. 26 Law J. Rep. (N.S.) Exch. 188). Your contention would narrow "common object" to common immediate object.]

ERLE, C.J. delivered the judgment of the Court.—We think that the judgment of the Court below should be affirmed. The plaintiff was in the employ of the defendants to do the carpenter's work. The wrongdoers were porters in the employ of the defendants, and engaged in moving a carriage on a turn-table, and through their negligence in so doing, pulled down a ladder placed near to it and against a shed, upon which the plaintiff was standing at his work.

We think they were both engaged in a common employment. They were doing work in common, for the common object or purpose of managing the traffic of the railway. The illustration put during the argument, of the painter being employed in painting the turn-table, is apt. The master would not in that case, I think, be liable. We approve of the language of Mr. Justice Blackburn, in delivering his judgment in the Court below, where he says, "There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. I think that whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment and within the rule." The cases upon this subject are very numerous, and have been closely examined. The present case is within the rule exempting the master from liability.

POLLOCK, C.B.—I am only desirous to add, that it appears to me that if we were to decide this case in favour of the plaintiff, we should open the gates to a flood of litigation. In every large manufactory, where a number of workmen are employed in different departments of the same business, we should have it split up into any number of objects, although they all had the one common purpose. Thus, in one manufactory the making of screws would be called one object and the doing woodwork another, and so on; and then a person employed in a superior department would be said to have nothing to do with the porter in the same establishment.

Judgment affirmed.

[IN THE HOUSE OF LORDS.]

July 1, 4, 1864; Feb. 20, July 6, 1865.

HARWOOD AND ANOTHER (*executors of Charles Wild, deceased*), v.
THE GREAT NORTHERN RAILWAY COMPANY.35 L. J. Q.B. 27; 11 H. L. C. 654; 11 E. R. 1488; 12 L. T. 771;
14 W. R. 1; 2 B. & S. 222.

Applied, *Jordan v. Moore*, [1866] E. R. A.; 35 L. J. C.P. 268; L. R. 1 C.P. 624; 14 W. R. 769 (C.P.). Referred to, *Penn v. Bibby*, [1867] E. R. A.; 36 L. J. Ch. 455; L. R. 2 Ch. 127; 15 L. T. 399; 15 W. R. 208 (L.C.); *White v. Toms*, [1868] E. R. A.; 47 L. J. Ch. 207; 17 L. T. 348 (V.C.); *Lane Fox v. Kensington Electric Lighting Company*, [1892] 3 Ch. 424; 67 L. T. 440 (C. A.).

Patent—Infringement—Novelty.

PATENT.—*Letters patent were granted to W. for an alleged invention of fishes and fish-joints, for connecting the ends of rails used on railways. The fishes were made of iron, with a groove on the outer surface, for the purpose of preventing the square heads of the bolts passing through them and the rail from turning round, and also for the purpose of procuring greater strength with an equal weight of metal than could have been obtained from a fish of the same thickness throughout. Before these letters patent had been granted, grooved iron plates with bolts let into the grooves, had been used for the purpose of fastening timbers placed vertically upon one another, or placed horizontally side by side. In one case of a bridge, a channelled plate with bolts had been used for the purpose of fishing a scarf-joint where the ends of two timbers met together:—Held, affirming the judgment of the Exchequer Chamber, that there was no novelty in the patent, and therefore that it was bad; that the supposed invention had been in use previously to the date of the patent, not only in the case of the bridge but for other purposes, and that a patent could not be upheld for the mere application of a well-known mechanical contrivance to a purpose which was analogous to the manner or to the purpose in or to which it had been hitherto notoriously used or applied.*

This was an appeal, by the plaintiffs in the action, against the judgment of the Court of Exchequer Chamber (2 Best & S. 222; s. c. 31 Law J. Rep. (N.S.) Q.B. 198), reversing the judgment of the Court of Queen's Bench (2 Ibid. 194; s. c. 29 Law J. Rep. (N.S.) Q.B. 193), and ordering that a verdict should be entered for the defendants.

The action was brought for the infringement of letters patent granted to Charles Wild, deceased, on the 16th of March, 1853, for an invention intituled "Improvements in Fishes and Fish-joints for connecting the Rails of Railways."

The declaration alleged that Charles Wild was the true and first inventor of a certain new manufacture, that is to say, improvement in fishes and fish-joints for connecting the rails of railways; that letters patent had been granted to him, and that the defendants had infringed the same.

The defendants pleaded, first, not guilty; secondly, that Charles Wild was not the true and first inventor; thirdly, that he did not cause a specification to be filed particularly describing and ascertaining his invention; fourthly, that the supposed invention was not at the time of granting the alleged letters patent new as to the public use and exercise thereof; fifthly, that the said alleged letters patent were not for the sole working or making of any manner of manufacture within the realm, according to the true intent and meaning of the statutes in such case made and provided.

Issues were joined.

Charles Wild, by his specification, after describing the nature of his invention and the manner in which the same was to be performed, claimed as

the invention intended to be secured by his patent, first, the constructing fishes for connecting the rails of railways, with a groove adapted for receiving the heads of the bolts or rivets employed for securing such fishes, and the application of such fishes for connecting the rails of railways in manner therein described; secondly, the constructing fish-joints for connecting the rails of railways by means of fishes applied to the joints of divided or split rails, in manner therein described; thirdly, the constructing fish-joints for connecting the rails of railways, with fishes secured by three or more bolts and nuts or rivets, of which the central bolt or bolts, or rivet or rivets is or are of greater diameter than the extreme ones, as therein described; fourthly, the constructing fish-joints for connecting the rails of railways with grooved fishes fitted to the sides of the rails, and secured to them by bolts and nuts or rivets, and having projecting wings secured to and resting upon the sleepers or bearers, so as to support the rails by their sides and upper flanges, in manner therein described; fifthly, the constructing fish-joints for connecting the rails of railways with rails and fishes having the touching surfaces of one or both of them planed, as therein described.

The case came on to be tried, by a special jury, before Cockburn, C.J., at the Middlesex Sittings after Michaelmas Term, 1859. The jury found a verdict for the plaintiffs, with leave to the defendants to move to set it aside, and enter one for them instead thereof.

In Hilary Term, 1860, a rule was obtained, pursuant to the leave reserved, on the ground that there was no novelty in the invention, and also for misdirection by the learned Judge.

This rule was discharged by the Court of Queen's Bench on the 8th of May, 1860 (2 Ibid. 194; s. c. 29 Law J. Rep. (N.S.) Q.B. 193).

The defendants below (the respondents in this appeal) appealed to the Court of Exchequer Chamber, pursuant to the provisions of the Common Law Procedure Act, 1854, against the judgment discharging the rule.

The case upon that appeal was, so far as is material, as follows: The plaintiffs are the executors of the will of the late Charles Wild. The action is for an infringement by the defendants of a patent granted to the said Charles Wild.

Upon the trial, at Westminster, before Cockburn, C.J., and a special jury, the following facts and circumstances were proved or admitted:

By letters patent, dated the 16th of March, 1853, the sole privilege was granted to Charles Wild, his executors, administrators and assigns, of making, using, exercising and vending within the United Kingdom of Great Britain and Ireland, the Channel Islands and Isle of Man, an invention for "Improvements in fishes and fish-joints for connecting the rails of railways," for the term of fourteen years from the said 16th of March, upon the usual conditions.

In pursuance of the condition of the said letters patent, a specification was afterwards duly filed by the said Charles Wild, in the Great Seal Patent Office.

It was and is admitted by the defendants, that if the patent of the said Charles Wild be sustained, the invention patented was useful, and that the defendants had infringed the patent.

It was proved that before the date of the letters patent, the rails of the railways had been commonly and publicly connected by fishes and fish-joints, pieces of iron being attached to each side of the rail at the joints by means of bolts and nuts, as mentioned by the said Charles Wild at the commencement of his provisional specification. In some cases flat fishes had been used, which were placed one on each side of the rail, and were attached by means of round bolts passing through round holes in the fishes, and having round or cup-shaped heads and nuts. When this mode of construction was adopted, it was necessary that the heads of the bolts should be held by a spanner or some other separate instrument, while the nuts were being screwed on and off. In other cases the fishes were flat, but the holes in one of the pair of fishes were square instead of being round, and the bolts were made with square

necks under the head, so as to fit the square holes. And in other cases, one of the pair of fishes was cast with square recesses sunk about a quarter of an inch below the surface, and the bolts were made with square heads so as to fit into these recesses. The object of having the bolts with square necks fitting into square holes, and in having the bolts with square heads fitting into recesses, was to prevent the bolts from turning round when the nuts were being screwed on or off, and this object was effectually accomplished by each of these contrivances. But until the time of the patent of the said Charles Wild, fishes for connecting the rails of railways had never been made with a groove or recess in their outer or lateral surfaces so as to receive the square heads of the bolts and at the same time to render the fish lighter for equal strength or stronger for an equal weight of metal than a fish made of equal thickness throughout.

It was also proved that before the date of the letters patent, in the construction of several timber bridges of and over one or two lines of railway, constructed under the superintendence of the late Mr. Brunel, beams of timber had been laid horizontally one above the other, and fastened or bolted together with bolts and nuts; that horizontal bars or plates of iron were placed beneath and parallel to and in contact with the horizontal beams, and were also fastened or bolted by the same bolts and nuts, and that each of these bars or plates of iron was constructed with a groove in its under surface, which received the square or hexagonal heads of the bolts. It further appeared that this mode of construction was adopted in order to effect, and did effect the double purpose of strength, and of preventing the heads of these bolts from turning round. But in these bridges there were not joints to be fished by the bars or plates of iron, nor were there corresponding bars or plates of iron, nor were there corresponding bars or plates of iron above the horizontal beams; there was, therefore, no fishing in the proper sense of the word.

Upon this evidence relating to bridges the defendants contended that the use of grooved iron, as above-mentioned for the double purpose of preventing the heads of the bolts from turning round, and of giving increased strength, having existed publicly prior to the date of the letters patent, the invention of the said Charles Wild being only an application of the same contrivance as that above mentioned to fishing iron rails of railways, was not the subject of a patent. The Lord Chief Justice ruled that notwithstanding this evidence the said invention was or might be the subject of a patent, but he reserved leave to the defendants on the foregoing evidence to move the Court of Queen's Bench to enter a verdict for them if the Court should be of opinion upon such evidence that the said invention was not the subject of a patent.

The defendants further proved that in the year 1847 a certain timber bridge known as the "Hackney Bridge," had been constructed by the late Isambard Kingdom Brunel, for carrying the South Devon Railway over the Teign Canal. The span of this bridge was too great to be conveniently crossed by any single beam, and the bridge was constructed so as to have upon each side two horizontal longitudinal beams of timber, the ends of which met and were joined together in the middle of the bridge by scarf joints. Beneath these beams were placed transverse planks, which extended from side to side of the bridge, and constituted the flooring or roadway of the bridge, and immediately beneath the ends of the transverse planks were longitudinal bars of grooved iron, one upon each side of the bridge, running parallel to and under the longitudinal beams along the whole length of the bridge with the grooves or channels downwards. Bolts with square heads, as shewn by the models, passed through the grooved iron bars, transverse planking and the longitudinal beams; that is to say, from the lower to the upper side of the bridge, the square heads of the bolts resting in the grooves of the iron bars, and being prevented, or intended to be prevented from turning round within the grooves, and the nuts were screwed on to the upper ends of the bolts. The grooved iron was carried under each of the scarf-joints in the same manner as under the other portions of the beams; and above and immediately

over each scarf-joint, extending for a distance of about 18 inches beyond each end of the joint, and resting immediately upon the longitudinal beam, was a horizontal flat plate of iron 13 feet in length, through which the bolts above described also passed at that portion of the bridge.

The bars of iron along the underside of the bridge were so constructed and used with a groove for the double purpose of receiving the square heads of the bolts and preventing them from turning round, and of rendering the bars of iron lighter for equal strength, or stronger for equal weight of metal, and the bars as so constructed effectually accomplished this double purpose.

In answer to questions put to them by the Lord Chief Justice, the jury found:

First, that the channel irons upon the railway bridges, independently of the single instance of the Hackney bridge, were used before the plaintiff's patent for the double purpose of obtaining increased strength and preventing the bolt-heads from turning round, but that they were not used for the purpose of fishing.

Secondly, that the fastening of the scarf-joint of the longitudinal beam at the Hackney bridge was a fishing of that joint, but that the use of the channel iron as one of the plates of the fish arose from its being already there for the purpose of fastening the beam and the iron together, and was not adopted by Mr. Brunel with reference to or in contemplation of the special advantages in fishing contemplated by the plaintiff's patent.

Upon that finding the Lord Chief Justice Cockburn directed a verdict to be entered for the plaintiffs, reserving leave to move upon the point stated in the former part of this case.

The appeal was argued in the Exchequer Chamber (2 Best & S. 222; s. c. 31 Law J. Rep. (N.S.) Q.B. 198), and that Court reversed the judgment of the Court of Queen's Bench (2 Ibid. 194; s. c. 29 Law J. Rep. (N.S.) Q.B. 193).

Hence the present appeal.

Grove and Hindmarch (Webster with them), for the appellants, the plaintiffs in the action.—This is a new invention. As regards the two modes of application of the fishes, one is entirely distinct from the other. In the case of the Hackney bridge there was a vertical pressure upon the flat part of the channelled iron, the flooring of the bridge and the longitudinal beams resting on it; but the action of the "fishes" upon the joints of the rails is a lateral action, the object being to support the ends of the rails, and to cause the wheels to run on an even surface, without deflection. The object of the patentee is sufficiently specified in his specification. It is not necessary for a patentee to specify the scientific principles upon which his patent is founded. The defendants say that this is no new invention, because it has been already applied to the bottoms of bridges; but the subject-matter of most modern patents is the application of known things to new purposes. The channelled iron used in the Hackney bridge has no principle in common with the invention of Mr. Wild, except that the bolts are prevented from turning round. The acquiring increased strength with the same weight of metal is not shewn in the application of the channelled iron to the bridge. In order to shew that this is not a new invention, it must be made out that the use of the channelled iron in the bridge would necessarily suggest the application of the same contrivance to a railway joint. *Smith v. the London and North-Western Railway Company* (2 El. & B. 69) is in point. There the plaintiff's specification for improvements in wheels described the invention as consisting of a mode of forming a wheel of one solid piece of wrought iron by means of welding pieces of wrought iron together, so as to form the rim, spoke and nave into one compact mass. The defendants used a wheel made by welding pieces of wrought iron together, so as to form a single compact piece of wrought iron. The mode of forming the nave was the same as that in the specification; the mode of forming the rim was different. The Court decided that, it appearing

that the mode of forming the nave was a material, new, and useful part of the invention, the use of it by the defendants was an infringement of the patent, although in the specification, after describing the whole structure, the invention was stated to consist in the circumstance of the centre boss or nave arms and rim of the wheel being wholly composed of wrought iron welded into one solid mass, "in manner hereinbefore described." Then comes the question which arises upon the construction of the statute 21 Jac. 1. c. 3. s. 6, commonly called the Statute of Monopolies, which enacts, that letters patent may be granted for the sole working or making of any manner of new manufactures to the true and first inventor of such manufactures, "*which others at the time of making such letters patent and grants shall not use.*" It cannot be said that this was an invention which others used. Here two objects are sought: increased strength with an equal weight of metal, and the prevention of the nuts turning when the fish is being screwed on to the rails. The use of it by Mr. Brunel and others was a mere accident in the case of the Hackney bridge. The use of the iron for the scarf-joint there arose in consequence of its being originally there. The case finds that where the channelled iron had been used in the bridges before the date of the letters patent there were no corresponding bars and plates of iron above the horizontal beams; there was, therefore, no fishing, in the proper sense of the word.

Secondly, there was no misdirection. The construction of the specification is a question for the Court—*Seed v. Higgins* (8 El. & B. 755; s. c. 27 Law J. Rep. (N.S.) Q.B. 148, 411), and if the construction put upon it by the Court be wrong the proper mode of redress is by a bill of exceptions—*Neilson v. Harford* (8 Mee. & W. 806, per Parke, B.; s. c. 11 Law J. Rep. (N.S.) Exch. 20). In *Russell v. Cowley* (1 Cr. M. & R. 864) a patent claimed the invention of manufacturing tubes by drawing them through fixed holes or dies, but the specification was silent as to the maundrils. The Court held, that taking the whole specification together they would infer that the maundril was not to be used, and therefore it was a good patent. The scarf-joint in the bridge is a joint of a totally different character to the joints of rails.

P. Collock and Horace Lloyd (*Bovill* with them), for the respondents.—The simple question is, whether Wild, in his patent, did more than make an application of a mechanical expedient to a cognate object without involving thereby any new invention. If there be a mere shifting from one subject to another that is not the object of a patent; and that is a question for the jury, which they have found against the plaintiffs. It is a fact found in the case, that fishing was known before Wild's patent, and this was known to Wild himself. If you manufacture a known article by a new process, so that it becomes much cheaper and more economical, you entirely alter the character of a mercantile product. There is nothing of that sort here. Different people had used different means of preventing the bolts from turning round heretofore. This patent is not for "fishing" rails for the first time, but for getting increased strength and for the square holes into which the nuts are worked: how far is this an improvement upon the old knowledge? The material part of the novelty seems to consist in rendering the fish lighter for equal strength or stronger for an equal weight of metal than a fish made of equal thickness throughout. The judgment of Willes, J. in the Court below, puts this supposed novelty on the proper footing (2 Best & S. 222; s. c. 31 Law J. Rep. (N.S.) Q.B. 198). In *Boulton v. Bull* (2 H. Bl. 463), Eyre, C.J. says, "The substance of the invention is a discovery that the condensing the steam out of the cylinder, the protecting the cylinder from the external air, and keeping it hot to the degree of steam heat, will lessen the consumption of steam. This is no abstract principle; it is in its very nature clothed with practical application; it points out what is to be done in order to lessen the consumption of steam." *Hall v. Jarvis* (Webster's Patent Cases, 100) is distinguishable from this case. There the process for which the patent had been obtained had never been used by any persons before. That is not the case here. There may be a valid patent for a new combination of materials previously in use for

the same purpose, or for a new method of applying such materials, but the specification must clearly express that it is in respect of such new combination or application (Ibid. 229). The observations of Dallas, C.J., in the judgment given in the case of *Hill v. Thompson* are in point (Ibid. 246). *Kay v. Marshall* (5 Bing. N.C. 492; s. c. 8 Law J. Rep. (N.S.) C.P. 261) is strongly in favour of the respondents. In *Brook v. Aston* (8 El. & B. 478; s. c. 27 Law J. Rep. (N.S.) Q.B. 145), Lord Campbell, says, "There may be a patent for the application of an old process to a new purpose, but then there must be some invention in the manner in which the old process is applied." And further on he says, "There is not in this case any new process nor any discovery or invention, but merely the application of a known process by known means to another substance." *The Patent Bottle Envelope Company v. Seymer* (5 Com. B. Rep. N.S. 164; s. c. 28 Law J. Rep. (N.S.) C.P. 22) decided that the application of a known tool to work previously untried materials, or to produce new forms, is not the subject of a patent. *Horton v. Mabon* (12 Ibid. 437; s. c. 31 Law J. Rep. (N.S.) C.P. 255), is to the same effect. Patteson, J. says, in *Steiner v. Heald* (6 Exch. Rep. 607; s. c. 20 Law J. Rep. (N.S.) Exch. 413), "There is here no new contrivance, for the process used under the plaintiff's patent with the spent madder is the same as that previously used with fresh madder." The case of *Booth v. Kennard* (1 Hurl. & N. 527; s. c. 26 Law J. Rep. (N.S.) Exch. 23) is distinguishable. That was a patent for the dispensing with an intermediate process in the manufacture of gas, and was held to be valid, here there is no difference between the article as manufactured for use in the Hackney bridge, and that applied to the joints of rails.

As to the misdirection. Upon the finding of the jury that the fishes had been previously used, the Chief Justice should have directed a verdict for the respondents. The finding precludes the appellants from saying that the use of them in the Hackney bridge was an accidental use.

[The LORD CHANCELLOR.—A mechanical contrivance, when applied to a bridge, may meet and prevent a particular evil; the same thing, when applied to rails, may remedy another and different evil. Is not that a new application of the same invention?]

In *Hunter v. Mower* (6 Ad. & E. 735; s. c. 6 Law J. Rep. (N.S.) K.B. 183) a patentee claimed in general terms the application of a principle to produce a mechanical effect, and it was proved that another person had previously applied the same principle to produce the same effect, but with different machinery; in consequence, it was held that the claim could not be supported. They also referred to *Lock v. Hogue* (Webster's Patent Cases, 208), *The Queen v. Cutler* (Macrory's Patent Cases, 133; s. c. 3 Car. & K. 215), *Crane v. Price* (4 Man. & G. 580; s. c. 12 Law J. Rep. (N.S.) C.P. 81), *Newton v. Vaucher* (6 Exch. Rep. 859; s. c. 21 Law J. Rep. (N.S.) Exch. 305), *Higgs v. Godwin* (El. B. & El. 629; s. c. 27 Law J. Rep. (N.S.) Q.B. 421), *Brunton v. Hawkes* (4 B. & Ald. 541), *Ormson v. Clark* (14 Com. B. Rep. N.S. 435; s. c. 32 Law J. Rep. (N.S.) C.P. 291), *Carpenter v. Smith* (9 Mee. & W. 300; s. c. 11 Law J. Rep. (N.S.) Exch. 213), and *Tetley v. Easton* (2 Com. B. Rep. N.S. 739; s. c. 26 Law J. Rep. (N.S.) C.P. 269).

Grove, in reply.—The question of patent or no patent must depend upon the amount of knowledge upon the subject when it is proposed to be patented. The term fishing was known before and applied to several objects, as for splicing a mast. But yet a new combination and application may be the subject of a patent, and that, even supposing Wild to be aware of its use in the Hackney bridge. Neither is there any need for a new trial, as in *Seed v. Higgins* (8 Mee. & W. 806, per Parke, B.; s. c. 11 Law J. Rep. (N.S.) Exch. 20) the models are before the House, upon which your Lordships can exercise the same judgment as a jury.

The Lord Chancellor put the following question to the Judges—Whether the verdict ought to be entered for the plaintiffs or the defendants; and if not, whether there ought to be a new trial?

BLACKBURN, J.—My Lords—By your Lordships' permission I will now deliver the joint opinion of Mr. Justice Shee and myself. We answer your Lordships' question by saying, that, in our opinion, there ought not to be a new trial, but that the verdict in this case ought to be entered for the plaintiffs.

This answer involves in it a statement that in our opinion the judgment in this case in the Exchequer Chamber was wrong, and should be reversed; but if we rightly understand the judgment delivered in that case, we do not differ from the Judges who concurred in that judgment, nor from the majority of the Judges who heard the argument at your Lordships' bar, on any question of law, but only on the effect of the facts and evidence stated in the case.

The Statute of Monopolies (21 Jac. 1. c. 3. s. 6) excepts from the abolition of monopolies patents for "the sole working or making of any manner of new manufactures within this realm to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patent and grant shall not use."

In order to bring the subject-matter of a patent within this exception there must be *invention* so applied as to produce a practical result. And we quite agree with the Court of Exchequer Chamber, that a *mere* application of an old contrivance in the old way to an analogous subject, *without any novelty or invention*, in the mode of applying such old contrivance to the new purpose, is not a valid subject-matter of a patent. There are many decisions to that effect, which were referred to at your Lordships' bar; and, if the matter were now for the first time to be decided on the construction of the statute, without reference to the cases, we should think, on principle, that such should be the conclusion of the Court. But then, in every case, arises a question of fact, whether the contrivance before in use was so similar to that which the patentee claims that there is no invention in the differences, if any, between the old contrivance and that for which the patentee claims a monopoly; and if there be none, there arises a further question of fact, viz. Whether the purpose to which the contrivance was before applied and the new purpose are so analogous or cognate that there is no discovery or invention in the new application; whether, in short, it is a *mere* application or not? For if there is invention or discovery producing a practical benefit, as in the case of *Crane v. Price* (4 Man. & G. 580; s. c. 12 Law J. Rep. (N.S.) C.P. 81), it is the valid subject of a patent. And we think it always must be a question of degree; a question of, more or less, whether the analogy or cognateness of the purposes is so close as to prevent there being an invention in the application. Mr. Grove, in his very able argument, contended, we believe correctly enough, that if there was any real invention, though a slight one, producing a practical beneficial result, the patent was good. But the question still remains, was there such an amount of cognateness in the purposes that there was no real invention or discovery?

In the present case the point was reserved at the trial on certain agreed facts and findings of the jury, and on the evidence of the models and the specifications. So far as the facts are admitted or found, the Court are bound by them, but on the models and on the specification must draw its own conclusion; and it is here that the difference in opinion between the Judges in the Exchequer Chamber and the majority of the Judges who heard the arguments at your Lordships' bar, and ourselves, arises. We differ, not as lawyers, but as mechanics and engineers. We need not say that on such a subject we express our opinion with diffidence, knowing that it will be liable to be criticized by those much more competent to form a judgment on such a point than ourselves; but still we are bound to express the opinion which, after hearing the very able arguments at your Lordships' bar, we have formed on the engineering and mechanical points.

The patent taken out is for "An improvement in fishes and fish-joints for connecting the rails of railways," and we understand this to be the effect of the evidence.

The rails meet butt-end to butt-end, and as the engine passes along the

rails its weight has a tendency to depress the rail on which it rests below the rail to which it is approaching, on which the engine does not yet rest; and, unless this tendency is counteracted, the end of the rail to which the engine approaches being more elevated than that on which the wheel of the engine rests, there will be a jolt when the wheel passes over the joint. The mode of counteracting this tendency is by attaching to the sides of the rails plates called "fishes," by means of bolts and nuts. The plates are at the sides of the joint and in the hollow of the double-headed rail, and so long as the fishes are held in that position the one rail cannot be depressed below the other, except in so far as the fish bends. The main strain, therefore, which the fish has to bear, is a strain tending to the flexure of the fish in the vertical plane, which is also the plane of the fish or plate attached to the side of the rails, the forces which tend to push the fish off from the rails being comparatively slight, and being counteracted by the bolts and nuts.

Now the fish which was in use at the time of the plaintiff's patent was a solid plate of equal thickness throughout, and as a strain in the plane of a plate, and tending to produce flexure in that plane, is principally borne by the upper and under parts of such a plate, there was a considerable part of the iron in the centre of the plate which was not brought into play in resisting such a strain.

The plaintiff's invention, as we understand it, consisted in the thought that the superfluous material might be removed, thus producing a groove which he takes advantage of, for the purpose of using it to hold the heads of the bolts, and also producing economy of material, without diminution of strength. These advantages are distinctly pointed out in the specification. The essence of the invention lay in the thought that, inasmuch as the fish was intended to resist a strain in its own plane, the metal in the centre of the fish, which was comparatively inert for the purpose of resisting such a strain, might with advantage be partially removed. The patentee does not in his specification state that the heavy train was to run along the tops of the rails, and that the fish was placed with its plane vertical to resist the vertical strain so produced, nor that the reason why the groove might be made, producing economy of material without diminution of strength, was because the plate was so placed, and that such was the strain it had to resist; but we think that all this might be supplied, and was supplied by evidence.

And on the case before your Lordships we think we are to consider this discovery as producing an improved article, and as being useful, and also new, unless in so far as it was anticipated by the mode in which Mr. Brunel strengthened his bridges, more particularly by the mode in which he fastened the scarf joint in the Hackney Bridge.

Now, here again, we are obliged to form our own opinion as to the facts from the models, and so doing, it seems to us that what was done by Mr. Brunel did not at all anticipate the plaintiff's discovery. He used a channelled iron for the purpose of strengthening the beams of a bridge, and in the case of the Hackney bridge, for the purpose of strengthening a scarf-joint; but the iron was placed horizontally, for the purpose of resisting vertical pressure. The channelled iron would have been a bad form for resisting a pressure such as is borne by the fish-uniting rails. The two wings would, under such a pressure, we apprehend, collapse together, and the centre snap. But it was a good form for the purpose of resisting a flexure transverse to the plane of the iron for which it was used; and what Mr. Brunel did in no way anticipated the plaintiff's idea, founded on the uselessness of the centre part of a plate placed vertically for the purpose of resisting vertical pressure, and used for the purpose of counteracting a tendency to flexure in the plane of the plate. In truth, in the plates and channelled iron used by Mr. Brunel in his bridges the grooves and channels were not formed by removing useless or inert material, but on, as we apprehend, a totally different principle. He in effect added rims or wings to strengthen the flat plate against transverse flexure; he did not make a groove by removing the part of a plate used to resist flexure in its own plane.

This is a view of the effect of the facts and evidence quite opposed to that taken by the Court of Exchequer Chamber, as expressed in their judgment at page 229 of the report in 2 *Best & Smith*, and at page 199 of the report in the 31 *Law Journal Reports*.

We are of opinion that from the manner in which the point is reserved, the Court below, and your Lordships now on appeal, must decide the question of fact. And if your Lordships take the view which we have submitted, the point on which it is said there was misdirection becomes immaterial, and the verdict ought to be entered for the plaintiffs, whether that direction was correct or not.

CHANNELL, B.—To your Lordships' question, "Whether the verdict ought to be entered for the plaintiffs or the defendants," for my Brothers Keating and Pigott, and for myself, with your Lordships' permission, I answer that in our opinion the verdict ought to be entered for the defendants.

The action was brought by the plaintiffs as executors of Charles Wild, for the infringement by the defendants of letters patent granted to Charles Wild in the year 1853, for an invention intitled "Improvement in fishes and fish-joints for connecting the rails of railways."

The defendants, by their pleas, denied the novelty of the invention, and that it was a good subject-matter of a patent. The case was tried before the Lord Chief Justice of the Queen's Bench and a special jury, and the verdict was found for the plaintiffs, subject to leave reserved to the defendants to move to enter the verdict for them. A rule *nisi* was obtained on this leave, and also on the ground of misdirection, but was afterwards discharged. The defendants appealed to the Court of Exchequer Chamber against the judgment of the Queen's Bench. The Court of Exchequer Chamber reversed the judgment, and ordered "that the verdict be entered for the defendants upon the pleas denying the novelty of the invention, and that it was the subject-matter of a patent."

By the specification, the patentee (after having particularly described the nature of the invention, and the use of it) says, "I claim as the invention the constructing fishes for connecting the rails of railways with a groove adapted for receiving the heads of the bolts or rivets employed for securing such fishes, and the application of such fishes for connecting the rails of railways in manner hereinbefore described." The advantages of the groove he states to be two, namely, that it serves to receive the square heads of the bolts, and to prevent their turning round when they are being screwed in; and, further, that it renders the fish lighter for equal strength, or stronger for an equal weight of metal, than a fish "if made of equal thickness throughout."

Now such being the nature of the invention as claimed, it is necessary, in order to determine its novelty or validity as the subject-matter of a patent, to refer to the evidence and findings of the jury, in order to see what was the state of knowledge and practice on the subject at the period of its date.

The case states, that before the patent the rails of railways were commonly connected by fishes and fish-joints, pieces of iron being attached to each side of the rail, at the joints, by bolts and nuts; that in one pair of fishes the holes were square, and the bolts made with square necks to fit the square holes; that the object of the square holes and bolts was to prevent the bolts from turning round when the nuts were being screwed on, and this object it effectually accomplished; that before the date of the patent, in the construction of several timber bridges, beams of timber had been laid horizontally one above the other, and bolted together with bolts and nuts; that horizontal bars or plates of iron were placed beneath and parallel to and in contact with the beams, and were bolted by the same bolts and nuts; that each of these bars was constructed with a groove in its under surface which received the square heads of the bolts; and, further, that this mode of construction was adopted in order to effect, and did effect, the double purpose of strength and of preventing the heads of these bolts

from turning round. But that in these bridges there were no joints to be fished, and that, consequently, there was no fishing in the proper sense of the word. The defendants further proved that the Hackney bridge had been constructed by Mr. Brunel in 1847 in the way stated in the case.

Upon the evidence at the trial the finding was, "That channel irons on the railway bridges (independently of the Hackney bridge) were used, before the patent, for the double purpose of obtaining increased strength, and preventing the bolt heads from turning round, but that they were not used for the purpose of fishing."

The result, therefore, as to previous knowledge, and as to the nature of the patented invention, is, that the use of iron plates for fishes ungrooved was known; that for strengthening timbers in bridges, and bolting them together, the use of iron plates grooved was known; that the special advantages, when so applied, of securing the bolt-heads, and of affording equal strength with less material, were also known.

Then upon this knowledge it is that the patentee claims the application of the groove to the railway fish, and the advantages he propounds are, that it receives the bolt-head, and by means of it is afforded equal strength with less material; or, in other words, the same advantages as are derivable when applied to the iron plates used in the bridges.

It therefore comes (apart from the Hackney bridge) to the question, whether the patentee has, by using the groove in the fish, invented a new manufacture, or has merely transferred a well-known thing to an analogous subject. Now, in our opinion, the law is correctly laid down in the judgment of the Court of Exchequer Chamber, to the effect that "a mere application of an old contrivance, in the old way, to an analogous subject, without any novelty in the mode of applying such old contrivances to the new purpose, does not make a valid subject-matter of a patent."

Therefore the point for consideration is thus reduced to this: Whether the fishing of rails meeting butt-end to butt-end with iron plates bolted together, and the strengthening of solid timbers by iron plates also bolted to the timbers as above stated, are analogous subjects.

It seems to us, upon the fullest consideration we can give to it (though being a question of mere mechanics we desire to express our opinion with diffidence), that they are analogous. It may be convenient, in considering the matter, to take the advantages of the groove separately. Now the subject of the plates or bars, when applied to both the above subjects, is to afford to them additional support, and thereby to enable the solid bodies, whether iron or wood, to bear pressure. This is effected by the bolted iron plates in both cases, and the advantage of the groove is to render both sets of plates stronger for an equal weight of metal.

The fact, however, seems to be, that a grooved iron plate, when used as a binding support, is as strong at least as the same plate would be if ungrooved, and this discovery was made before the patent, and was given to the world, and, in the language of the Court of Exchequer Chamber, "though not immediately applied, it was immediately applicable to all forms of pieces of iron used for holding together other materials."

But it was argued at the bar of your Lordships' House that there was invention at all events in this,—that whereas the grooved iron as used in the bridges had been applied for the purpose of binding together pieces of material laid upon one another horizontally, the grooved iron in fishing the rails was applied laterally, binding together the material, and that its great merit consisted in its performing the novel function of resisting the vertical pressure to which it was exposed, and did so by means of a plate equally strong, but rendered lighter than that previously in use by the removal of that portion of the plate which was useless in resisting such pressure.

We do not find that any allusion to such an invention as that now suggested was made either at *Nisi Prius*, or in any of the judgments in the Court of Queen's

Bench supporting, or in that of the Exchequer Chamber invalidating, the patent right; nor do we think, looking to the terms of the specification, that Wild ever intended to claim or did claim any such. He certainly does state in his specification that the groove renders the fish lighter for equal strength, or stronger for equal weight, but that, as to grooved iron, was previously well known, and is a very different thing from claiming the invention as now put forward. If he had intended to claim the discovery that, by the removal of a certain quantity of material from a particular part of the solid plate, in the shape of a groove, the power of resistance to vertical pressure would not be diminished, he would surely have described the sort of groove that would produce that effect with the greatest certainty. If it be true that a groove of a certain width and depth will produce the effect, it cannot be equally true of grooves of all dimensions.

There is nothing, as we think, stated in the specification to indicate that a resistance to vertical pressure was contemplated, and increasing the diameter of the bolts at the point where the strain is said to be the greatest, would seem to point to something different from assisting the fish in resisting vertical pressure.

On looking to the drawing we can see that the groove is well adapted for the purpose to which the specification states it is to be applied, namely, preventing the bolt-head from turning; but we can find nothing in it to shew us that it at all contemplates a peculiar resistance when placed laterally, as contradistinguished from that which it has when it is placed vertically, against the solid substance which it is designed to strengthen. So in the evidence there is much with reference to the claim to prevent, by means of a groove, the bolt-head from turning, but we cannot discover any finding of any fact bearing upon the resistance to vertical pressure.

What appears to us to shew that no such claim was contemplated by the patentee is this,—that if the power of resisting vertical pressure produced or effected by the groove were a merit in the fishes it would be equally applicable to both; not to one more than the other; yet the patentee himself suggests that the inside fish need *not* be grooved.

Then, as regards the second advantage of the groove in receiving the bolt-head, it seems impossible to say, after its use for the identical purpose in the bridges, whenever it became necessary to fit an iron plate to another material by screws and nuts, that the analogy for that purpose, at all events, is not clear and obvious. It is in this respect only a bare transference.

So that in our opinion, whether the proposed advantages are regarded in detail, or as a whole, there is no invention or novelty to support a patent; and upon the latter view we crave leave to refer your Lordships to the judgment in the Exchequer Chamber, with which we entirely agree.

This being the result at which we have arrived on the first branch of your Lordships' question, we have only to add, that, in our opinion, there ought to be no new trial.

As far as we may be allowed to do so, consistently with the forms of your Lordships' House, we desire to state that, since the questions were proposed by your Lordships to Her Majesty's Judges, some of us have seen Sir Edward Vaughan Williams, who was in attendance on your Lordships during the whole of the argument, and we are authorized to state that he sees no reason for changing the opinion he formed when sitting in the Court of Exchequer Chamber, to whose judgment he was a party, and in which he fully concurs.

The LORD CHANCELLOR.—My Lords, in this case, in consequence of the difference of opinion between the Court of Queen's Bench and the Court of Exchequer Chamber, and in some degree by reason of the nicety of the subject, which requires some examination, I shall beg leave to trouble your Lordships with a few explanatory observations as the reasons upon which my judgment is founded.

You will recollect that in this case the verdict was entered for the plaintiffs upon an action for the infringement of his patent, and a rule was afterwards obtained to set aside that verdict and to enter the verdict for the defendants, which rule was discharged by the Court of Queen's Bench. The matter was then carried, under the Common Law Procedure Act, to the Court of Exchequer Chamber, and in the Court of Exchequer Chamber the judgment of the Court of Queen's Bench was reversed.

The patent of Mr. Wild was taken out by him for the application of fish-joints, of a particular construction, to the rails of a railway. The denomination of the patent is "improvements in fishes and fish-joints for connecting the rails of railways." A fish, which is obviously a vulgar abbreviation of the French word *afficher*, is something annexed externally to a joint or severance either in pieces of timber or in pieces of iron. A familiar application of the word is well known to sailors when they speak of fishing a broken mast, namely, annexing the severed pieces by the aid of lateral bands applied externally. But the application of fish-joints to railways was very well known antecedently to Mr. Wild's patent, and Mr. Wild's patent accordingly is for an improvement in the shape or character of the fish.

Now, it is very material to observe that the plaintiff describes the fish, as used by him, to be a piece of iron of the shape of a parallelogram, with a groove or recess in the outer surface, and the groove is described by him as intended to receive the square heads of the bolts, which pass through the fish and through the body of the tram or rail, and which are fastened on the other side by a nut turning upon a screw, and serving, of course, to fasten the bolt. The bolt has a square head on the one side, and on the other a nut running up a screw, and keeping the bolt firm in its place. Now, of course, it was a desirable thing that the head of the bolt should fit into the recess of the fish, that is to say, in the fish-plate, in order to preserve the bolt from being affected by the flange of the wheel of the railway carriage as it ran over the tram. The recess, therefore, is here described by the plaintiff as serving "to receive the square heads of the bolts and prevent them from turning round, when the nuts," which would be on the other side of the rail, "are being screwed on or off." He describes the fish as consisting of two lateral plates, one on the one side of the rail and the other on the other; and he says that the one on the one side may be made without a groove, that is to say, that the lateral plate, where the head of the bolt is affixed, may be the only plate which is grooved or recessed. He then goes on to use this particular passage, which alone has given rise to any difficulty in my mind, namely,—“The groove renders the fish lighter for equal strength, or stronger for an equal weight of metal,” a passage which requires some explanation. The plaintiff, undoubtedly, was aware that as the lateral plate forming the fish is applied perpendicularly to the side of the rail, it would have to endure vertical pressure only. Mechanics and engineers are well aware that when a plate receives a vertical pressure, the impulse, the force of the pressure, is sustained by the upper rim of the plate and the lower rim of the plate, where it rests on the foundation, and that little or no strain is felt by the central portion of the plate. Accordingly, the plaintiff, being aware of that, observes, that his peculiar fish might be constructed in such a manner as to save a considerable portion of metal by having the groove only in the centre of the plate, I mean in the centre of the plate as it is placed horizontally. But it is material to notice that in the description of the plaintiff's invention, and in his claim, he does not advert at all to this peculiarity of a grooved plate, namely, the peculiar result that if it be grooved, the metal may be saved without injury to the efficiency or strength of the plate; and when he sums up his claim, as constituting his invention, it will be found to consist of a very detailed statement of various advantages resulting from the peculiar form and the configuration which he gives to the fish, but no part of the claim will be found to advert to, or to rest upon the fact that the recess or hollow made in the fish-plate for the reception of the square head of the bolt, is effected by a groove in

the plate itself, and that that groove may be made with great advantage in the economy of metal, and without any prejudice in respect of the plate.

At the trial the novelty of this invention was impeached, on the ground that channelled iron, which, altogether corresponded with the grooved fish plate, had been in use for a considerable period anterior to the patent, and several examples were furnished to illustrate that, but, in particular one example in the construction of a railway bridge by the late Mr. Brunel, in which channelled iron was used to a very great extent for the purpose of acting as a support to the beams, which were placed transversely, and in which there were scarf-joints. In that case, the square heads of the bolts which bolted on the iron that served as a support or fish were received in the hollow produced by the channel, and fitted the channel in order to effect the same object as is here described by the plaintiff, namely, the preventing of the head of the bolt from being turned when the nut was unscrewed.

I particularly wish to point out to your Lordships the difference between a grooved plate and the channelled iron. The centre of the plate of the channelled iron is not cut away at all—it has the same thickness throughout—but it is constructed with two flanges, one at either end joining the plate at right angles, and producing, therefore, this configuration of the plate, that there is a lateral plate forming the base, having on either side a flange, at right angles to the plane of the plate. The difference, therefore, between the grooved fish-plate and the channelled iron consists in this,—that the centre of the plate of the grooved fish is cut away by the groove, and part of the metal is taken away, so that the plate is not of a uniform thickness throughout, but in the channelled iron the plate is of a uniform thickness throughout, and instead of a groove formed by hollowing out a recess in the plate the same object is effected by two flanges, one on either side of the plate which forms the bottom (I am speaking in familiar language) of the channelled iron.

Now, unquestionably this is a difference, and it would have raised in my judgment a material question whether, if the plaintiff had pointed out and had rested upon this difference of configuration as constituting his invention, it would have been possible to set up the anterior use of the channelled iron as depriving him of all claim to that invention, because the true mode of trying the question of course would be to reverse the order of time of the two productions, and to inquire, whether, if any one had now introduced the channelled iron, it would or would not have been an infringement of the plaintiff's patent. If tried by that criterion, the conclusion should be, that the channelled iron was an infringement of the plaintiff's patent, then of necessity it would follow that as the channelled iron was in use, and was in public and notorious use preceding the plaintiff's patent, the plaintiff's patent could not be lawfully considered as a new invention.

The learned Judges differed on this point. Two learned Judges, Mr. Justice Blackburn and Mr. Justice Shee, have, in a very learned argument, pointed out the difference between the mechanical effects produced by the use of the grooved fish-plate, placed so as to resist vertical pressure in the one case, and the mechanical effect which would be produced upon the channelled iron placed so as to resist transverse pressure in the other case. But I do not think that that of itself would constitute a material difference. The patent is taken out for a fish of a particular configuration; the patent is not taken out for a saving of metal in the construction of the fish-joint, but the patent is limited entirely to the introduction and use of fishes of a particular shape and configuration. Then the question is simply this,—whether the channelled iron, which undoubtedly was a fish, and one of the objects of which channel was to receive the square heads of the bolts and to prevent their turning, is not, in truth, substantially the same thing as a grooved plate with a recess hollowed out in its own plane, instead of a hollow being effected by flanges placed on either side of the plate. Regarding the patent, as limited to a claim for fishes of a particular configuration, I cannot

for a moment doubt that the channelled iron having the same object, and being capable of the same application, substantially involves the fish-plate made with a grooved hollow, in the manner which I have attempted to describe.

Then the question is, whether there can be any invention of the plaintiff in having taken that thing, which was a fish for a bridge, and having applied it as a fish to a railway. Upon that I think the law is well and rightly settled, for there would be no end to the interferences with trade and with the liberty of any mechanical contrivance being adopted, if every slight difference in the application of a well-known thing were held to constitute a patent. There is the familiar contrivance of the button, and the button-hole, taken from the waistcoat or the coat, which may be applied in some particular mechanical combination in which it has not been hitherto applied; but it would be an idle thing if it were possible to take a well-known mechanical contrivance, and by applying it to a subject to which it has not hitherto been applied to constitute that application the subject of a patent to be granted as for a new invention. No sounder or more wholesome doctrine, I think, was ever established than that which was established by the decisions which are referred to in the opinions of the four learned Judges who concur in the second opinion delivered to your Lordships, namely, that you cannot have a patent for a well-known mechanical contrivance merely because it is applied in a manner or to a purpose which is analogous to the manner or to the purpose in or to which it has been hitherto notoriously used. The channelled iron was applied in a manner which was notorious, and the application of it to a vertical fish would be no more than the application of a well-known contrivance to a purpose exactly analogous or corresponding to the purpose to which it had been previously applied.

Therefore, with some anxiety upon this subject, and feeling that the intricacy of the matter must render it impossible to convey one's ideas in words, unless one perpetually referred to drawings or models, I think that upon the whole I must advise your Lordships and move your Lordships to confirm the decision of the Exchequer Chamber, that there was no novelty in the patent; and that, therefore, there was a misdirection on the part of the Lord Chief Justice. The consequence will be, that I shall move your Lordships to affirm the judgment of the Court of Exchequer Chamber, and to dismiss the appeal, with costs.

LORD CRANWORTH.—My Lords, in this case I concur with the opinions of Barons Channell and Pigott, and Mr. Justice Keating, assented to, as we understand, by Sir Edward Vaughan Williams. Their reasons are so fully and so clearly given, that I need hardly do more than say that I adopt their reasoning.

The case finds that before the date of the letters patent it had been usual to fasten and bolt together, with bolts and nuts, beams of timber laid horizontally one over another, and traversing railway bridges, and that under these beams horizontal plates or bars of iron were placed parallel to and in contact with the beams, and were fastened by the same bolts and nuts which fastened the beams. These bars were all constructed with a groove on their under surface, which received the square heads of the bolts, this mode of construction having, as the case finds, been adopted for the double purpose of preventing the bolt-heads from turning round, and also of giving strength to the beams. It was also found by the case, that before the date of the letters patent the rails of railways had been usually connected by iron fishes, applied and fastened precisely as those mentioned in the specification, though not grooved. I cannot think that the adoption of the groove in the plates used for fishing railway joints, as it had been previously used in the beams of bridges, is an invention capable of sustaining a patent. It is the mere application of an old contrivance in the old way to an analogous subject, without novelty in the application. I say without novelty, for I cannot think

that the mere fact of the application being made laterally in the case of the rails, instead of under the surface of the beams, as in the case of the bridges, can be treated as a novelty; nor indeed do I find in the specification any claim of novelty on such a ground. This would have been the conclusion at which I should have arrived, even if there had not been the case of the Hackney bridge. In that bridge the span was too great to be traversed by a single beam, and there were, therefore, two beams, one on each side, joined in the middle by scarf-joints, and under the beams were transverse planks traversing the whole width of the bridge. Along and under the ends of these planks, on each side of the bridge, a long bar of grooved iron was placed under the connected beams, which passed from one end of the bridge to the other. Bolts, with square heads, passed through these grooved iron bars, and through both the planking and the beams, all along the bridge; and the case finds expressly that the groove was used for the double purpose of preventing the square heads of the bolts from turning round, and of making the bars lighter for equal strength of metal or stronger for equal weight. This seems to me to have been the use of grooved iron for the very same purpose as that for which it was claimed by the patent. On these grounds I think that the judgment of the Exchequer Chamber was right, and ought to be affirmed.

LORD WENSLEYDALE.—My Lords, the questions in this case have been most fully discussed and considered in the Court of Queen's Bench and in the Court of Exchequer Chamber, in which the judgment of the Court of Queen's Bench was reversed, and in your Lordships' House, by the Judges who have given their advice. Every argument which can possibly elucidate the questions in the cause has been brought forward and fully presented to us on both sides. Five Judges have given their opinion that the patent is good, that it was, at the time of its being granted, new as to the public use and exercise thereof; and eight Judges have given their opinion that there was not so much novelty in it as to entitle it to the privilege of a patent. After considering these arguments, especially that of the Judges of the Exchequer Chamber, delivered by Mr. Justice Willes, and that delivered in this House by Mr. Baron Channell, I have satisfied myself that the alleged discovery of the plaintiff had no such novelty in it as to entitle it to a patent.

His plan was to attach to the sides of the railway, under the joints of the railway plates, or fishes of iron grooved, which clearly means channelled from end to end, without flanges, so as to be adapted for receiving the heads of the bolts, which are prevented from turning round when the nuts are screwed on. A similar process had been used long before, in the case of pieces of timber lying horizontally on one another, and each constructed with grooves, which received the square heads of the bolts, and prevented the heads of the bolts from turning. I agree entirely that the application of this principle laterally, which had before been applied horizontally, the application to the sides of a railway of the same principle, which had long been in practice for securing the sides of pieces of timber lying on each other, to the sides of timber placed in contact with them, is not such a novelty of invention as to be a sufficient warrant for a patent. It is so clearly connected with the former practice as not to have the merit of a new discovery.

On this ground, therefore, I entirely agree with the majority of the learned Judges in the view they have taken, and so clearly explained in this case. It is unnecessary to give any opinion on the question whether the patent was not void on the ground that a similar mode of using grooved pieces of wood, occurred before the patent in the construction of the Hackney bridge; but I am much disposed to approve the opinion of Mr. Justice Willes on that subject, contained in his judgment.

Judgment affirmed; and appeal dismissed with costs.

[IN THE QUEEN'S BENCH.]

Nov. 14, 1865.

LE COUTEUR v. THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

35 L. J. Q.B. 40; L. R. 1 Q.B. 54; 12 Jur. N.S. 266; 13 L. T. 325;
14 W. R. 80; 6 B. & S. 961.

Referred to *Talley v. Great Western Railway Company*, [1871] E. R. A.; 40 L. J. C.P. 9; L. R. 6 C.P. 44; 23 L. T. 413; 19 W. R. 154 (C.P.). Commented on, *Bergheim v. Great Western Railway*, [1878] E. R. A.; 47 L. J. C.P. 318; 3 C.P. D. 221; 38 L. T. 160; 26 W. R. 301 (C. A.). Referred to, *Willen v. Brask*, [1882] E. R. A.; 51 L. J. Q.B. 166; 8 Q.B. D. 35; 45 L. T. 653 (sub nom. *Miller*) (Q.B. D.): reversed, [1883] E. R. A.; 52 L. J. Q.B. 37; 10 Q.B. D. 142; 47 L. T. 685; 31 W. R. 190 (C. A.).

Carriers by Railway—Carriers' Act—Journey by Land and Water—Liability for Goods placed on the Seat of a Railway Carriage.

CARRIERS.—A railway company issuing a ticket for the conveyance of a passenger partly by land and partly by water are entitled to the benefit of the Carriers' Act, in respect of so much of the journey as is performed by land.

The plaintiff arrived at the railway station of the defendants, carrying a chronometer in his hand wrapped up in a handkerchief. This chronometer he gave to one of the porters, who in the presence of the plaintiff placed it on the seat of one of the carriages. Both the porter and the plaintiff immediately after this left the platform together, the porter to attend to other duties and the plaintiff to look after the rest of his luggage. After ten or fifteen minutes, the plaintiff returned and found that the chronometer was gone:—Semble, that the chronometer, at the time of its loss, was in the charge of the company as carriers, so that but for the Carriers' Act they would have been liable.

This action, by the consent of the parties, and an order of Mellor, J., had been referred to one of the Masters of the Court, with power to raise points of law on the face of his award for the opinion of the Court. Upon the death of the Master, the cause, by an order of Crompton, J., was referred upon similar terms to an arbitrator, by whom a CASE, to the following effect, was stated for the opinion of the Court.

At the time of the transaction in question, the defendants were common carriers of passengers, with their luggage, between Jersey and London, the portion of the journey between London and Southampton being performed by them as common carriers by land, and the residue of the journey as common carriers by sea. The defendants were in the habit of allowing passengers between London and Jersey to pay one entire sum for a return ticket, entitling a passenger to be carried, together with his ordinary luggage, from London to Jersey, *viâ* Southampton, and back, without further payment, the passenger being at liberty to stop, with his luggage, at Southampton, either going or returning, for such period as he pleased, provided that the whole journey out and home did not exceed one calendar month. The plaintiff having taken and paid the defendants for such a return ticket in London, and having been carried from London to Jersey, became a passenger for the return journey from Jersey to London, with his ordinary luggage, including the chronometer in question.

The plaintiff had not the chronometer with him on his outward journey from London to Jersey, but had it with him at the time when he commenced his return journey from Jersey to London. The luggage of the plaintiff, exclusive of the chronometer, was, on the return journey, stowed away by the defendants apart from him; but when he became a passenger at Jersey,

and during the whole of the voyage from Jersey to Southampton he kept the chronometer tied up in a handkerchief.

On the arrival of the plaintiff at the pier or wharf at Southampton, he left his luggage to be conveyed by the defendants to the railway station at Southampton, and from thence to London by railway; but he carried the chronometer in his hand tied up in the handkerchief, walking through the streets of Southampton to the railway station, a distance of nearly half a mile. On arriving at the railway station he went, with the chronometer in his hand, up to one of the railway carriages going to London, and gave the chronometer to a porter of the defendants, who then, in the presence of the plaintiff, placed it on the seat of one of the carriages. Both the porter and the plaintiff immediately after this left the platform together, the porter to attend to other duties, and the plaintiff to look after the rest of his luggage, which had not arrived from the custom-house. The plaintiff remained absent for some ten or fifteen minutes. When he returned the chronometer could not be found, and has since been lost.

The plaintiff did not at any time declare the value and nature of the chronometer, the value of which, in fact, exceeded 10*l*. The defendants did everything to entitle them to the protection of the 11 Geo. 4. & 1 Will. 4. c. 68, supposing that statute to apply to the case.

The question for the opinion of the Court was whether, upon the facts above stated, the plaintiff was, in point of law, entitled to recover in respect of the loss of the chronometer; it being agreed by the parties that the sum of 5*l*. paid into court by the defendants in respect of the other causes of action in the declaration had been accepted by the plaintiff in full satisfaction thereof.

If the Court should decide in the affirmative, the arbitrator awarded to the plaintiff the sum of 25*l*. over and above the 5*l*. paid into court, and directed that the defendants should bear and pay the costs of the reference and of the award. If the Court should decide in the negative, the arbitrator awarded in favour of the defendants, and directed the plaintiff to bear and pay the costs of the reference and of the award. The arbitrator also certified that there was sufficient reason for bringing the action in the superior Court. The declaration was to be considered part of the award, and to be referred to by either party in the argument of the case.

J. Brown, for the plaintiff.—The defendants will rely on the Carriers' Act.

[*COCKBURN*, C.J.—How do you shew negligence on the part of the company? The chronometer is placed in the carriage by the desire of the plaintiff. Was it not then in his custody?]

It was not. The case states that the plaintiff left the carriage with the porter. The chronometer was therefore placed in the carriage with the knowledge of the company, and their porter acquiesced in the departure of the plaintiff. In *Chitty and Temple on Carriers*, 285, it is said, "The luggage of a passenger by railway, though never delivered to any servant of the company, but placed by the passenger under the seat of the carriage in which he is riding during the journey, is, nevertheless, in point of law, in the custody of the company, so as to render them responsible for its loss. So, if a man travel in a stage-coach, and take his portmanteau with him, and during the journey he keep his eye upon it, yet if it is lost, the carrier is not absolved from his responsibility; the care of the luggage by its owner amounting merely to this,—that it is much more to his interest to preserve his property than that he should be put to the inconvenience of losing it, and the trouble of suing the carrier to recover its value." And the cases of *The Great Northern Railway Company v. Shepherd* (8 Exch. Rep. 30; s. c. 21 Law J. Rep. (N.S.) Exch. 286) and *Richards v. the London, Brighton and South Coast Railway Company* (7 Com. B. Rep. 839; s. c. 18 Law J. Rep. (N.S.) C.P. 251) are cited in support of these positions. Then, it will be said that, assuming that there was negligence, the company have still a defence under the

Carriers' Act. But that act applies solely to a journey by land, and not to a compound journey by land and water.

[COCKBURN, C.J.—Why should not the journey be divided into portions, each subject to different regulations?]

In *The Peninsular and Oriental Steam Navigation Company v. Shand* (13 W. R. 1049), where a passenger took a ticket for the passage from Southampton to Alexandria, and from Suez to the Mauritius, it was held that the case must be decided according to the common law, and that it was not within the Carriers' Act.

[MELLOR, J.—In that case there was no carriage by land in England.]

In *Branley v. the South-Eastern Railway Company* (12 Com. B. Rep. N.S. 63; s. c. 31 Law J. Rep. (N.S.) C.P. 286) the railway company, with steamboat powers, made what was alleged to be an overcharge on parcels carried from Boulogne to London. It was there held, that the railway acts did not apply to sea transit. In *Pianciani v. the London and South-Western Railway Company* (18 Com. B. Rep. 226) the question was raised whether a passage from the Waterloo Station to Jersey, *via* Southampton, could be divided, so as to make a different contract for that portion of the journey which was by water from that which was to be performed by land. It did not, however, become necessary to pronounce any decision; and the *dicta* of the Judges during the argument of the case cannot be taken as an authority. It is submitted that it would be unreasonable to divide the responsibility of the company; otherwise a passenger, in the few minutes between his disembarkation and entry into a train must hurry away to insure his luggage. A chronometer is not a "time-piece" within the meaning of the act. The arbitrator must be taken to have found that the company accepted the chronometer to be carried as personal luggage—*The Belfast and Ballymena Railway Company v. Key* (9 H.L. Cas. 556).

C. W. Wood (*Mangles* with him), for the defendants, was not called upon to argue.

COCKBURN, C.J.—I am of opinion that the defendants are entitled to judgment. When the case was first opened, I thought that the facts were such as to lead to a necessary inference that the plaintiff had taken possession of this chronometer, withdrawing it from the custody of the company, and keeping it under his own personal control. But I now think that I had taken too strong a view of the facts; for all that appears is that the porter placed the chronometer in the carriage in which a particular seat was to be appropriated for the use of the plaintiff. I am very far from saying that there may not be cases, where a company is bound by its contract to convey goods safely, in which the conduct of the passenger in taking the goods into his own personal custody and charge may, to some extent, release the company from its obligation. But I think that the evidence must be strong to make out such a case; and it is not because an article is, by common consent, placed in a carriage along with a passenger that the company is released. If it were otherwise, it would follow that no one would be able to take any luggage into a carriage along with him, without risk of losing it. I cannot therefore by inference come to a conclusion which would relieve the company from the obligation of keeping a general superintendence over articles placed in their carriages so as to prevent thieves from purloining them. I think, therefore, that a case must be proved, leading irresistably to the conclusion that the passenger takes possession of his articles before we say that carriers are not liable for the loss of them. If, then, the case depended on the question whether the company were liable upon these facts, I should say that the plaintiff ought to recover.

But the defendants have set up the Carriers' Act. Now, it was not disputed that the article in question was one which came within the provisions of that act; but it was said that its provisions were not applicable to this case, because the contract here was to carry, not only by land, but also by

water; and it was argued that the contract was not divisible, and was not within the terms of the Carriers' Act. I think that the argument fails both on authority and principle—on authority, because of the case in the Common Pleas, *Pianciani v. the London and South-Western Railway Company* (18 Com. B. Rep. 226), where the Court expressed a strong opinion that the contract was divisible, and so far as the carriage by land was concerned the act was a protection to the company, a decision in which I for one entirely concur; and upon principle, because it would be matter of serious inconvenience, where a company is established for the purpose of carrying goods by land and obtains powers for opening a traffic by water, that such privileges should prevent it from providing accommodation for an entire journey without the necessity of separate contracts, as would be the case if the company were deprived of the protection which the Carriers' Act affords. I think, therefore, that the company have a good defence to this action.

MELLOR, J.—I am of the same opinion. I think that the circumstances stated in the case, as found by the arbitrator, fall short of shewing that the plaintiff had taken his chronometer out of the care and custody of the company. I agree with the Lord Chief Justice that some cases might occur which persons might so take charge of in articles as to relieve the company from the care of them. In the present case the finding of the arbitrator does not disclose any such circumstances. The only other question is, are the company relieved from liability by reason of the terms of the Carriers' Act? Mr. Brown's contention is, that this was a compound contract which would be performed partly on land and partly on water, and that the Carriers' Act is confined to cases where the contract was to carry by land. In contracts by carriers, the statute gives protection by land, and therefore, so far as this is a contract to carry by land, there is a liability for which the company must answer, except so far as they are shielded by the Carriers' Act. I think that there can be no doubt that this is a case to which the statute does apply.

SHEE, J. concurred.

LUSH, J.—The first question is whether the chronometer was delivered to and accepted by the company. The case states that the plaintiff, on his arrival at the station, took the chronometer in his hand and gave it to the porter, who, in his presence, put it in the carriage. The porter was there for the purpose of receiving luggage. The company might have said, We won't carry goods in our carriages. But they did not say so. We know that it is every-day practice to carry carpet-bags into a railway carriage, with the consent of the company, and to make it a place of deposit. And there is no fact to shew that the plaintiff who was entitled to have his property carried by the defendants with the ordinary liability of carriers, ever took it out of their custody. That the chronometer was one of the articles enumerated in the Carriers' Act I have no doubt, because it mentions time-pieces above the value of 10l. It was contended that, because the contract is entire, partly by land and partly by water, that it is out of the protection of the act—that is, because the company is obliged to make a special contract for that part of the journey which is by sea, it is therefore obliged to make another for the residue of it, which is by land. This is reasoning in which I cannot bring myself to concur. As for the inconvenience suggested by Mr. Brown in insuring goods after arrival from a sea-voyage, it is not necessary to decide the point; but it may be necessary for the company, in order to bring themselves within the act, to have a table of their increased rates and charges put up in every office where goods are received. There is, however, no such difficulty here, as it is expressly found that the defendants did everything to entitle themselves to the protection of the act.

Judgment for the defendants.¹

(1) With regard to the opinion expressed by the Court upon the question as to the custody of the chronometer, it will be observed that the company were not heard upon this point, as it became unnecessary to call upon them to argue at all.

[IN THE QUEEN'S BENCH.]

Nov. 4, 1865.

ABERYSTWITH PROMENADE PIER COMPANY (LIMITED) *v.*
COOPER.

35 L. J. Q.B. 44; 12 Jur. N.S. 995; 13 L. T. 273; 14 W. R. 28.

Referred to, *Cesena Sulphur Coy. v. Nicholson* [1876] E. R. A.; 45 L. J. Ex. 821; L. R. 1 Ex D. 428; 35 L. T. 275; 25 W. R. 71 (Ex. D.).*Costs—County Court Acts—9 & 10 Vict. c. 95. s. 128.—15 & 16 Vict. c. 54. s. 4.—Concurrent Jurisdiction—"Dwells"—Place of Business of Joint-Stock Company.**COUNTY COURT.—A joint-stock company dwells, within the meaning of the County Court Acts (9 & 10 Vict. c. 95. s. 128, and 15 & 16 Vict. c. 54. s. 4), where the substantial business of the company and its negotiations are carried on, and not necessarily in the locality where its property is situated and its immediate objects carried out.**A promenade pier company, whose objects were the erection and maintenance of a pier and the reception of tolls thereon at Aberystwith, but whose registered offices were at Westminster, where the substantial business of the company and their negotiations were carried on, was held to "dwell" at Westminster, and not at Aberystwith, within the meaning of those acts.*

This was a motion for a rule to set aside an order of Martin, B., made at chambers, in vacation, by which it was ordered that the plaintiffs should recover their costs, and that the same should be referred to the Master for taxation.

It appeared from the affidavits that this action was brought to recover the sum of 14l. 14s. in respect of calls and an allotment deposit on shares in the above company. Judgment was signed against the defendant, for want of a plea. The defendant was a publican and livery-stable keeper at Aberystwith, within the jurisdiction of the county court of Cardiganshire. The object of the company was stated to be described, in the papers at the Joint-Stock Company's Registration Office, to be the erection of a promenade and landing pier at Aberystwith; and the registered office of the company was there stated to be at No. 4, Victoria Street, Westminster. The company had, before the action, erected a promenade pier at Aberystwith, and had begun to receive tolls from passengers thereon; but the plaintiffs' affidavit stated that all the business of the company was transacted at the offices of the company in Westminster.

Underhill, in support of the motion.—The order was made under the 9 & 10 Vict. c. 95. s. 128. and the 15 & 16 Vict. c. 54. s. 4. The question is, whether the company "dwelt" more than twenty miles from the defendant, and that depends on the question whether they are to be taken to dwell at Aberystwith, where the pier was erected upon which the tolls were taken, which produced the dividends for the shareholders, and in respect of the repairs whereof the money of the company must be expended, or at Victoria Street, Westminster, where the registered office of the company is situated.

[MELLOR, J.—The business of the company is carried on where the directors transact the ordinary business of the company. COCKBURN, C.J.—If a man wished to get an annual ticket, would he go for it to London or Aberystwith?]

The Keynsham Blue Lias Lime Company (Limited) v. Baker (2 Hurl. & C. 729; s. c. 33 Law J. Rep. (N.S.) Exch. 41) is on all fours with this case. In that case the place of manufacture and sale was within twenty miles of where the defendant dwelt, and the registered office of the company was in London, more than twenty miles distant; and the Court held that the company

dwelt at the place of manufacture and sale, and not at the registered office of the company.

[COCKBURN, C.J.—There the material was manufactured, and sold and delivered, all at their place of business in the country. MELLOR, J.—The reception of the tolls of the pier is not the carrying on of the business of the plaintiffs' company. COCKBURN, C.J.—You have not stated in your affidavit that the company had any office at Aberystwith.]

The case of railway companies which, it has been held, dwell and carry on their business where the principal station is situated, not at the intermediate stations, stands on a peculiar ground, and is distinguishable—*Brown v. the London and North-Western Railway Company* (32 Law J. Rep. (n.s.) Q.B. 318; s. c. 4 Best & S. 326), *Shiels v. the Great Northern Railway Company* (30 Law J. Rep. (n.s.) Q.B. 331). He also referred to *Taylor v. the Crowland Gas Company* (11 Exch. Rep. 1; s. c. 24 Law J. Rep. (n.s.) Exch. 233).

COCKBURN, C.J.—I think there should be no rule. The section of the act we are now considering has already received judicial exposition in point. In the cases of railway and coal companies, they have been deemed to carry on their business where their principal offices were situated. Mr. Underhill's reasoning, if it could prevail, might be applied to railways, and to contracts entered into at the intermediate stations; and if a dispute arose upon such contracts, it might be said, in accordance with such reasoning, that the railway company dwell or carry on business at every one of their intermediate stations; but it has been held that a railway company does not carry on business at any place other than its principal office at which its business is managed. So it cannot be said here that the Aberystwith Promenade Pier Company dwell on the pier, but it must be taken that they dwell at the office of the company at Westminster. The affidavit of the plaintiffs states that the only office is in Westminster, and the affidavit on the other side only says that in the belief of the deponent they had no other business than maintaining and keeping in repair the pier, and receiving the tolls in respect thereof at Aberystwith. I think that the company dwell where its representatives are to be found.

MELLOR, J.—I am of the same opinion. To raise the question as to what constitutes the principal place of business, the affidavits ought to have gone further. There might be cases where only the declaration of dividends or such formal matters might be done at the registered office, and then it might be a different matter; but where the substantial business of the company is done, and its negotiations entered into, there, I think, the company dwells.

SHEE, J. and LUSH, J. concurred.

Rule refused.

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Queen's Bench.)

May 15, 1865.

THE QUEEN v. THE DARLINGTON LOCAL BOARD OF HEALTH.*

Local Board of Health—Interference with Water-Right—Local Government Act, 1858, 21 & 22 Vict. c. 98. s. 73.—Mandamus—Compensation—Action—Injunction.

LOCAL GOVERNMENT.—*The local board of health constructed a sewer along*

* Decided in the Sittings after Easter Term, *coram* Erle, C.J., Pollock, C.B., Channell, B., Keating, J. and Smith, J.

the bank of a river, with trap-doors in it, communicating with the river. When the river was full and water abundant, the board, by means of the trap-doors, drew water off from the river and let it into the sewer, for the purpose of flushing it. The place where the trap-doors were placed was at a part of the river above that on which a mill, occupied by the prosecutor, was situated. On one occasion, the board made a hole in the bottom of the river, and so let the stream run into the sewer for nearly two days continuously, during that time abstracting the water of the river in such quantities that the prosecutor's mill ceased working for want of water:—Held, that the acts of the board were in excess of the powers given them by statute; that they had injuriously affected the river; and that the prosecutor might have brought an action for the wrong, and also, in such action, obtained an injunction against the continuance of it; that he was therefore an individual entitled by law to prevent or be relieved against the injuriously affecting the river, within the meaning of statute 21 & 22 Vict. c. 98. s. 73; and, consequently, that he could not sustain a mandamus against the board to summon a jury to assess him compensation.

Error was brought, in this case, to reverse the judgment of the Court of Queen's Bench, in favour of the defendants, on a mandamus.

The pleadings and facts are set out at great length in the report below (33 Law J. Rep. (N.S.) Q.B. 305).

The mandamus was to the Darlington Local Board of Health, commanding them to make compensation to the prosecutor, Thomas Taylor, for the damage sustained by him by the exercise of the powers of the Public Health Act, 1848, in making certain drains and sewers, and thereby diminishing the water of a stream to which he was entitled for the working of a mill.

The return, in substance, denied that the defendants had affected the stream in their exercise of the powers of the act; and alleged that if they had affected it at all, it was by acting in excess of those powers, and that so a cause of action had accrued to the complainant.

A case was stated which shewed that the prosecutor was a miller, occupying a mill on the banks of the river Skerne, and as riparian proprietor was entitled to the use of the waters of the Skerne for the working of his mill. The defendants, the local board of health of the town of Darlington, constructed a sewer along the banks of the Skerne, with trap-doors for admitting the water of the river into the sewer. During the construction of part of the sewer, certain water oozed from the river into the sewer and was lost to the prosecutor's mill. Previous to making the sewer the surface water from the town of Darlington was carried by artificial drains into the Skerne above the plaintiff's mill.

These drains had been turned into the sewer, and so the surface water was lost to the prosecutor's mill; all water entering the sewer being carried below the prosecutor's mill.

On the 18th of June, 1850, by the direction of a servant of the defendants, a hole was made in the sewer and the water of the river let into it to flush it. The hole remained open till the 20th of June. During the time it was open the water of the Skerne ran into it in large quantities, and was lost to the prosecutor, and the working of his mill was stopped.

The trap-doors were usually kept closed. They were, however, occasionally opened for the purpose of flushing the sewer, when there was a flush of water in the river.

The prosecutor claimed compensation under four heads—First, for damages sustained by the defendants having carried off the water by the hole in the sewer on the 18th and 19th of June for forty-six hours. Secondly, for water drawn off from the Skerne by the sewer being so near the river. Thirdly, for the trap-doors being made, and water being allowed to flow through them from the river into the sewer. Fourthly, for the defendants having drained off

into the sewer the rain and refuse water of the town of Darlington, which used to run into the river.

T. Jones (*Henderson* with him), for the prosecutor.—The prosecutor has a right to a mandamus. The local board of health have constructed a sewer so as to admit of the river there being diverted into the sewer and carried past the prosecutor's mill. By reason of the abstraction, the water for forty-six hours went into the sewer, and the prosecutor's mill was prevented working. Without relying on the claim for loss of water by percolation during the construction of the sewer, or for the carrying off the surface water of the town from the river into the sewer, it is clear that the prosecutor is entitled to compensation for the abstraction of the water from the river by means of the hole and trap-doors. The only question is, whether the compensation is to be by action or under the act. The statute 11 & 12 Vict. c. 63. ss. 43, 44, 45, gives the local board of health very ample powers in respect of sewers. Section 144. directs full compensation to be made for damage by reason of the exercise of the power of the act, and section 145. (now repealed) prohibits the interference of the board with any watercourse without consent in writing of the party interested in the water. The repealing section of the Local Government Act, 21 & 22 Vict. c. 98. s. 68, gives new limitations, and is addressed to interference with works of a public character, and prohibits it unless there be a consent in writing. The 3rd branch of the section is not an absolute prohibition, but applies only to those cases where public trustees could but for the act obtain relief in the Court of Chancery. Section 73. says, "Nothing in this act or any act incorporated therewith shall be construed to authorize any local board to injuriously affect any reservoir, river or stream, or the feeders of any reservoir, river or stream, or the supply, quality or fall of water contained in any reservoir, river, stream, or feeders of any reservoir, river or stream, in cases where any company or individuals would, if this act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such reservoir, river, stream, feeders, supply, quality or fall of water, unless such board shall have first obtained the consent in writing of such company or individuals so entitled as aforesaid." The question therefore is, whether a suit in equity would, if the act had not passed, have lain on the part of the prosecutor to prevent the board affecting the river in the above-mentioned manner. Section 69, as to compensation, illustrates the meaning to be put on the words in section 68, "prevent or be relieved by law," and shews that all other cases not provided for are put on the same level as those in which the parties have an equitable remedy. Section 74. contains a similar proviso as regards individuals. Having limited the board from interfering in any case in which a party is entitled in equity to prevent or be relieved, the statute permits a party injured either to go into equity or have an arbitration. The prosecutor was not bound to have brought an action, but is entitled to a mandamus for compensation. A Court of equity could not interfere with the trap-doors, even though the prosecutor might occasionally suffer a little damage. The statute allows the board to do that, making compensation. In *Isenberg v. the East India House Estate Company* (33 Law J. Rep. (N.S.) Chanc. 392) Westbury, L.C. held that no mandatory injunction ought to be granted to prevent a company in London building a house so as to interfere with the access of light and air to a neighbouring house, because the injury was one that might be amply compensated for by money, and Chancery could now assess the compensation under the new powers of Sir Hugh Cairns's Act, 21 & 22 Vict. c. 27. *Adams on Equity*, 217, 218, shews that a mandatory injunction is one which virtually compels the defendant to undo his previous work.

[ERLE, C.J.—In *Isenberg v. the East India House Estate Company* (33 Law J. Rep. (N.S.) Chanc. 392) the Lord Chancellor gave relief. He suspended the order and took the mode of building under his care, and assessed damages, though he refused the mandatory injunction.]

The Earl of Ripon v. Hobart (3 Myl. & K. 169) and *Beardmore v. Tredwell* (31 Law J. Rep. (N.S.) Chanc. 892) shew that equity always considers the

balance of convenience in determining whether an injunction should be granted. There can here be no question that it is far more convenient that the prosecutor should be liable to injury occasionally, and receive compensation, rather than the whole town of Darlington should be liable to flooding by the trap-doors being entirely closed. *The Attorney General v. the Sheffield Gas Consumers' Company* (22 Law J. Rep. (N.S.) Chanc. 811) shews that an injunction will not lie for trivial or temporary injuries. According to the judgment below, the Local Government Act became a nullity, for the local board must always be liable to an action whenever they touch the property of others, since there is always a party who can file a bill in equity. The true construction of section 73. is whether the damage is such as, according to the doctrine of the Court of Chancery, equity would not relieve against. The local board can do what it pleases with the property of individuals, making compensation under the act.

Rew (*Kemplay* with him), for the defendants, the local board, was not called upon to argue.

ERLE, C.J.—We are of opinion that the judgment of the Court below ought to be affirmed. The prosecutor in this mandamus moved for the mandamus to the defendants to issue their warrant to summon a jury, so that he might obtain compensation for damages sustained by him by reason of something done by the defendants in the exercise of their powers under the Public Health Act. It is familiar law that a mandamus cannot be sustained if the act complained of is actionable, and is not authorized by the statute under which the defendant acts.

The prosecutor has given four heads of damage, in respect of which he makes a claim. With regard to the claim for taking away the surface water, and for abstraction of the water from the river by percolation into the sewer, it was admitted during the argument that these could not be maintained as a ground of compensation. The third ground was, that the local board had dug a hole from the bottom of the river Skerne into the new sewer which they had constructed, and so turned a very large portion of the water of the Skerne into the sewer for the purpose of flushing the sewer.

The other ground is very similar; that for placing trap-doors, by means of which the local board have the power of turning the water of the Skerne into the sewer at their pleasure. The case finds that the defendants used the trap-doors only when there was an abundance of water in the river. But the prosecutor has to guard his rights, and has a ground of complaint, and the keeping of trap-doors would be a ground of action, if there were no statute applicable to the case.

Now, are the defendants authorized to do these acts? They are not authorized by the Public Health Act, 1848, and the question turns on section 73. of the 21 & 22 Vict. c. 97.—[His Lordship then read the section.]—It is clear that the defendants had not obtained the prosecutor's consent in writing, and that they have injuriously affected the stream. The act does not authorize what they have done, if any individual, supposing that the statute had not been passed, would have been entitled by law to prevent or be relieved against it. So the question comes to this: had the prosecutor a title by law to prevent or to be relieved against these acts? Opening the hole in the bottom of the river, and the damage caused by the use of the trap-doors, would be an injurious affecting the stream, and wrongs for which the prosecutor could have brought an action, and in the action have applied for an injunction. He was a person entitled by law to prevent and be relieved against such injuriously affecting the stream, if he could have obtained an injunction.

I take the word "law" to be used, in its widest sense, as including all the tribunals for protecting the rights of property. The wisdom of the legislature has given to Courts of equity, by Sir Hugh Cairns's Act, the power of assessing damages. The law has also given power to a Court of common law to grant an injunction. I think that the prosecutor, Mr. Taylor, was entitled to prevent and be relieved, if he could obtain an injunction in either Court. I do not confine

it to the cases where relief could be obtained in equity, for I am not certain of the rules which would govern in that Court. The question of the degree of the injury would make a difference. In my opinion, this injurious affecting of the river by the defendants, by their act, was not authorized, because the prosecutor was entitled by law to prevent and be relieved from it. This is clearly the same train of ideas which prevailed in the Court below. We affirm the judgment, on the grounds expressed now and by the Judges in the Court below.

The other Judges concurred.

Judgment affirmed.

[IN THE QUEEN'S BENCH.]

Nov. 7, 1865.

BRABANT, *appellant*, v. SIR T. M. WILSON, *respondent*.

35 L. J. Q.B. 49; 6 B. & S. 979; L. R. 1 Q.B. 44; 12 Jur. N.S. 24;
13 L. T. 319; 14 W. R. 28.

Copyhold—Grants of Manor Waste by Lord with Assent of Homage—Extinction by Enfranchisement of Reservations in favour of Copyhold Tenants Strangers to the Grant—4 & 5 Vict. c. 35. s. 40, 15 & 16 Vict. c. 51. s. 8, and 21 & 22 Vict. c. 94. s. 10.

COPYHOLD.—*By the custom of a manor the lord, with the assent of the homage, could make copyhold grants of part of the manor waste. The lord granted a portion of the waste to C, reserving the trees, and subject to a restriction against building on any part of the ground. In the grant was a power of entry for the lord, the trustees of a charity, and the copyhold tenants of the land adjoining, for the purpose of pulling down houses thereafter erected on the soil granted, and also a power of entry for the lord and the trustees for the purpose of cutting down trees or shrubs obstructing the prospect from the charity estate. The interest of C. vested by purchase in B., who gave notice to the lord, under the Copyhold Enfranchisement Acts, of his desire to have the land enfranchised:—Held, that the award of enfranchisement put an end to the restrictions above mentioned, and that the land must be valued as having been discharged from them.*

This was a case stated under the Copyhold Acts, 4 & 5 Vict. c. 35, s. 40. and 15 & 16 Vict. c. 51. s. 8.

The appellant is William Hughes Brabant, a tenant of the manor of Hampstead, and the respondent is Sir Thomas Maryon Wilson, lord of the manor. According to the custom of the manor of Hampstead, in the county of Middlesex, the lord of the manor may, with the consent of the homage, make grants of parcels of the waste land of the manor to customary tenants of the manor.

On the 27th of May, 1820, Sir Thomas Maryon Wilson, Bart., the then lord of the manor, at a special court that day holden for the manor, with the consent of the homage, granted to George Collings, a customary tenant of the manor, a parcel of the waste lands of the manor, upon the following conditions, contained in the grant; namely, that a good footpath, 4 feet wide, should be made on the south-west side of the piece of ground so granted, and that the piece of ground should be inclosed, and at all times thereafter should be kept inclosed, with an open fence or paling, not exceeding 5 feet from the level of the roads, on the several sides of the piece of ground. That any hedge or shrubs planted next to the fence should not be suffered to grow above this height. That no

erection or building should at any time thereafter be erected on the piece of ground or any part thereof.

By the grant there was reserved to the lord, his heirs and assigns, the several trees then standing on the piece of ground, with liberty for him, his heirs and assigns, at any time to enter upon the ground to cut, fell, take down and remove the same for his and their own use; and there was also thereby reserved to the lord and to the trustees of the Wells Charity estate, within the manor, for the time being, and also to the customary tenants, for the time being, of the copyhold messuages or tenements on the north-west side of the piece of ground, then belonging to Viscount Clifden, and his and their stewards and agents, full liberty and authority at any time after any building or erection which might thereafter be erected or set up on the piece of ground contrary to the condition aforesaid should be so erected, to enter upon the ground to pull down and remove any such erection or building at their pleasure, without any interruption by George Collings, his heirs and assigns; and there was also reserved by the grant, to the lord and to the trustees and to his and their stewards and agents, like liberty and authority thereafter in case any trees or shrubs should be planted upon the piece of ground which might obstruct or diminish the prospect from any part of the charity estate in a north-east direction towards and over Hampstead Heath, to enter upon the ground and to cut or fell and remove any such trees or shrubs at his and their pleasure, without any interruption by George Collings, his heirs and assigns, and free from all claim and demand by or from him or them in consequence of the exercise of the reservations, liberties and authorities thereinbefore reserved.

A copy of the grant accompanied and was to be referred to as part of the case.

The interest of George Collings under the grant in the piece of ground vested, in July, 1864, in William Hughes Brabant, who then became the purchaser of it, and was duly admitted as tenant to the lord of the same.

The conditions and restrictions contained in the grant of 1820 have not hitherto been broken or infringed, and the parties in whose favour those conditions and restrictions are created by the grant still have the same interests in their continuing in force which they had at the time of the grant. Viscount Clifden and the trustees of the Wells Charity estate have no rights, either legal or equitable, as against the lord of the manor, beyond the conditions or restrictions contained in the grant to George Collings, and their respective rights (if any) thereunder, and there is no other deed or obligation between them other than the grant to George Collings.

In September, 1864, Mr. Brabant, under the provisions of the Copyhold Enfranchisements Acts, gave notice in writing to the lord of the manor of his desire to enfranchise the piece of ground and premises, and two valuers were duly appointed to assess the consideration to be paid to the lord for such enfranchisement. In the course of the valuation a question arose whether, upon the enfranchisement of the piece of ground, the conditions and restrictions contained in the grant against building and planting on the ground would continue to be in force; the valuer for the lord contending that they would not continue to be in force, and the valuer for Mr. Brabant contending that they would so continue.

At the request in writing of the parties, made within due time, the question was referred to the Copyhold Commissioners, who, on the 13th of February, 1865, made their decision in writing, whereby,—after reciting the grant of 1820 to George Collings, and that it was material to the valuation of the gross sum of money to be paid for the enfranchisement of the said copyhold tenement, whether the conditions mentioned in the grant would so far continue in force after an award of enfranchisement, as to prevent the owner for the time being of the freehold land from building, planting and fencing upon such land as he might have done, if no such conditions had been contained in the grant so as to entitle any persons to enter upon such lands, when so become a freehold tenement, and to pull down and remove any erections or buildings erected

thereon contrary to the conditions in the grant contained, and that the continuance or non-continuance in force of such conditions of such enfranchisement, was a question of law material to the valuation,—decided that the conditions and restrictions against building and planting, contained in the grant, would not continue to operate after the enfranchisement of the land.

Mr. Brabant being dissatisfied with such decision, on the 14th of February, 1865, requested the Commissioners, in writing, to state a case for the opinion of one of the superior Courts, according to the provisions of the Copyhold Act, 1852, and in pursuance of such request this case has accordingly been stated.

The question for the opinion of the Court is, whether or not the restrictions against building and planting, contained in the said grant of 1820, will continue in force after the enfranchisement of the piece of land.

Mellish (*R. E. Turner* with him), for the appellant.—The conditions and restrictions contained in the grant may continue binding as against subsequent purchasers. At common law these conditions would not run with the land, but would be regarded merely as covenants in gross. But in equity if a man acquires land upon condition that he will treat it in a peculiar way, the Court will enforce the agreement as against purchasers with notice. The homage gave their consent to the grant only upon condition that the land should not be built upon. The enfranchisement can make no difference. If the homage might have removed buildings before, they can now.

[*LUSH, J.*—The tenants only assent or dissent; nothing passes from them.]

Two leading cases upon this subject are, *Tulk v. Mozhay* (2 Phill. 774; s. c. 18 Law J. Rep. (N.S.) Chanc. 83) and *Piggott v. Stratton* (Johns. 341; s. c. 29 Law J. Rep. (N.S.) Chanc. 1). In *Tulk v. Mozhay* (2 Phill. 774; s. c. 18 Law J. Rep. (N.S.) Chanc. 83) the purchaser of a garden in Leicester Square covenanted to keep it in order as a public garden, and it afterwards came by mesne conveyances to the defendant, whose purchase deed contained no similar covenant, though he had notice of the original covenant by the vendee. In *Piggott v. Stratton* (Johns. 341; s. c. 29 Law J. Rep. (N.S.) Chanc. 1), the defendant, who was lessee of land, subject to a covenant not to build within a certain interval, made an underlease of part of it to the plaintiff, telling him that he was prevented by the head lease from building so as to break the sea view. It was held, that the defendant in the former case, was bound by the covenant, and in the latter case by the representation, though he afterwards surrendered the original lease and obtained another.

[*COCKBURN, C.J.*—Do these cases shew that the agreement will be enforced on the part of every person in whose favour it was made? If the lord of the manor takes compensation on the understanding that the conditions are done away with, could he be allowed in equity to insist upon them?]

Scriven on Copyholds, 4th edit. p. 17, shews, that where there is a custom to make fresh copyhold grants with the consent of the homage, this consent is material in determining the validity by the custom.

C. Pollock, for the respondent.—The case of *Tulk v. Mozhay* (2 Phill. 774; s. c. 18 Law J. Rep. (N.S.) Chanc. 83) only shews that the vendor may assert conditions as trustee on behalf of those to whom he has sold property which would be affected by a breach of these conditions. In this case the power of entry for the trustees and the co-tenants is nothing more than a gratuitous reservation to a stranger, for the assent of the homage is only a matter of form. The Commissioners have awarded compensation on the principle that the appellant will obtain a freehold estate without restrictions, and this is the effect of enfranchisement. The Copyhold Act, 15 & 16 Vict. c. 51, takes no notice of the rights of the homage. In *Watkins on Copyholds*, 4th edit. vol. 1. p. 450, it is stated that the enfranchising lord cannot reserve to himself any services on the enfranchisement, since the copyhold tenure is absolutely at an end.

Mellish, in reply.—It is true that a mere gratuitous contract cannot be enforced as against the copyholder after enfranchisement. Here, however,

it is clear that the other tenants wanted some security that the land would not be built upon, apart from the will of the lord.

COCKBURN, C.J.—I am of opinion that our judgment should be in favour of the respondent, on the ground that Mr. Brabant, the appellant, holds the land without being restrained, by virtue of the reservations and conditions in the grant, from applying the soil to such purposes as he may find most beneficial to him. The land was originally part of the waste of the manor. By the custom of the manor (as appears from the case) the lord, with the consent and concurrence of the homage, can convert land, part of the waste, into copyhold tenements. It appears that this was done in favour of a person named Collings, from whom the appellant derives title. But the grant was made subject to restrictions in favour of the trustees of the Wells Charity and the customary tenants of Viscount Clifden; one of which was, that the land should not be built upon. This restriction was gratuitous, so far as respects the trustees and the tenants in whose favour it was made. None of them could enforce it, either against the copyhold tenant on the one hand, or the lord of the manor on the other. There is nothing to shew that the homage insisted on this restriction, or intended it for the general benefit of the copyholders. I think that it must be taken to have been made for the particular benefit of the grantor. But even if this restriction be taken to have been made for the benefit of the copyholders themselves, I do not think that they would have any *locus standi* to enforce it. The homage have a right to withhold their assent; but when it is once given and a grant made, their interest ceases. The land is no longer waste, and the homage have nothing more to do with it. It is for the lord alone to enforce the rights reserved to them; and his obligation to do so may be binding in honour, but is not binding at law. The waste having been converted into copyhold tenements, the lord of the manor and the copyhold tenant, by the late Copyhold Act, may either of them compulsorily enfranchise the land without the concurrence of the homage. Now, the valuer can only look at the real value of the land; and as the lord, who alone has a legal interest in a continuance of the conditions, is estopped by his release from insisting upon them, I think that he is entitled to have the valuation made upon the understanding that they are removed.

MELLOR, J.—I am of the same opinion. This is not the case of a person who has been induced to alter his condition upon the faith of a representation in the nature of a promise. I think, therefore, that the cases in equity which have been cited have no application, and that the homage, having resigned their commonable privileges over a portion of the waste by assenting to a separate grant of it, have no rights against the lord, or any person claiming under him.

SHEE, J.—I am of the same opinion. I think that the restrictions in the grant, though made in favour, not only of the lord, but of two other classes of persons, could be enforced by the lord alone. I think, too, that the power of the lord to enfranchise remained intact, and that in exercising it he did not require the concurrence of the homage. The award of enfranchisement under the Copyhold Acts, 15 & 16 Vict. c. 51. and 21 & 22 Vict. c. 94, expressly frees the land from all incidents of copyhold tenure; and the decisions which have been cited from the Equity Reports, shewing that a person who buys an estate with notice of conditions affecting it is bound by them, do not apply to a case where the person who has imposed conditions is himself desirous of being released from them.

LUSH, J.—I am also of opinion that the decision of the Commissioners is correct. Mr. Brabant has a copyhold tenement clogged with conditions and restrictions against planting and building on the land. He is desirous of having the land enfranchised, and when that is done the question will be, what estate has he in his property? If he has an estate in fee simple discharged from the conditions which were formerly imposed upon it, he ought to pay to the lord a fair equivalent for what he has acquired. The question,

therefore, which we have to decide is, whether the freehold remains clogged with these restrictions and conditions, or whether it is discharged from them. Now, by the 21 & 22 Vict. c. 94. s. 10, the award of the Commissioners is to have the same force as a deed of enfranchisement under the provisions of the former acts. By these provisions, what was copyhold land becomes an estate of freehold tenure, subject to a charge only, if it is agreed that the compensation shall be secured to the parties entitled in that manner. I take it therefore to be perfectly clear that as soon as the enfranchisement is complete, the tenant will have the land free from all molestation by any persons claiming under the lord. Then, it is said that these conditions and restrictions must be taken to have been required by the homage as a security, and as the consideration for their assent to the grant. By the custom of the manor, the homage may give their assent to grants of part of the waste, to be held by copy of court-roll. But excepting what arises from their assent to these grants, they have no interest in them. There is an express power of entry in favour of two classes of persons besides the lord; but the case states that they have no rights over the subject of the grant. It follows that the enfranchisement which takes from the lord the right to enforce these restrictions puts an end to them altogether. I think, therefore, that the appellant must pay a consideration equal to the value which he is to receive.

Judgment for the respondent.

[IN THE QUEEN'S BENCH.]

Nov. 17, 27, 1865.

BRAND AND MARY HIS WIFE v. THE HAMMERSMITH AND CITY RAILWAY COMPANY.

35 L. J. Q.B. 53; 7 B. & S. 1; L. R. 1 Q.B. 180; 13 L. T. 501; 14 W. R. 129: reversed, [1867] E. R. A.; 35 L. J. Q.B. 52; 7 B. & S. 1; L. R. 2 Q.B. 223; 16 L. T. 101; 15 W. R. 437 (Ex. Ch.): the latter decision reversed, [1869] E. R. A.; 36 L. J. Q.B. 139; 8 B. & S. 318; L. R. 4 H. L. 171; 21 L. T. 238; 14 W. R. 12 (H.L.) 129.

Lands Clauses Consolidation Act, 1845, (8 Vict. c. 18. ss. 18, 21, 22, 49, 63, 68.)—*Railways Clauses Consolidation Act*, 1845, (8 Vict. c. 20. ss. 6, 16, 86.)—*Compensation—Injury to Premises adjoining Railway by Vibration, Noise and Smoke.*

Premises adjoining a railway, but untouched by it, were injured by vibration, noise and smoke, caused by the running of trains on the railroad, after it had been completed. The premises sustained no structural injury:—Held, that the owner was not entitled to compensation from the company by virtue of the provisions of either the Lands Clauses Consolidation Act or the Railways Clauses Consolidation Act.

This was an action to recover the sum of 272*l.*, balance of a sum of 1,141*l.* for which last sum the plaintiff, Mary, then Mary Piper, had obtained judgment at a sheriff's inquisition held August 13th, 1864. By consent of the parties, and an order of the late Mr. Justice Crompton, a case to the following effect was stated for the opinion of the Court, without pleadings.

After stating the title of the plaintiff Mary (as executrix and devisee in fee of her late husband R. M. Piper) to a messuage, outbuildings, garden, and lands at Shepherd's Bush, Middlesex, known as Cumberland House, it proceeded—

By the Hammersmith and City Railway Act, 1861, the defendants were incorporated and empowered to make and maintain a railway and works as therein mentioned, and to enter upon, take and use certain lands for the purposes of that act.

The Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, are incorporated with and form part of the special act.

The defendants proceeded to construct and execute the railway and works under and in accordance with the provisions of the special act, and the acts incorporated therewith. The railway in its course crosses the Uxbridge Road, nearly at right angles, and at and near this point it is constructed upon a viaduct of brick arches, and at a height of about 19 feet above the level of the ground. This part of the railway was completed in August, 1863, and the railway was opened for public traffic in June, 1864. The railway is worked by the Great Western Company, as lessees of the defendants, as a passenger railway only, and in the usual and ordinary way. Cumberland House is situated in the immediate neighbourhood of the railway near the spot where the railway crosses the Uxbridge Road. No part of Cumberland House, and no lands or hereditaments whatsoever of Robert Monkhouse Piper, or of the plaintiff Mary, were ever entered upon or taken or used by the defendants permanently or temporarily. The railway and works were commenced in the lifetime of Robert Monkhouse Piper, and he was then residing there with his wife and family, and after his death the plaintiff Mary, then his widow, continued to reside there with her family. On the 19th of July, 1864, a notice was served on the defendants by the plaintiff Mary, claiming, both as trustee and executrix, compensation from the company for (amongst other things) damage and injury done, and which would thereafter be occasioned to her property by the working and use of the railway, and consequential thereon.

The defendants, after the receipt of this notice, duly issued their warrant to the sheriff of Middlesex to summon a special jury under the Lands Clauses Consolidation Act, 1845. The warrant stated that the company did not recognize the plaintiff's claim, and that the warrant was issued under protest. After due notice given, the plaintiff Mary and the defendants appeared on the 13th of August, 1864, before the sheriff and a special jury, duly summoned and sworn, when the claim of the plaintiff was duly inquired into. Upon the inquiry, the claimant, by her counsel, claimed compensation in respect of the following matters: 1. For the obstruction of light and air and way. 2. For damage to the garden by lime-dust and smoke in the course of construction of the railway in the lifetime of Robert Monkhouse Piper. 3. That the working of the railway and the running of trains over it after it had been constructed and opened for traffic, had occasioned, and always would occasion, vibration, noise and smoke; and that the premises, by reason of their being subjected to such vibration, noise and smoke from passing trains were, and always would be affected and further depreciated in value.

Evidence was given on behalf of the claimant in support of each of these three heads of claim. As to the third head of claim, it did not appear that any structural injury was or would be caused to Cumberland House, or any of the outbuildings, by the construction of the railway. But it appeared, and was admitted, for the purposes of the case, that by reason of the working of the railway after it had been opened for traffic the house and buildings were and would be subjected to vibration, noise and smoke from passing trains, and were and always would be affected and depreciated and lessened in value thereby. The defendants, by their counsel, objected to any evidence being given or received of any depreciation in value occasioned by these causes, and such evidence was admitted under protest.

The defendants, by their counsel, then objected that the plaintiff, Mary, was not entitled to any compensation under the third head of claim; but

finally, and in order that the question might be conveniently raised and determined, it was agreed that the jury should assess the amount of compensation under each of the said several heads of claim separately, and the jury accordingly assessed the amount of compensation to be paid to the plaintiff Mary under the several heads of claim as follows:

	£.
For obstruction of light, air and doorway	836
For damage to garden in the lifetime of Robert Monkhouse Piper	23
For vibration from the use of the railway after construction as before mentioned	272

For which several sums they gave their verdict; and the sheriff gave judgment that the several sums be paid by the defendants, and such verdict and judgment were afterwards duly recorded.

The case then stated the marriage of the plaintiff Mary with the plaintiff Horatio Brand, and the payment into the Bank of what was due under the first two heads of claim.

The question for the opinion of the Court was, whether the said plaintiff Mary was entitled to have compensation made to her by the defendants in respect of the matters falling under the third head of claim. If the question were answered in the affirmative, judgment was to be entered for the plaintiffs, as the Court should direct, either for the sum of 272*l.*, with interest thereon at the rate of 4*l.* per cent. per annum, from the 13th of August, 1864, until judgment, or that a peremptory writ of mandamus should issue commanding the defendants to pay the sum of 272*l.*, with interest thereon as aforesaid, into the Bank in the name and with the privity of the Accountant General of the Court of Chancery in England, to be placed to the account there of such Accountant General, *ex parte* the Hammersmith and City Railway Company, in the matter of the Hammersmith and City Railway Act, 1861, pursuant to the acts for the time being in force for regulating monies paid into the court, and in either case, with costs of suit. If the question were answered in the negative, judgment was to be entered for the defendants, with costs of suit.

The Hammersmith and City Railway Act, 1861, to be referred to, and to form part of this case.

Hawkins (Dixon with him), for the plaintiffs.—Upon the facts stated in the case the plaintiffs are entitled to compensation. It is stated that the defendants have leased their line to the Great Western Company; but this circumstance will hardly be relied upon as a matter of defence. It is acknowledged that the premises in question have been injured by vibration, noise and smoke, and that their value is lessened. The same principles must apply to the case as if the house had been shaken to its foundations. The acts of parliament granting compulsory powers must be construed in favour of private individuals, and strictly against the company. These acts were not intended to deprive any one of the value of his property. If a private individual were to construct a railroad, and to injure his neighbours as the plaintiffs have been injured, he would be liable to an action. The legislature has converted this right of action into a right to compensation.

[LUSH, J.—If a farmer frightened the horses of his neighbour with a thrashing machine, that would be a cause of action like the present one?]

Yes.

[LUSH, J.—Therefore a person whose horses were frightened by a railway train would have a right to compensation?]

Where the public suffer alike the rule does not apply.

[LUSH, J.—I believe that actions against railway companies for setting fire to stacks have always been grounded on negligence?]

Yes; but this is like the case of *Bradley v. Gill* (1 Lutw. 69), where an action was held to lie against a smith for setting up a forge adjoining the land

of the plaintiff and frightening his horse. But by the express words of the Railway Acts the claim of the plaintiffs can be upheld. The right to compensation is not regulated by section 68. of the Lands Clauses Act, which merely specifies the mode of assessing compensation. Material provisions are to be found in section 6. of the Railways Clauses Consolidation Act, which provides, "That in the exercise of the power given by the special act to construct the railway and to take lands for that purpose, the company are to make to the owners and occupiers of lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the land and for all damage sustained by such owners, occupiers and other parties, by reason of the exercise, as regards such lands, of the powers by the general and by the special act, or any acts incorporated therewith, vested in the company."

[MELLOR, J.—The compensation is given to persons injuriously affected by the construction of the railway.]

The word "construction" must mean construction of the works for the purposes to which they are to be applied, and having regard to the manner in which they are to be used. By section 16. of the same act power is given, for the purpose of constructing the railway, to execute certain specified works, among which are bridges and viaducts, with a general power to do all other acts necessary for using the railway, doing as little damage as can be, and making full satisfaction to all parties interested for all damage by them sustained by reason of the exercise of such powers.

[MELLOR, J.—These powers refer only to the construction of works, and the power to do acts necessary for using the railway must mean necessary for enabling the railway to be used.]

Sections 86. and 87. explain what are the acts necessary for using the railway. By the first of these sections, the company take powers to employ locomotive engines and carriages and waggons, to be drawn and propelled thereby, and to carry passengers and goods upon the railway. By the second, running powers may be granted to other companies. Damage like that sustained by the plaintiffs is provided for by different sections of the Railway Acts. By the Lands Clauses Act, section 49, compensation is awarded for the severance of lands taken by the company from other lands, or otherwise injuriously affecting such lands by the exercise of the compulsory powers. In section 18. the notice to treat is required to express the willingness of the company to make compensation to all parties for the damage that may be sustained by them by reason of the execution of the works. By section 63, in estimating the compensation for damage from severance, regard is to be had to the damage from injuriously affecting other lands.

[LUSH, J.—It can hardly be said that damage caused by the use of the railway is damage caused by the execution of the works.]

In *Chamberlain's case* (2 Best & S. 605; s. c. 32 Law J. Rep. (N.S.) Q.B. 173) the house of the claimant had sustained no structural damage, but he recovered compensation; and the effect of this case is not altered by the recent decisions in *Cameron v. the Charing Cross Railway Company* (16 Com. B. Rep. N.S. 430; s. c. 33 Law J. Rep. (N.S.) C. P. 313) and *Ricketts v. the Metropolitan Railway Company* (5 Best & S. 156; s. c. 34 Law J. Rep. (N.S.) Q.B. (Ex. Ch.) 257). The case *In re Penny v. the South-Eastern Railway Company* (7 El. & B. 660; s. c. 26 Law J. Rep. (N.S.) Q.B. 225) is no authority against the plaintiffs. Lord Campbell, indeed, says, at page 672 of his judgment, that the claimant, in his opinion, would be entitled to compensation for injury from vibration during the construction of the railway, but not afterwards. This, however, was a dictum unnecessary for the decision of the case; and in *Glover v. the North Staffordshire Railway Company* (16 Q.B. Rep. 912; s. c. 20 Law J. Rep. (N.S.) Q.B. 376) his Lordship held that where a railway crossed a private road so that the train was not seen till a few seconds

before crossing, this was a ground for compensation, although it seems clearly to be an inconvenience arising from the use of the railway.

[MELLOR, J.—There the putting up gates so as to obstruct the road was the principal injury.]

There are several cases where claims in respect of damage, such as that in the present instance, have been entertained. In *The New River Company v. Johnson* (2 E. & E. 435; s. c. 29 Law J. Rep. (N.S.) M.C. 93) compensation was refused, because no action would have lain for the abstraction of the underground water. In *The London and North-Western Railway Company v. Bradley* (6 Rail. Cas. 551) injury to a cellar from vibration was held to be damage within the 68th section of the act. In *Croft v. the London and North-Western Railway Company* (3 Best & S. 436; s. c. 32 Law J. Rep. (N.S.) Q.B. 113) a tunnel had been carried under premises of the plaintiff, and compensation was awarded him for all damage sustained by reason of the construction of the tunnel. Years afterwards the premises sustained injuries owing to the tunnel; and it was held, that the prospective damage must be taken to have been considered by the arbitrator, and that no further compensation could be recovered.—See also *Read v. the Victoria Station and Pimlico Railway Company* (1 H. & C. 826; s. c. 32 Law J. Rep. (N.S.) Exch. 167) and *Lee v. Milner* (2 Mee. & W. 824; s. c. 6 Law J. Rep. (N.S.) Exch. 205). The latest case touching upon the question is *In re the Stockport, Timperley and Altringham Railway Company* (33 Law J. Rep. (N.S.) Q.B. 251), where Crompton, J. held that the damage to a cotton-mill, owing to the increased risk of fire by reason of the proximity of the railway, might be taken into account in assessing compensation. It is true that the company had taken part of the land of the claimant; but after severance, and before the damage takes place, the claimant is in the position of a separate owner.

[LUSH, J.—The owner is exposed to greater risk by reason of the severance, and ought to receive compensation for consequential damage.]

Karslake (H. Lloyd with him), for the company.—The case makes it plain that no land or easement belonging to the plaintiffs has been touched or interfered with by the company. The company has not been guilty of negligence; no damage has been sustained by the construction of the works, and no injury has been caused unless by the working of the railway.

[MELLOR, J.—In all the cases cited by Mr. Hawkins something had been done in the progress of the works.]

In *The Caledonian Railway Company v. Ogilvie* (2 Macq. H.L. Cas. 229) a railway crossed a high road on a level near the claimant's house. It was held, that the inconvenience was personal, and gave no right to compensation. In the judgment (p. 235) Lord Cranworth, after stating that an injury to give a right to compensation must be actionable, says: "I am far from admitting that there would be a right to compensation in some cases, where, if the act of parliament had not passed, there might have been, not only an indictment, but an action. In *Glover v. the South Staffordshire Railway Company* (16 Q.B. Rep. 912; s. c. 20 Law J. Rep. (N.S.) Q.B. 376) a private road was blocked up by the construction of the works. The case of *In re the Stockport, Timperley and Altringham Railway Company* (33 Law J. Rep. (N.S.) Q.B. 251) is an authority against the plaintiffs instead of being one in their favour. Crompton, J., in his judgment, while noticing *Broadbent v. the Imperial Gas Company* (7 De Gex, M. & G. 436; s. c. 26 Law J. Rep. (N.S.) Chanc. 276) lays stress upon the fact that in the case before him a portion of the claimant's land had been taken. If any one were to construct a railway without parliamentary powers, he might be sued according to the extent of the injury which he inflicted. But a railway, by act of parliament, is supposed to confer a benefit upon the public; and if it does not touch landed property, it is not bound to give compensation. The injury in question is just as personal as that of the owner of horses frightened by passing trains. The preamble of the Lands Clauses Act shews that its operation is limited to the acquisition

of lands. It is true that by section 63. there is a special provision granting compensation for injuriously affecting lands; but that is where there is a severance. Section 68. supposes that the person is entitled. It is contended that the general power to do acts necessary for using the railway includes the power in section 86; but the former section applies only to the construction of works. There is no clause giving compensation to those injured by the working of the railway. He cited *Mumford v. the Oxford, Worcester and Wolverhampton Railway Company* (1 Hurl. & N. 34; s. c. 25 Law J. Rep. (N.S.) Exch. 265).

Dixon, in reply.—The payment of compensation is a purchase of the right to do injury for all future time. The distinction which is relied upon in the case of *In re the Stockport, Timperley and Altringham Railway* (33 Law J. Rep. (N.S.) Q. B. 251) is not disputed. It is admitted, that where land is not taken by the company the liability to damage from fire is not a ground for compensation, as it would not be a cause of action. But here there is a cause of action by the common law, for where an act otherwise lawful actually causes damage to another person, it is the subject of an action on the case, and the person possessing this right of action has a claim to compensation; though his rights are not equal to those of a person whose lands are taken, and who may recover for any sort of consequential damage against the trespasser. In section 18. of the Lands Clauses Consolidation Act, arrangements are directed for the compensation to all parties for damage by reason of the execution of the works. But in section 22. the compensation is stated to be in respect of lands injuriously affected by the execution of the undertaking, although in section 21. the words are, "damage by reason of the execution of the works," shewing that the words "undertaking" and "works" are regarded as identical. In section 63, where damage like that in question is provided for, the words are "otherwise injuriously affecting such lands by the exercise of the powers of the statute and special act." These words, "execution of the works," must mean "the carrying out of the whole scheme." All that is relied upon in the case of *Broadbent v. the Imperial Gas Company* (7 De Gex. M. & G. 436; s. c. 26 Law J. Rep. (N.S.) Chanc. 276) is extra-judicial.

MELLOR, J.—In this case our judgment must be in favour of the company. The case has been extremely well argued on both sides. Mr. Dixon has put before us many considerations well worthy of attention, but he has failed to convince me that the distinction on which he rests is a sound one. The compensation claimed by the plaintiffs was assessed for damage incurred after the construction of the railway, and which was not the result of negligence. I quite agree to the proposition, that if a company exercise its powers negligently so as to cause injury, this would be the subject of an action at common law. But the difficulty of the plaintiffs is to shew that by the terms of the different railway acts compensation is provided for inconvenience, such as that which their land has sustained, and that it is not *damnum absque injuriâ*. Now we can understand many reasons why the legislature should have intended that the use of the railway should not subject the company to claims from a multitude of persons. It would be almost impossible to construct a railway near a large town without causing some slight injury to many of its inhabitants, and the legislature may have thought that so important an undertaking ought not to be sacrificed to their convenience. I do not deny that hardship may sometimes arise, but as I cannot find any provisions in the special act, or in the Lands Clauses Consolidation Act, or the Railways Clauses Consolidation Act, giving compensation to persons whose land is injured in the manner complained of, I must conclude that for the consequences of the use of the railway without negligence there is no remedy. Now, what is the object of the two acts, the Railways Clauses Act and the Lands Clauses Act? They give an authority to companies to take and use lands, making compensation to the owners and occupiers for the value of the lands taken or used, and for the damage caused by severing these lands from the rest of their property,

or otherwise injuriously affecting it. The difference between the case of those who have to surrender part of their land and those whose property is not actually entered upon, may account for indulgence being shewn to claims by the former class of persons. It is not necessary, however, to discuss the question, as the case may be readily distinguished from *In re the Stockport, Timperley and Altringham Railway* (33 Law J. Rep. (N.S.) Q.B. 251), decided by my late Brother Crompton. He proceeded on a distinction which is well known. Where any one living near a railroad is injured not merely by the construction of its cuttings, tunnels, level crossings, or embankments, but has part of his land separated from the rest into the bargain, he may well say, "The company are about to take part of my land and to use it so as to prejudice the rest of my property. If I am compelled to yield to their demands, I ought to receive compensation for any mischief that may thereby be caused to me." Such a claim might be thought reasonable by the legislature when that of persons differently situated might be rejected. Therefore, after looking carefully at the different clauses of the two acts, I cannot but think that they apply only to injury from the execution of the works of the railway, and not to that which is produced by the use of it; a construction maintained by Lord Campbell in the case of *Penny v. the South-Eastern Railway Company* (7 El. & B. 660; s. c. 26 Law J. Rep. (N.S.) Q.B. 225). I admit that there are words at the end of Lord Campbell's *dictum* which satisfactorily shew that his opinion was not decisive, but it seems that he thought that there was a real distinction between damage by the construction of the railway, and damage by the exercise of the powers to run locomotive engines. I think this distinction sound. Whether the words "execution of the works" or "exercise of the powers" are used, seems to me to make no difference. It is worthy of observation that it is only upon failure to comply with a notice to treat as to compensation to be made for the execution of the works, that the machinery for settling the compensation provided by the Lands Clauses Act, comes into operation. In the result, I am convinced that injury arising from the running of locomotives can only be the subject of an action for damages; and I cannot help adding, that the facts of this case, when compared with the evidence required in similar actions against railways, shew that the plaintiffs have no remedy at common law. The legislature, in passing over claims such as that of the plaintiffs, seems to me to have done no more than the interests of the public require.

LUSH, J.—I am of the same opinion. The question which we have to decide is, whether the owner of a house and buildings adjacent to a railway, which are and are likely to be subjected to vibration, noise and smoke from passing trains, and thereby depreciated in value, is entitled to compensation. The railway acts give compensation to two classes of persons: first, to persons interested in lands taken or used for the purposes of the railway; secondly, to persons interested in lands which are injuriously affected by the construction of the railway. With the first of these classes we have nothing to do. It is not for us to inquire whether damages like those which are now claimed could be recovered by the owner or occupier of land any part of which had been taken or used by the company. This is only the case of a person whose land has been injuriously affected. The title of the plaintiffs to compensation must depend entirely upon the language of the acts of parliament. The right to compensation of a man whose land is injuriously affected is subject to two limitations: he must have sustained damage which would have been a cause of action before the special act, and the damage must have been occasioned by the execution of the works to which this act relates. As to the nature of the injury which must be the ground of an action, there are two cases bearing on it. In *Chamberlain's case* (2 Best & S. 605; s. c. 32 Law J. Rep. (N.S.) Q.B. 173), where the high road on which the plaintiff's houses abutted, was blocked up by the railway and the value of the houses was diminished, it was held that he was entitled to compensation. In *Ricketts v. the Metropolitan*

Railway Company (5 Best & S. 156; s. c. 34 Law J. Rep. (N.S.) Q.B. (Ex. Ch.) 257), where a bridge was for some time substituted for a footway in front of the plaintiff's shop, and fewer customers resorted to it than before, the Court of Exchequer Chamber held that the injury was not actionable, and gave no right to compensation. But supposing the land to be injuriously affected, is it injured by the execution of the works? Now, "the execution of the works," in the ordinary sense, means nothing more than the construction of the railway, and if these words, which are directed to be used in the notice to treat by section 18. of the Lands Clauses Act, were all that the plaintiffs had to rely upon, their argument would have fallen to the ground. But their counsel had recourse to the Railways Clauses Act, which shewed, it was said, that compensation ought to be awarded for damages sustained after the execution of the works. Now, the 6th section of this act begins in this way: "And with respect to the construction of the railway and the works connected therewith, be it enacted as follows." Here there is nothing at all concerning the use of the railway. It then goes on to direct that the company shall make "to the owners and occupiers of, and all other persons interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used and for all damage sustained by such owners, occupiers and other parties, by reason of the exercise, as regards such lands, of the powers by the special act or any act incorporated therewith, vested in the company." Therefore, in one clause the legislature uses the words "construction of the railway," as synonymous with "exercise of the powers of the act." I think that the only class of persons to which this section applies are those who are described in section 68. of the Lands Clauses Act, as parties "entitled to compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works," that is, by the construction of the railway. Now, the damage in question is effected by the working of the line, and is in no respect connected with the construction of the railway. I am, therefore, of opinion that the plaintiffs have made out no claim to compensation.

Judgment for the defendants.

[IN THE COURT OF QUEEN'S BENCH.]

Nov. 14, 1865.

RAYNER AND ANOTHER v. RITSON.

35 L. J. Q.B. 59; 6 B. & S. 888; 14 W. R. 81.

Explained, *China Trans-Pacific Steamship Co. v. Commercial Union Assurance Co.*, [1882] E. R. A.; 51 L. J. Q.B. 182; 8 Q.B. D. 142; 45 L. T. 647; 30 W. R. 224 (C. A.). Applied, *China Traders' Insurance Co. v. Royal Exchange Assurance Corporation*, [1898] E. R. A.; 67 L. J. Q.B. 736; [1898] 2 Q.B. 187; 78 L. T. 783; 46 W. R. 497 (C. A.).

Inspection of Documents—Action on Policy of Insurance—14 & 15 Vict. c. 99. s. 6.—17 & 18 Vict. c. 125. s. 50.

DISCOVERY. MARINE INSURANCE.—*The practice which formerly existed of allowing, in an action on a policy of insurance, inspection of documents in any way relating to the subject of the policy, is not affected by the acts 14 & 15 Vict. c. 99. s. 6. and 17 & 18 Vict. c. 125. s. 50.*

Therefore, in an action against an underwriter for his proportion of the

amount insured, the Court granted to the defendant an inspection of letters passing between the captain and the plaintiffs before and after the loss, and relating to the ship, voyage and loss, and also of log-books, surveys, protests and other documents relating to the loss, upon an affidavit that these papers were material and necessary to the defence.

Rule calling on the plaintiffs to shew cause why the defendant should not be at liberty to inspect and have copies of all the letters and documents mentioned in the affidavit of Charles Robert Rayner, one of the plaintiffs.

The action was brought against the defendant, as a member of two mutual marine insurance companies, to recover his proportion of the insurance payable upon an alleged total loss of a ship, called the *Henrietta*.

On the 27th of June, 1865, the defendant's attorney made an affidavit in support of a summons for a discovery, in which he stated that he believed that the captain of the ship, before she sailed on the voyage during which the alleged loss took place, during the voyage, and after the alleged loss, wrote and sent several letters to the plaintiff in relation to the ship, voyage and alleged loss; that the plaintiffs had in their possession log-books, surveys, protests and other documents relating to the ship, voyage and alleged loss; that he was advised and believed that it was material for the defence to the action, and to enable him to prepare the same, that he should have all letters and other documents relating to the matters in question produced; that he believed that the letters and other documents were in the possession of the plaintiffs or their attorneys.

On the 7th of July, 1865, Blackburn, J. made an order for the plaintiffs to answer on affidavit, stating what documents were in their possession or power relating to the matters in dispute, or what they knew as to their custody, and whether they objected (and if so, on what grounds) to the production of such as were in their possession or power.

On the 1st of November, 1865, the plaintiff, Charles Robert Rayner, made an affidavit, in which he admitted that the plaintiffs had from time to time, both before and after the loss of the ship *Henrietta*, received letters from the captain of the ship, which letters were then in the plaintiffs' possession, and of various dates, beginning the 24th of December, 1863, and extending to the 14th of October, 1865; and that the plaintiffs had in their possession a log-book, surveys, a protest and other documents relating to the ship and her loss; that the documents and certain of the letters were specified in a schedule to the affidavit, and the plaintiffs did not object to the production of these; that, with regard to the captain's letters which were not scheduled, the plaintiffs objected to their production, for the two following reasons: namely, first, the captain's letters which were scheduled, and the log-book, protest, surveys and other scheduled documents narrated the history, in minute detail, of the loss of the ship, and set out the nature and extent of her damage, and the particulars of the plaintiffs' course of action fully; secondly, the captain's other letters related to questions of freight and expenses, to disputes about wages and matters of account, to the captain's evidence, and to other matters of a private and confidential nature, into which the defendant had no right to inquire.

On the 8th of November a summons, in the terms of the rule, was heard before Lush, J., who referred the matter to the full Court.

In support of the rule the clerk of the attorney of the defendant made an affidavit, stating what proceedings had been taken, and that he believed it was material to the defendant's defence to the action to have inspection and copies of the letters mentioned in the affidavit of the plaintiffs.

Kemplay shewed cause.—The defendant is not entitled to the inspection which he asks for. In order to entitle a party to an action to a discovery, he must prove that he has a case, and that the documents are material and relevant to that case—*Wigram on Discovery*, 2nd edit. pp. 46, 261. Here the defendant has made out no affirmative case; and, indeed, there is nothing for him to prove, as all the issues are on the plaintiffs. An applicant is bound to inform

the Court of the purpose for which a discovery is sought. How otherwise can the Court judge whether it is material? *Cardale v. Watkins* (5 Madd. 18), *Guppy v. Few* (Wigram on Discovery, 12).

Hannen, in support of the rule.—This is an action against an underwriter, and in such an action it was the practice even before the 14 & 15 Vict. c. 99. to order an inspection of letters and papers relating to the policy. A common form of such an order is in use at Judges' chambers. An underwriter at a distance is called upon to pay the amount of a constructive total loss, knowing nothing of the circumstances under which it is said to have taken place.

[LUSH, J.—Can you say that you are entitled to know all that is known by the assured at the time of the loss? You may be entitled to know all that is in their knowledge at the time of the policy.]

It is of special importance that the insurers should know the circumstances of the loss.

[*J. Brown*, *amicus Curie*, stated it was the practice to grant such orders even without an affidavit.]

In *The Chartered Bank of India v. Rich* (2 Best & S. 73; s. c. 32 Law J. Rep. (N.S.) Q.B. 300), where the affidavit was in the same form as in this case, the inspection was refused on the ground that the Court, looking at all the circumstances, could not see that the discovery was material to the case of the party applying. In *Thompson v. Robson* (2 Hurl. & N. 412; s. c. 26 Law J. Rep. (N.S.) Exch. 367) the application was refused because the affidavit did not shew that the documents existed, or would be evidence in the cause. In *Coleman v. Truman* (3 Ibid. 371; s. c. 28 Law J. Rep. (N.S.) Exch. 5) the Court thought that communications between one of the parties and their agent before and after the matters in dispute were not privileged. The old rule as to allowing inspection in actions on policies is mentioned in *Tidd's Practice*, 9th ed. p. 591.

COCKBURN, C.J.—I am of opinion that the defendant is entitled to the inspection for which he applies. The peculiar nature of the contract of insurance was, no doubt, the cause of an exception which has prevailed in the practice as to inspection of documents. The underwriter is so much at the mercy of the assured with regard to the circumstances under which a ship is abandoned, that he ought, as far as possible, to have all documents relating to the abandonment within his reach. These considerations appear to have led to the introduction of the old practice, and I think that they ought to guide us in the present case. I at first thought it doubtful whether the affidavit in support of the rule ought not to have disclosed the materials upon which the order for discovery of documents was made. But the affidavit specifies certain letters and documents, and states that it is material to the defendant's defence to the action to have inspection and copies of them. They may clearly be useful in enabling the underwriter to see whether it will be worth his while to defend the action or pay the amount claimed.

I think that whether it be demanded under the former practice or the Common Law Procedure Act, the inspection is material to the issue raised.

MELLOR, J., SHEE, J. and LUSH, J. concurred.

Rule absolute.

[IN THE QUEEN'S BENCH.]

Nov. 20, 1865.

WORTHINGTON AND ANOTHER v. HULTON, HULTON, CLERK TO THE LOCAL BOARD OF HEALTH OF MOSS SIDE.

35 L. J. Q.B. 61; 6 B. & S. 943; L. R. 1 Q.B. 63; 12 Jur. N.S. 73;
13 L. T. 463; 14 W. R. 632.

Applied, *Julius v. Bishop of Oxford*, [1880] E. R. A.; 49 L. J. Q.B. 577; L. R. 5 A.C. 214; 42 L. T. 546; 28 W. R. 726 (H.L.). Referred to, *Smith v. Chorley D. C.*, [1897] E. R. A.; 66 L. J. Q.B. 427; [1897] 1 Q.B. D. 532; 76 L. T. 637; 45 W. R. 417 (Q.B. D.). Discussed, *Reg. v. Leigh Rural Council*, [1898] E. R. A.; 67 L. J. Q.B. 562; 1898, 1 Q.B. D. 836; 78 L. T. 604; 46 W. R. 471 (C. A.). Applied, *Wolstanton United U. C. v. Tunstall U. C.*, [1910] E. R. A.; 79 L. J. Ch. 522; 1910, 2 Ch. 347; 103 L. T. 98 (Ch. D.). Considered, *Croydon Corporation v. Croydon Rural Council*, [1908] E. R. A.; 77 L. J. Ch. 800; 1908, 2 Ch. 321; 99 L. T. 180 (C. A.): reversing, [1908] E. R. A.; 77 L. J. Ch. 138; [1908] 1 Ch. 222; 98 L. T. 182 (Ch. D.).

Public Health Act (11 & 12 Vict. c. 63. s. 89).—*Retrospective Rate for Charges within Six Months—Mandamus to enforce making of Rate.*

LOCAL GOVERNMENT. The 89th section of the 11 & 12 Vict. c. 63. (the *Public Health Act*), enacts, that rates may be made "prospectively in order to raise money for the payment of future charges and expenses, or retrospectively in order to raise money for the payment of charges and expenses which may have been incurred at any time within six months before the making of the rate": Held, that inasmuch as a judgment properly obtained is a charge within this section—(see *The Queen v. the Rotherham Local Board*)—a mandamus lies to a local board of health to make a rate in aid of a judgment within six months after the judgment was obtained, though the action in which it was obtained was commenced more than six months after the claim accrued, if the delay in bringing the action is excused, and shewn not to have been an undue delay.

The plaintiff entered into contracts with the defendants, a local board of health, for the execution of works for the board, to be paid for out of money to be collected from those on whom the works were chargeable under the *Public Health Act*. The contracts were duly performed by the plaintiff, but the notices given by the defendants to the owners who were so chargeable were informal, and many of those who were liable refused to pay the sums assessed upon them. It became known to the plaintiff that the notices were defective, in February, 1860, and he then made a demand on the defendants; they were in hopes of being able to collect the money, notwithstanding the resistance to the notices, and 800l. was in fact collected and paid over to the plaintiff, the last payment being in November, 1860, leaving a balance of more than 3,000l. then due to the plaintiff. He commenced an action against the defendants early in the following December, and judgment was obtained by the plaintiff in that action. Within six months after he had obtained that judgment, the plaintiff commenced an action claiming a writ of mandamus, commanding the defendants to levy a rate to satisfy such judgment:—Held, that the delay in commencing the original action was excused and shewn not to be an undue delay, and a peremptory writ of mandamus to make and levy a rate, accordingly, was awarded.

This was an action claiming a writ of mandamus commenced on the 8th of July, 1862, in which, by consent of the parties, and by order of the Court of Queen's Bench, the following SPECIAL CASE, without pleadings, was stated for the opinion of the Court:

1. On the 10th of December, 1860, the plaintiffs commenced an action in the Court of Queen's Bench against the defendant, as clerk to the local board of health of Moss Side, for breaches of certain implied contracts, whereby the

plaintiffs were prevented from recovering the sum of 3,310*l.* 15*s.* 8*d.*, the balance of four several sums mentioned respectively in four several contracts, as the price of certain works intended to be executed by the local board, under the provisions of the 69th section of the Public Health Act, 1848, and by the said contracts agreed to be done by the plaintiffs.

2. The first of the said contracts was dated the 10th of February, 1858, to be performed within six months, for the sum of 2,367*l.*; the second, the 7th of July, 1858, to be performed within five months, for the sum of 2,376*l.* 10*s.*; the third and fourth, the 17th of November, 1858, to be performed within four months, for the sums of 1,228*l.* and 1,122*l.* respectively. Under the first contract there were extra works to the extent of 38*l.* 19*s.* 3*d.*; and under the second contract to the extent of 141*l.* 19*s.* 3*d.*; and under the third contract to the extent of 34*l.* 6*s.* 9*d.*; thus making the total claim of the plaintiffs under the contracts 7,308*l.* 15*s.* 8*d.*

3. Each contract contained a provision stating that the contractors were to be paid for work done when and as the money was collected from the owners of the adjacent property.

4. Under the first and second of the said contracts the plaintiffs have been paid the sum of 1,994*l.* and 2,004*l.* respectively, being the whole of the monies recovered by the local board from the owners of the adjacent property in respect of the works included in those contracts; but under the third and fourth of the said contracts the plaintiffs have not been paid anything, the local board not having received anything from the owners of the adjacent property in respect of the work included in those two contracts.

5. The last payment made by the board to the plaintiffs was made on the 2nd of November, 1860, in respect of the contract dated the 10th of February, 1858.

6. After the parties had pleaded to issue in the action which was so commenced on the 10th of December, 1860, they agreed to state the facts in the form of a special case for the opinion of the Court of Queen's Bench, and that special case, with the pleadings and contracts in the former action, is annexed to the present case in the form of an appendix (See *Worthington v. Sudlow*, 31 Law. J. Rep. (N.S.) Q.B. 131), and may be referred to as part thereof; and the facts stated in that case are admitted to be true.

7. The special case was argued in Easter Term, 1862, and the Court gave judgment for the plaintiffs (See *Worthington v. Sudlow*, 31 Law J. Rep. (N.S.) Q.B. 131); and on the 8th of May, 1862, the plaintiffs signed and entered up their judgment for the sum of 3,467*l.* 11*s.* 8*d.*, being the said sum of 3,310*l.* 15*s.* 8*d.*, and the plaintiffs' costs of suit.

8. After that day, and before the commencement of the present action, the plaintiffs having ascertained that the local board had no funds in their hands for the satisfying of the judgment debt, demanded that a general district rate should be levied by the board to satisfy the said sum of 3,467*l.* 11*s.* 8*d.*, and it is admitted that if the local board are by law liable to levy such a rate, that demand was a valid demand, and that a reasonable time for complying with it elapsed before the commencement of the present action; also, that the plaintiffs are personally interested in the subject of the present action to the entire amount of the said judgment debt.

9. It is admitted that, as regards the first two contracts, such general district rate, if made and levied, would have to be made and levied, amongst others, upon and in respect of those properties the owners of which had before the commencement of the former action paid all such portions of the said several sums mentioned in such two contracts as had been assessed upon, and demanded of them, as such owners, and paid by the board to the plaintiffs. It is also admitted, that the several streets, in respect of which the works in the said contracts were performed, have not yet been declared highways.

10. The works mentioned in the four several contracts, including the extras,

were all completed within the stipulated times, all the works and all the extras having been completed on the 17th of March, 1859.

11. The proportions payable by the owners of the property adjacent to the works comprised in the first three contracts were settled and apportioned by the surveyor of the board; and notices of the amount so settled and apportioned as due from such owners respectively were given to them as to the first two contracts, in the year 1858, and as to the third contract on or before the 21st of April, 1859, and no notice to dispute the same was at any time given by any such owners. Immediately upon the expiration of three months from the times of the notices of apportionment the amounts so settled and apportioned were demanded.

12. The proportions payable by the owners of the property adjacent to the works comprised in the fourth contract for 1,122*l.*, were settled and apportioned by the surveyor of the board, and notices of the amounts so settled and apportioned as due from such owners respectively were given to them some time between the 3rd and 16th of November, 1859, and no notice to dispute the same was at any time given by any of such owners; and immediately upon the expiration of three months from the time of the notices of apportionment, payment of the amounts so settled and apportioned was demanded and refused.

13. The local board having failed to obtain payment from some of the owners of their shares of the expenses comprised in the first contract, were advised to endeavour to obtain them from the occupiers, and accordingly on the 19th of January, 1859, they declared such expenses to be private improvement expenses, and levied a rate upon the respective occupiers, and, among others, upon a Mr. Thomas Naden, who occupied property belonging to a Mr. Lawton, for 15*l.* 13*s.* 5½*d.*, to be paid within a period of five years. Mr. Naden did not pay any portion of this rate, and the local board therefore summoned him to appear before the Justices of Lancashire, on the 29th of March, 1860. Mr. Naden then appeared, and the summons was then dismissed. The local board served notice of appeal against such dismissal on the 13th of April, 1860; but such appeal was not prosecuted. No other proceedings were taken against Mr. Naden, nor were any taken against any other person upon whom the said rate had been assessed.

14. The local board took proceedings against Mr. Thomas Willis, to recover from him, as an owner, the sum of 41*l.* 17*s.* 9*d.*, being his apportioned share of the expenses comprised in the third contract, and summoned him before the Justices on the 13th of October, 1859, when such summons was dismissed. One or two other summonses against owners were pending at the time when the one against Mr. Thomas Willis was heard; but in consequence of the result, they were not prosecuted.

15. The local board failed on the several proceedings hereinbefore mentioned, on the ground that the notices given by the board under the 69th section of the Public Health Act, in respect of the works included in the said contracts respectively, were bad, and such notices were in fact decided by the Justices to be bad, more than six calendar months before the said action of the 10th of December, 1860, was commenced. The notices to owners in respect to all the four contracts were identical with those given by the board to Lawton, the owner of the property occupied by Naden, and to Mr. Willis. And one of the streets in which the plaintiffs had by the said contracts agreed to execute the said works, and in respect whereof notices had been served by the board on the owners of property in such street, was called Whalley Road, and one of the last-mentioned notices had been held to be bad by the Court of Quarter Sessions sitting at Salford, on the authority of a case of *Parkinson v. the Corporation of Blackburn*, which had been recently decided in the Court of Queen's Bench. This case is reported in volume 33 of the *Law Times*, p. 119.

16. In the month of February, 1860, the plaintiffs' attornies wrote to the then clerk of the said board a letter, of which the following is a copy.

“ Clarence Buildings, Manchester,
“ 1st February, 1860.

“ Dear Sir,—Messrs. W. & J. Worthington, of this city, contractors, have been advising with us respecting their claims for paving, sewerage, &c., various streets, &c., in the district of Moss Side. The accounts, as we are informed, amount to upwards of 4,000*l.*, and as this large sum has been owing for some time, Messrs. Worthington are naturally desirous to have a definite arrangement made for the payment, the more especially as they understand that serious differences exist between the board and the landowners, and that the owners of property in Whalley Road (one of the streets, &c., paved by them) have been declared by a judicial decision exempt from any liability to pay for the paving, &c., of that street, on the ground that the notices to pave, &c., which it was the duty of the board to give to the owners, were defective and bad.

“ As your board meets on Thursday next, our clients instruct us to require, in the course of the present week, definite replies to the following questions: 1st. When and how Messrs. Worthington will be paid for paving, &c., Whalley Road and any other streets the owners of which have been judicially exempted from liability to pay their accounts to the board? 2nd. Whether any other accounts claimed by the board from the owners of the land fronting the streets paved by Messrs. Worthington have been judicially declared irrecoverable through the neglect of the board to give the requisite notices, or for any other reason; and if so, what were the amounts of such accounts, from whom and in respect of what streets were they claimed? 3rd. Whether all the notices given by the board in respect of the other streets paved by Messrs. Worthington are similar to the notices given in respect of Whalley Road, and liable to be objected to by the owners on the same grounds, and whether the board will seek to compel the owners to pay their accounts? 4th. When and how Messrs. Worthington will be paid their accounts for paving streets other than Whalley Road?—Yours truly,

“ Rowley & Son.

“ John Thompson, Esq.,

“ Clerk to The Moss Side Local Board of Health.”

This letter was laid before a meeting of the said board on the 2nd of February, 1860, when it was ordered that the clerk should see Messrs. Rowley & Son in reference to the letter, and communicate the result of the interview to the next meeting. At the next meeting of the board, held on the 9th of February, 1860, the clerk having said that he had seen Messrs. Rowley & Son and obtained a short delay in their commencing proceedings, it was ordered that the clerk should see Messrs. Rowley & Son again, and endeavour to obtain a more satisfactory arrangement with them.

17. The then clerk to the board informed Messrs. Rowley & Son at that interview that all the notices were similar to the notices given in respect of Whalley Road, and must be taken to be objected to by the owners on the same grounds.

18. Until a few weeks previously to the commencement of the said action of the 10th of December, 1860, the local board were in expectation of collecting the monies from the landowners notwithstanding the badness of the notices: and this was stated to the plaintiffs' attorneys by the present defendant, and to the plaintiffs by several members of the local board.

19. The Court were to have power to draw any inference of fact necessary for the decision of the present action, or for enabling them to give judgment therein.

20. The question for the opinion of the Court was, whether or not the plaintiffs are entitled to maintain the present action and to have a general district rate levied by the local board for the payment to the plaintiffs of the said sum of 3,467*l.* 11*s.* 8*d.*, or any and what part thereof.

21. If the Court should answer the said question in the affirmative, the plaintiffs are to be entitled to judgment according to the 70th and 71st sections of the Common Law Procedure Act, 1854.

22. If the Court should answer the said question in the negative, judgment is to be entered for the defendant according to the same sections.

The case was argued, in Easter Term, May 5, 1865.

Mellish (*Crompton Hutton* with him), for the plaintiffs, contended that the present case fell within *The Queen v. the Rotherham Local Board of Health* (8 El. & B. 906; s. c. 27 Law J. Rep. (n.s.) Q.B. 156), and not within *Burland v. the Kingston-upon-Hull Local Board of Health* (3 Best & S. 271; s. c. 32 Law J. Rep. (n.s.) Q.B. 17).

T. Jones (*R. G. Williams* with him), for the defendants, contended that if the plaintiffs were entitled to recover, the policy of section 89. of the Public Health Act, 1848, 11 & 12 Vict. c. 62. would be defeated; and he referred to the Local Government Act, 1858, 21 & 22 Vict. c. 98. s. 5.

Cur. adv. vult.

The judgment of the Court¹ was now (Nov. 20) delivered by—

MELLOR, J.—This is a case in which the plaintiffs claim a writ of mandamus to be directed to the Local Board of Health of Moss Side, to make and levy a district rate for the payment of a judgment obtained by the plaintiffs against the local board.

The plaintiffs had entered into four contracts with the local board for the execution of works for the board. By these contracts the plaintiffs were to be paid out of the monies collected from those on whom the expenses of the works were chargeable under the Public Health Act. The contracts were duly performed by the plaintiffs. It unfortunately happened that the notices given by the local board to the owners were informal,² and, consequently, that they could not be enforced against such as resisted them. Some time elapsed before it was known that any objection would be made by any one, and some further time necessarily elapsed before it was ascertained that the objections were valid; but, at all events, as early as February, 1860, it was known to the plaintiffs that the notices were defective; and in that month their solicitor applied to the local board. The writ on which the judgment sought to be enforced was obtained did not issue until the 10th of December, 1860, more than six months after the plaintiffs were aware of the facts constituting their cause of action. The reasons of this delay are stated in the case.

It appears that the local board were still in the expectation of being able to collect the money, notwithstanding the badness of the notices, and that they did, in fact, obtain 800*l.*, which was paid over to the plaintiffs, the last payment being as late as in November, and only a few weeks before the writ on which the judgment was obtained issued.

Power is reserved in the case to draw inferences of fact; and we draw the inference that, under such circumstances, there was no improper delay or *laches* on the part of the plaintiffs, nor any blame imputable to them or their advisers. Still, it is undeniable that a period of more than six months elapsed, during which the plaintiffs might practically have commenced their action, and did not.

The plaintiffs recovered judgment in this Court for upwards of 3,000*l.* The present writ was issued within six months after the judgment, and everything subsequent to the judgment is admitted to have been right. The one point, therefore, which we have to decide is whether the delay, in fact, of more than six months in commencing the original action is a bar to the plaintiffs' claim for a mandamus to make the rate, though that delay is shewn

(1) Cockburn, C.J., Blackburn, J. and Mellor, J.

(2) Under section 69. of 11 & 12 Vict. c. 63 :—see *Worthington v. Sudlow* (81 L. J. Q.B. 181).

to be excused by the circumstances, so as not to be improper or to amount to *laches*.

There are only two cases decided which in any way bear upon the subject. In *The Queen v. the Rotherham Local Board* (8 El. & B. 906; s. c. 27 Law J. Rep. (N.S.) Q.B. 156) the action was commenced in July, 1856, being within six months after the cause of action accrued. Judgment was signed in that month under a Judge's order, by which execution was stayed till the 27th of December, 1856, being more than six months after the cause of action had accrued.

A writ of mandamus was obtained on the 10th of June, 1857, more than six months after the judgment was signed, but within six months after it was enforceable. The decision of the Court was that the judgment was a fresh charge on the day when the judgment was enforceable, and that the postponement of the execution by arrangement with the local board was not objectionable. This latter part of the decision, that a delay by arrangement with the local board is not fatal to the plaintiff's claim, affords an argument in favour of the present plaintiff's contention, that a delay rendered reasonable by the circumstances is not necessarily fatal, though certainly it falls short of a positive decision in their favour.

In *Burland v. the Hull Local Board of Health* (3 Best & S. 271; s. c. 32 Law J. Rep. (N.S.) Q.B. 17) the plaintiffs had a cause of action against the local board for money had and received, which had accrued in 1856; the action, in which judgment was signed by default, had been commenced in 1862, very nearly six years after the cause of action had accrued, and there was nothing whatever to explain or excuse this very long delay. This Court, under such circumstances, gave judgment against the plaintiffs' claim for a mandamus. Our late Brother Wightman used language that seems to indicate an opinion that it was essential that the action should be commenced within six months after the accruing of the cause of action. This is in favour of the defendants, though it was not the point in the case. The other three members of the Court do not intimate any such opinion. The Lord Chief Justice, in his judgment, said, "I protest against the doctrine that in order to get the benefit of any judgment, no matter what, the jurisdiction of this Court is to be invoked to give subsidiary aid by mandamus." And in substance the other two Judges said the same. And all that was necessary for the decision of the case, and all that can be considered as really decided by it, was, that a plaintiff could not claim as of right a mandamus to enforce a judgment where there was great and unexcused delay in commencing the original action.

We are therefore called upon to decide this point for the first time, unassisted, but at the same time unfettered, by authority. The legislature, in the Public Health Act (11 & 12 Vict. c. 63), s. 89, has enacted that rates may be made "prospectively in order to raise money for the payment of future charges and expenses, or retrospectively in order to raise money for the payment of charges and expenses which may have been incurred at any time within six months before the making of the rate." This language shews that they were alive to the desirability that the charges which were to be defrayed by a fluctuating body of ratepayers should be levied promptly; but the attention of the legislature does not seem to have been drawn to the probability that it might not always be possible to ascertain and enforce a claim against the board within six months after the claim has accrued.

The *Rotheram case* (8 El. & B. 906; s. c. 27 Law J. Rep. (N.S.) Q.B. 156) decides that a judgment, when properly obtained, is a charge within the meaning of this section; and when that is decided, the case is within the literal words of the section. We feel that there is great difficulty in the case; but, on the whole, we think we best effectuate the intention of the legislature, and at the same time further the ends of justice, by holding that a rate may be ordered in aid of a judgment, within six months after that judgment was obtained, though the action on which the judgment was obtained was

commenced more than six months after the claim accrued, if the delay is excused, and shewn not to have been undue. We do not mean to throw any doubt on the decision in *Burland v. the Local Board of Hull* (3 Best & S. 271; s. c. 32 Law J. Rep. (N.S.) Q.B. 17), that where there has been undue delay the mandamus should not go. In the present case, we think the delay is explained and justified, and we therefore give judgment for the plaintiffs.

Peremptory writ of mandamus awarded.

[IN THE HOUSE OF LORDS.]

June 30, July 5, 1865.

THE SAINT HELENS SMELTING COMPANY (LIMITED) v. TIPPING.

35 L. J. Q.B. 66; 11 H.L. Cas. 642; 11 Jur. N.S. 785; 12 L. T. 776;
13 W. R. 1083.

Distinguished, *Attorney-General v. Bradford Canal*, [1866] E. R. A.; 35 L. J. Ch. 619; L. R. 2 Eq. 71; 15 L. T. 9; 14 W. R. 579 (V.C.). Applied, *Smith v. Thackerah*, [1866] E. R. A.; 35 L. J. C.P. 276; L. R. 1 C.P. 564; 14 L. T. 761; 14 W. R. 832 (C.P.); *Dent v. Auction Mart Co.*, [1866] E. R. A.; 35 L. J. Ch. 555; L. R. 2 Eq. 238; 14 L. T. 827; 14 W. R. 709 (V.C.); *Crump v. Lambert*, 1867, L. R. 3 Eq. 409; 15 L. T. 600; 15 W. R. 417 (M.R.): affirmed, 17 L. T. 133 (L.C.); *Crossley v. Lightowler*, 1867, L. R. 3 Eq. 279 (V.C.): affirmed, [1867] E. R. A.; 36 L. J. Ch. 584; L. R. 2 Ch. 478; 16 L. T. 438; 15 W. R. 801 (L.C.). Considered, *Luscombe v. Steer*, 1867, 17 L. T. 229; 15 W. R. 1191 (L. J.). Applied, *Cooke v. Forbes*, [1868] E. R. A.; 37 L. J. Ch. 178; L. R. 5 Eq. 166; 17 L. T. 371 (V.C.); *Gaunt v. Fynney*, [1873] E. R. A.; 42 L. J. Ch. 122; L. R. 8 Ch. 8; 27 L. T. 569; 21 W. R. 129 (L.C.); *Salvin v. North Brancepeth Coal Co.*, [1875] E. R. A.; 44 L. J. Ch. 149; L. R. 9 Ch. 705; 31 L. T. 154; 22 W. R. 904 (L. J.). Distinguished, *Roskell v. Whitworth*, [1879] E. R. A.; 39 L. J. Ch. 765; L. R. 5 Ch. 459; 23 L. T. 179; 18 W. R. 682 (L. J.). Discussed, *Blair v. Deakin*, 1887, 57 L. T. 522 (Ch. D.). Referred to, *Colls v. Home & Colonial Stores*, [1904] E. R. A.; 73 L. J. Ch. 484; [1904] A.C. 179; 90 L. T. 687; 53 W. R. 30 (H.L.). Considered and applied, *Rushmer v. Polsue*, [1906] E. R. A.; 75 L. J. Ch. 79; [1906] 1 Ch. 234; 93 L. T. 823; 54 W. R. 161 (C. A.): affirmed, [1907] E. R. A.; 76 L. J. Ch. 365; [1907] A.C. 121; 96 L. T. 510 (H.L.).

Nuisance—Actionable Injury—Injury to Property—Personal Discomfort—User of Property—“Suitable” or “Convenient” Locality.

NUISANCE.—In actions brought for nuisance, a difference is to be marked between an action brought for a nuisance on the ground that the alleged nuisance produces material injury to property, and an action brought for a nuisance on the ground that the alleged nuisance is productive of sensible personal discomfort. In certain cases a submission is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, which would not be required to circumstances the immediate result of which is sensible injury to the value of property.

Therefore, where T. became the proprietor of an estate, and shortly afterwards other persons commenced smelting operations, which caused noxious

vapours, whereby material injury was done to the trees and shrubs of T., it was held (affirming the judgment of the Courts of Exchequer Chamber and Queen's Bench) that, in an action brought by T. in respect of the injury caused by such vapours, the learned Judge had rightly directed the jury to find for the plaintiff if they were satisfied that real sensible injury had been done to the enjoyment of his property, or the value of it, by reason of the noxious vapours which had been sent forth from the defendants' works; and had also rightly directed the jury that the place where any works were carried on so as to occasion an actionable injury to another was not, in the meaning of the law, a convenient place.

This was a proceeding in appeal from the judgment of the Court of Exchequer Chamber (4 Best & S. 616), sitting in error from the Court of Queen's Bench (Ibid. 608), confirming the judgment given in that Court refusing a rule to shew cause why the verdict found for the plaintiff below should not be set aside and a new trial had between the parties.

The parties are here described as in the proceedings in the Queen's Bench.

In May, 1863, an action was brought in the Court of Queen's Bench by the plaintiff, Mr. Tipping, against the defendants. The declaration in the action alleged that the plaintiff was possessed of a certain messuage, dwelling-house and premises, with gardens, parks and lands adjoining; and was also entitled to the reversion of certain lands and premises near to the said dwelling-house in the possession of his tenants; that the defendants erected, used, and continued to use certain smelting-works upon land near to the said dwelling-house and lands of the plaintiff, and caused large quantities of noxious gases, vapours and other noxious matter to issue from the said works and diffuse themselves over the land and premises of the plaintiff, whereby the hedges, trees, shrubs, fruit and herbage were greatly injured, the cattle were rendered unhealthy, and the plaintiff was prevented from having so beneficial a use of the said land and premises as he would otherwise have enjoyed; and also the reversionary lands and premises were depreciated in value.

The defendants pleaded not guilty.

The plaintiff joined issue on the plea, and the cause was tried, before Mellor, J., at Liverpool, in August, 1863.

It was clearly proved at the trial that the vapours exhaling from the works of the defendants caused great injury to the trees and shrubs on the property of the plaintiff.

The learned Judge, in summing up the evidence, directed the jury as follows: "This is an action brought by the plaintiff against the Saint Helens Smelting Company, for what he says is an actionable injury, which has been occasioned by their works to the property which he purchased, and of which he is the owner, and in some sense the occupier."—[After some observations, in regard to damages, the learned Judge proceeded]—A man has, no doubt, a right to exercise certain rights, and to act upon his own property. He has certain rights of property, and within the limits of those rights he may do any act which is not unlawful. When I say unlawful, I mean any act which is not wrong: he may erect a lime-kiln, if it is in a convenient place; but the meaning of the word "convenient" I shall venture to interpret to you as being that it must be plain that he will not do an actionable injury to another, because a man may not use his own property so as to injure his neighbour. When he sends on the property of his neighbour noxious smells, or smoke, or vapours, then he is not doing an act on his own property only, but he is doing an act on his neighbour's property also, because every man by common law has a right to the pure air, and to have no noxious smells sent on his land, unless by a period of time a man has, by what is called a prescriptive right, obtained the power of throwing a burthen upon his neighbour's property. If a man for twenty-one years or more has carried on in a particular district a work which is noxious to his neighbours, and has for a period of time sent noxious smells and impure air over the neighbourhood, and that has been

submitted to for twenty years, he gets in time what is called a prescriptive right to do what he has done. But here you have no prescriptive right at all; there is nothing of that sort in the case. You are to consider this as if done quite recently, within a very few years indeed; therefore you are not embarrassed by any considerations of that sort. Now, that being the case, I tell you that if a man by an act—either by the erection of a lime-kiln, or brick-kiln, or copper works, or any works of that description—sends over his neighbour's land that which is noxious and hurtful to an extent which sensibly diminishes the comfort and value of the property, and the comfort of existence on the property, that is an actionable injury. That is what I tell you is the law, gentlemen. But when you are coming to the question of facts, there is no doubt you must take into consideration a variety of circumstances. In considering whether or not a man's property has been sensibly injured by the actions of another person on his own land, of course you will consider the place, the circumstances, and the whole nature of the thing. It would not be sufficient merely to say that noxious vapours have come on the man's property, but you must consider to what degree and to what extent they have come, and whether they have come from the premises of the defendants. Now with respect to that, I do not think I can lay it down in better words than I find expressed in a note to a very admirable book, edited by a gentleman, now dead, who was an eminent lawyer, and whose loss is a loss to be deplored. He says, on the question of fact: "Whether a nuisance has been caused by the defendants at all, the nature of the locality, the work, and every other fact in the case, must be taken into consideration;" and so Chief Justice Erle said, in a case which has been handed up to me: 'The time, the locality, and so on, are all circumstances to be taken into consideration upon the question of fact whether an actionable injury has been occasioned by a man to his neighbour or not.' Now, gentlemen, you must apply your common sense to the question on the one side and the other. The defendants say, If you do not mind you will stop the progress of works of this description. I agree that that is so, because, no doubt, in the county of Lancaster, above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights and allow a person to say, I will bring an action against you for this and that, and so on. Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected. Therefore, you see, there are two questions here, and, no doubt, they are questions of some difficulty. At the same time, when you come to a review of all the facts, it will be for you to say whether or not the plaintiff has not affirmatively satisfied you that, whether to the extent suggested by his witnesses or not, or whether to some lesser extent only, there has not been sent out, clearly distinguishable as from the defendants' works, noxious vapours which have affected the trees and shrubs. If they have sensibly affected the trees and shrubs, and if they come from the defendants' works, they do tend to diminish the real comfort and enjoyment of the estate, because if a man has got a fine estate and gardens and plantations, and they are got up with care, and noxious vapours are sent from neighbouring works on these trees and shrubs, so as to cause them to decay and crumble up, and if it can be traced to be the result of noxious vapours from neighbouring works, it is perfectly clear that it is an actionable injury, because it does affect the enjoyment and comfort of a place which a man with care, and the application of his wealth, has created for his own enjoyment. Now, the defendants' case really consists in this: that the district of Saint Helens seems to be, as one of the witnesses said, without a living tree, and that the hedges are universally blackened and destroyed. In point of fact, no one who rides about in this county, and the manufacturing parts of it, and other counties, can fail to observe that in the neighbourhood of such large towns, where smoky chimneys exist, even

although there may not be alkali or copper works, the effect on vegetation and trees and shrubs is very clear, marked and distinct; you cannot shut your eyes to that fact. It was said by a gentleman, who was called by the defendants, to have been very much the character of the district for many years past. Mr. Brett, on the other hand, says 'It is all very well to say so. No doubt, there were manufactories carried on in this neighbourhood; but I have called witnesses to shew that these works were works in operation before the plaintiffs came there; and that up to a period contemporaneous with the beginning of the defendants' works, which was in 1861, when they began under the old company, being afterwards continued in the autumn of 1862 by the new company.' He says, 'I will shew you that up to that time these trees were in good condition and healthy, notwithstanding the works continued in operation. I say that they were not such as you would find in Cheshire or in some of the southern districts of England; but they were in good condition.'—[And after further comments on the evidence, the learned Judge proceeded]—But, gentlemen, looking fairly at the evidence on both sides, taking those considerations into view which I have alluded to, I ask you, has the plaintiff satisfied you that the effect of the noxious vapours to a sensible extent can be traced to have come from the defendants' works to his property, and so to have injured it? Applying the rule of law which I have laid down, you will be good enough to consider whether you think that has been made out to your satisfaction; because this is a case in which the burthen of the proof rests on the plaintiff, inasmuch as he seeks to recover from the defendants damages which, he says, have been occasioned to his estate. But if you are satisfied of that, you must find your verdict for the plaintiff, with such damages as you think you can reasonably assign—you must grope your way in the best way you can. Sometimes you are told the noxious vapour is mixed; sometimes it is not mixed; sometimes it comes from one works, sometimes from another, although probably in a less degree, because it appears that the farther it travels the less condensed it is, and the less likely to do mischief. Therefore, the nearer the works are, if it comes in the direction of the plaintiff's property, the more likely the vapour is to do mischief, because it is more likely to be concentrated; but the longer it travels through the atmosphere the more it becomes weakened or reduced by the addition of the water in the atmosphere. Consider all these circumstances, and apply your own experience to the evidence which has been given, and then say, has the plaintiff satisfied you that a real, sensible injury has been done to the enjoyment of his property, or the value of it, by reason of the noxious vapours which have been sent forth from time to time from the defendants' works. If that is made out to your satisfaction, you will find for the plaintiff; and if it is not made out to your satisfaction, you will find a verdict for the defendants.

The jury intimated that they found for the plaintiff. Damages, 861*l.* 18*s.* 4½*d.*

The learned Judge then put the following questions to them:

MELLOR, J.—Was the enjoyment of the plaintiff's property sensibly diminished?—*The Foreman*: We think so.

MELLOR, J.—Do you consider the business there carried on to be an ordinary business for smelting copper?—*The Foreman*: We consider it an ordinary business, and conducted in a proper manner—in as good a manner as possible.

MELLOR, J.—And do you consider, supposing that made any difference, that it was carried on in a proper place?—*The Foreman*: Well, no, we do not.

In November, 1863, the defendants moved for a rule calling upon the plaintiff to shew cause why the verdict should not be set aside and a new trial granted on the following grounds: 1. That the learned Judge misdirected the jury in directing them that an actionable injury was one producing sensible discomfort, without, at the same time, directing them as to the evidence respecting the purchase of the property by the plaintiff, the existence of the work at the time of the purchase, the character of the locality, the requirements of the

public as to a necessary and ordinary trade conducted in a suitable manner, and other surrounding circumstances. 2. That the learned Judge should have directed the jury as to the character of the locality. 3. That having reference to the character of the locality and the trade, the learned Judge should have directed the jury, as matter of law, that the same was carried on in a proper place. 4. That there was no sufficient evidence to support the finding of the jury that the damage was done exclusively by the works of the defendants. 5. That the learned Judge should have directed the jury to take into consideration the improved nature of the property by reason of the works complained of. 6. That the learned Judge should have directed the jury that the works having been established at the time the plaintiff purchased the property, an action for nuisance was not maintainable, if the works were carried on in a proper manner and without wilful negligence.

The Court of Queen's Bench gave judgment, refusing to grant the rule; the following judgment being delivered by—

COCKBURN, C.J.—In my opinion there should be no rule. The direction of my Brother Mellor to the jury cannot be found fault with, in my opinion, when looked at by the light of the decision of the majority of the Court of Exchequer Chamber in the case of *Bamford v. Turnley* (3 Best & S. 62, 66; s. c. 31 Law J. Rep. (N.S.) Q.B. 286), that decision overruling the decision of the Common Pleas, and establishing that it is not right to put to the jury, where a case of nuisance has been made out, whether the place is a proper and convenient one for the carrying on a work of that nature, or whether the carrying on of such work or manufacture was a reasonable use by the defendant of his own property. If that question be excluded with reference to the circumstances relating to the relative positions of the plaintiff and defendants as private individuals, it seems to me utterly inconsistent with sound reasoning to say that such a question or questions can be considered with reference to the interests of the public. I own that it is quite new to me to learn that, without compensation on the part of the public, a private individual is precluded from complaining and obtaining redress for a private injury on the score of the benefits which may accrue to the public from the injury he thus sustains. I do own that it seems to me to be getting out of the decision of the Court of Exchequer Chamber and the law as established by that decision. Upon that decision I desire at present to pronounce no opinion. I am bound by it, and must act upon it; but I cannot help taking this opportunity of saying that, if where A. sustains a nuisance by the act of B. you are precluded from submitting to the jury the consideration of the grounds on which B. might allege this was a reasonable use and a proper and convenient place on his property for the purpose of the manufactory complained of, but that you can take that matter, and all the surrounding circumstances into consideration, if you add to the case of B. that of C, D, E. and F, and saying that, taking the interests of all those parties combined, B. has an answer to the action of A. in respect of the nuisance A. sustains at his hands, that seems to me to be altogether an untenable doctrine and an illogical mode of establishing it; and I take this opportunity of dissenting altogether, so far as I am concerned, from the doctrine as laid down. For the present purpose it is only necessary for me to say that, according to the decision of *Bamford v. Turnley* (3 Best & S. 62, 66; s. c. 31 Law J. Rep. (N.S.) Q.B. 286), the summing up of my learned Brother was perfectly right, with, perhaps, this observation,—that, if anything, it would have been the other side that would have had reason to complain. However, there can be no doubt that the question is one of very great importance, and if the defendants feel disposed, considering the position of these parties, and the interests involved, to take it to the highest tribunal, we ought to assist them in so doing; and therefore, although we grant no rule, and we are bound by that decision, yet we shall willingly give leave to take the case up to the Court above.

Against this judgment the defendants appealed to the Court of Exchequer Chamber, when the following points were stated for argument on behalf of the plaintiff and defendants respectively.

The defendants' points—1. That sensible discomfort from the carrying on of a necessary trade in a reasonable manner and in a suitable locality is not an actionable injury. 2. That the learned Judge misdirected the jury as to what constituted an actionable injury. 3. That the learned Judge ought to have directed the jury as to the character of the locality, the circumstances of the purchase, and the improved value of the property, by reason of the works, as material for their consideration; as to whether the injury was or was not actionable, and as to the amount of the damages. 4. That the suitability of the locality is matter of law, as to which the learned Judge should have directed the jury. 5. That the learned Judge should have directed the jury that there was no sufficient evidence of the damage being due to the works of the defendants exclusively; or upon which the damage due to the works of the defendants could be ascertained. 6. That the plaintiff was not entitled to sustain the action, or to recover substantial damages for the necessary consequence of a trade established and carried on, with his knowledge, before and at the time of the acquiring the property alleged to be depreciated in value.

The plaintiff's points—That the finding of the jury is conclusive in his favour; and that no person has a right, to the damage of his neighbour, to carry on in an improper place any noxious trade, however conducted that trade may be. And, moreover, that no person is allowed by law to inflict damage on his neighbour or his estate in the absence of prescription, grant or right so to do.

The Court of Exchequer Chamber confirmed the judgment of the Court of Queen's Bench; the judgments being as follows:

ERLE, C.J.—We think that the judgment ought to be affirmed, and that there is no misdirection.

POLLOCK, C.B.—I have only to reiterate what has fallen from me in the course of the argument—my opinion has not been always that which it is now. I am compelled to say that which I now pronounce to be the law, not entertaining that opinion. I think that, acting upon what has been decided in this Court, my Brother Mellor's direction is not open to a bill of exceptions, and is not open to question in this Court.

Hence the present appeal.

The following learned Judges were present during the hearing of the appeal, viz., Blackburn, J., Shee, J., Willes, J., Keating, J., Martin, B. and Pigott, B.

The Attorney General and Webster, for the appellants, pursued the same line of argument as that defined in the points for argument in the Court of Exchequer Chamber, and referred to *Hole v. Barlow* (27 Law J. Rep. (N.S.) C.P. 207), *Bamford v. Turnley* (3 Best & S. 62, 66; s. c. 31 Law J. Rep. (N.S.) Q.B. 286), *Cavey v. Lidbetter* (13 Com. B. Rep. N.S. 470; s. c. 32 Law J. Rep. (N.S.) C.P. 104), *The Wanstead Local Board of Health v. Hill* (Ibid. 479; s. c. 32 Law J. Rep. (N.S.) M.C. 135), *The Stockport Waterworks Company v. Potter* (31 Law J. Rep. (N.S.) Exch. 9), and *Com. Dig.*, tit. 'Action upon the Case for a Nuisance' (C.).

Mellish, Milward and Brett, for the respondent, were not called upon.

The LORD CHANCELLOR.—My Lords, as your Lordships, as well as myself, have listened carefully to the argument on the part of the appellants, and are perfectly satisfied with the decision of the Court below, and you are of opinion that, subject to what we may hear from the learned Judges, the direction is right, I would submit to your Lordships that these questions should be put to the learned Judges; but at the same time the learned Judges will be good enough to understand that if they desire further argument of the case, the respondent's counsel must be heard. Unless the learned Judges express their

desire for further argument, your Lordships will, I think, concur with me that the questions ought to be as follows:

Whether the directions given by the learned Judge at Nisi Prius to the jury were correct, or whether a new trial ought to be granted in this case.

The learned Judges will intimate to your Lordships whether they desire to hear further argument on the part of the respondent's counsel, or whether they are prepared to answer the questions put to them by your Lordships.

The learned Judges having intimated that they did not desire any further argument of the case, the Lord Chancellor put the questions as suggested.

MARTIN, B.—My Lords, in answer to the questions proposed by your Lordships to the Judges, I have to state their unanimous opinion that the directions given by the learned Judge to the jury are correct, and that a new trial ought not to be granted. As far as the experience of all of us goes, the directions are such as we have given in these cases for the last twenty years.

The LORD CHANCELLOR.—My Lords, I think your Lordships will be satisfied with the answer we have received from the learned Judges to the question put by the House.

In matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort.

With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must, undoubtedly, depend greatly on the circumstance where the thing complained of actually occurs. If a man lives in a town, of necessity he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce; also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop; but when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or business is a material injury, then, unquestionably, arises a very different consideration, and I think that in a case of that description the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours would not apply to circumstances the immediate result of which is sensible injury to the value of the property.

Now, in the present case, it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from large smelting-works. What the occupation of these copper-smelting premises were anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June, 1860. In the month of September, 1860, very extensive smelting operations began on the property of the present appellants, the works at Saint Helens. Of the effect of the vapours exhaled from these works upon the plaintiff's property, and the injury done to the trees and shrubs there is abundance of evidence. The action has been brought for that. The jury have found the existence of the injury, and the only ground upon which your Lordships are asked to set aside that verdict and to direct a new trial is this—that the whole neighbourhood where these copper-smelting works were carried on is a neighbourhood more or less devoted to manufacturing purposes, and therefore it is said that, inasmuch as this copper-smelting is

carried on in what the appellants contend is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. I apprehend that that is not the meaning of the word "suitable," or the meaning of the word "convenient," within the law as laid down on the subject. The word "suitable" unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighbouring property. Of course, I except the cases where any prescriptive right has been acquired by a lengthened user of the place.

On these grounds, therefore, shortly, without dilating further upon them,—they are sufficiently unfolded by the judgment of the learned Judge in the Court below,—I advise your Lordships to affirm the decision of the Court below, and to refuse this appeal, and refuse it with costs.

LORD CRANWORTH.—My Lords, I entirely agree with my noble and learned friend, and also in the opinion expressed by the Judges, that this has been considered to be the proper mode of directing a jury, as Mr. Baron Martin said, for at least twenty years. I believe I should have carried it back rather further. I have always understood that the proper question was—and I cannot do better than adopt the language of Mr. Justice Mellor—"it must be plain that persons using a lime-kiln, or other works which emit noxious vapours, may not do an actionable injury to another, and that that place where it is carried on so that it does occasion an actionable injury to another is not, in the meaning of the law, a convenient place."—I always understood that to be so; but, in truth, as was observed in one of the cases by the learned Judges, it is extremely difficult to lay down any actual definition of what constitutes an injury, because in truth, it is always a question of compound facts which must be looked to, to see whether or not the mode of carrying it on did or did not occasion so serious an injury as to interfere with the comforts of life and enjoyment of property.

I perfectly well remember, when I had the honour of being one of the Barons of the Court of Exchequer, trying a case in the county of Durham, when there was an action for smoke in the town of Shields. It was proved incontestably that smoke did come, and in some degree interfered with a certain person; but I said you must look at it now with a view to the question, not whether abstractedly that quantity of smoke was a nuisance, but whether it was a nuisance to the person living in the town of Shields, because, if it only added, and in an infinitesimal degree, to the quantity of smoke, I thought that the state of the town rendered it altogether impossible to call that a nuisance. There is nothing of that sort in the present case. It seems to me that the distinction in matter of fact was most correctly pointed out by Mr. Justice Mellor, and I do not think he could possibly have stated the law either abstractedly or with reference to the facts, better than he has done in this case.

LORD WENSLEYDALE.—My Lords, I entirely agree in opinion with both my noble and learned friends in this case. In these few sentences I think everything is included: "The defendants say, If you do not mind, you will stop the progress of works of this description. I agree that that is so, because, no doubt, in the county of Lancaster, above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights and allow a person to say, I will bring an action against you for this and that, and so on. Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences—injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected." I do not think that the question could have been more correctly laid down by any one to the jury, and I entirely concur in the propriety of dismissing this appeal.

Appeal dismissed with costs.

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Queen's Bench.)

Nov. 27, 1865.

LLOYD v. GUIBERT AND OTHERS.*

35 L. J. Q.B. 74; L. R. 1 Q.B. 115; 6 B. & S. 100; 13 L. T. 602.

Applied, *The Karnak*, [1869] E. R. A.; 38 L. J. Adm. 57; L. R. 2 P.C. 505; 21 L. T. 159; 17 W. R. 1028 (P.C.). Referred to, *The Empire of Peace*, [1869] E. R. A.; 39 L. J. Adm. 12; 21 L. T. 763 (Adm.). Not applied, *Ellis v. McHenry*, [1871] E. R. A.; 40 L. J. C.P. 109; L. R. 6 C.P. 228; 23 L. T. 861; 19 W. R. 503 (C.P.). Distinguished, *The Patria*, [1872] E. R. A.; 41 L. J. Adm. 23; L. R. 3 A. & E. 436; 24 L. T. 849 (Adm.). Observed upon, *The San Roman* [1872] E. R. A.; 41 L. J. Adm. 72; L. R. 3 A. & E. 583; 26 L. T. 948 (Adm.): affirmed, [1873] E. R. A.; 42 L. J. Adm. 46; L. R. 5 P.C. 301; 21 W. R. 393 (P.C.). Referred to, *James v. London and South-Western Railway*, [1872] E. R. A.; 41 L. J. Ex. 186; L. R. 7 Ex. 287; 27 L. T. 382; 21 W. R. 25 (Ex.); *Nugent v. Smith*, [1875] E. R. A.; 45 L. J. C.P. 19; 1 C.P. D. 19; 33 L. T. 731 (C.P. D.): reversed, [1876] E. R. A.; 45 L. J. C.P. 697; 1 C.P. D. 423; 34 L. T. 827; 24 W. R. 237. (C. A.). Considered, *The M. Mozham*, [1876] E. R. A.; 45 L. J. Adm. 36; 1 P. D. 43; 33 L. T. 463 (Adm.): reversed, [1876] E. R. A.; 46 L. J. Adm. 17; 1 P. D. 107; 34 L. T. 559; 24 W. R. 650 (C. A.). Adopted, *Moore v. Harris*, [1876] E. R. A.; 45 L. J. P.C. 55; L. R. 1 App. Cas. 318; 34 L. T. 519; 24 W. R. 887 (P.C.). Referred to, *Cohen v. South Eastern Railway*, [1877] E. R. A.; 46 L. J. Ex. 417; 2 Ex. D. 253; 36 L. T. 130; 25 W. R. 475 (C. A.); *Chamberlain v. Napier*, [1880] E. R. A.; 49 L. J. Ch. 628; 15 Ch. D. 614; 29 W. R. 194 (V.C.). Applied, *The Gaetano and Maria*, [1882] E. R. A.; 51 L. J. Adm. 67; 7 P. D. 137; 46 L. T. 835; 30 W. R. 766 (C. A.). Distinguished, *Chartered Bank of India v. Netherlands India Steam Navigation Co.*, [1882] E. R. A.; 51 L. J. Q.B. 393; 9 Q.B. D. 118; 46 L. T. 530; (Q.B. D.): partly affirmed and partly reversed, [1883] E. R. A.; 52 L. J. Q.B. 220; 10 Q.B. D. 521; 48 L. T. 546; 31 W. R. 445 (C. A.). Applied, *Jacobs v. Crédit Lyonnais*, [1884] E. R. A.; 53 L. J. Q.B. 156; 12 Q.B. D. 589; 50 L. T. 194; 32 W. R. 761 (C. A.); *In re Missouri S.S. Co.; Monroe's claim*, [1889] E. R. A.; 58 L. J. Ch. 721; 42 Ch. D. 321; 61 L. T. 316; 37 W. R. 696 (C. A.); *The August*, [1891] E. R. A.; 60 L. J. P. 57; [1891] P. 328; 66 L. T. 32 (P. D.). Referred to, *Krell v. Henry*, [1903] E. R. A.; 72 L. J. K.B. 794; [1903] 2 K.B. 740; 89 L. T. 328 (C. A.). Applied, *The Industrie*, [1894] E. R. A.; 63 L. J. P. 84; [1894] P. 58; 70 L. T. 791; 42 W. R. 280 (C. A.); *British South Africa Co. v. De Beer's Consolidated Mines*, [1910] E. R. A.; 79 L. J. Ch. 345; [1910] 1 Ch. 354; 102 L. T. 95 (Ch. D.): affirmed, [1911] E. R. A.; 80 L. J. Ch. 65; [1910] 2 Ch. 502; 103 L. T. 4: reversed, [1912] E. R. A.; 81 L. J. Ch. 137; [1912] A. C. 52; 105 L. T. 683 (H.L.).

Ship and Shipping—Diversity of Laws—Bottomry—Authority of Master to bind Owner—Abandonment.

CONTRACT. SHIPPING.—*The rights of parties under a contract not expressly provided for thereby, but arising incidentally within the sphere of the relation created by it, are to be determined by that general law which the parties intended to govern the transaction, or rather by which they may justly be presumed to have bound themselves.*

Primâ facie, the law of the place where a contract is made is that which

* *Coram* Erle, C.J., Pollock, C.B., Martin, B., Willes, J., Keating, J. and Pigott, B.

the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and such law ought to prevail in the absence of circumstances indicating a different intention; but a contract of affreightment made between a charterer and owners of the ship, being persons of different nationalities, in a place where both of them were foreigners, to be performed partly there by the ship breaking ground in order to start for the port of loading, a place where both parties would also have been foreigners; partly at the latter port, by taking the cargo on board; and partly on board the ship at sea, subject there to the laws of the country of the ship; and partly by final delivery at the port of discharge, is to be construed by the law of the nation of the ship.

The pleadings are set out in the report of the case in the Court below (33 Law J. Rep. (N.S.) Q.B. 241).

The facts disclosed by the record are as follows:

The plaintiff below, a British subject at St. Thomas, a Danish West India island, chartered the ship *Alivier*, belonging to the defendants, who are Frenchmen, for the voyage from St. Marc to Haiti, to Havre, London or Liverpool, at the charterer's option.

The plaintiff must have known that the ship was French. The charter-party was entered into by the master, in pursuance of his general authority as master, and not under any special authority from the owner. The plaintiff shipped a cargo at St. Marc for Liverpool, with which the vessel sailed. On her voyage she sustained damage from a storm, which compelled her to put into Fayal, a Portuguese port, for repair. There the master properly borrowed money upon bottomry of the ship, freight and cargo, and repaired the ship, which proceeded with the cargo, and arrived in safety at Liverpool.

The bondholder proceeded in the Court of Admiralty against ship, freight and cargo. The ship and freight were insufficient to satisfy the bond. The deficiency and costs fell upon the plaintiff as owner of the cargo, and in respect thereof he seeks to be indemnified by the defendants as shipowners.

Crompton Hutton argued for the appellant; and, besides other authorities alluded to in the judgment of the Court, referred to *Benson v. Duncan* (3 Exch. Rep. 644; s. c. 18 Law J. Rep. (N.S.) Exch. 169) and *Pope v. Nickerson* (3 Stor. 465).

Hodgson argued for the respondents.—The arguments are, however, so fully referred to in the judgment of the Court that it is unnecessary to set them out here.

WILLES, J. now delivered the judgment of the Court, and, after referring to the facts as above stated, proceeded:—The defendants abandoned the ship and freight, and it must be taken as a fact, because it is alleged, and not denied, that by the law of France they abandoned in such time and in such manner and under such circumstances as are required by the French law; and that according to such law, abandonment (by which we understand a giving up of the ship and freight to the shippers—see *Dakin v. Oxley* (15 Com. B. Rep. N.S. 665), absolved them from liability.

This law, if applicable, is one which furnishes an absolute bar to the plaintiff's claim by way of satisfaction or discharge, and affected the validity of the claim, and not merely the mode of proceeding to enforce it. Whether the French law permits abandonment under such exceptional circumstances is a question of fact not before us, and which for the present purpose we must assume to be answered in the affirmative—see, however, *Devilleeneuve et Massé, Dictionnaire des Contentieux Commercial*, tit. 'Armateur,' sections 23 and 25.

By the English law, a shipowner, under such circumstances, is liable personally, and not merely to the value of the ship and freight; and it is alleged, and not denied, that the Danish, Portuguese, and Haitian laws agree in this respect with our own. The law of Haiti was not, however, relied upon in argument.

Upon these facts, it was insisted for the plaintiff that the decision ought to proceed upon either what was called the general maritime law, as regulating all

maritime transactions between persons of different nationalities at sea; the Danish law, as that of the place where the contract was made (*lex loci contractus*); the Portuguese law, because the bottomry bond, which, in one sense, caused the question to arise, was given in a Portuguese port, and the rule that the place governs the act (*locus regit actum*) was supposed, therefore, to furnish a solution; or the English law, as being that of the place of the final act of performance by the delivery of the cargo (*quasi lex loci solutionis*), in either of which alternatives the liability of the defendant was established; and it was argued that the charter-party having been entered into *bona fide* in the ordinary course of business by the master, within the scope of his ostensible authority to contract for the employment of the vessel which the owner by appointing a master and sending him abroad in command allows him to assume, the right of the charterer could no more be narrowed by a provision of foreign law unknown to him than by secret instructions from the owners, which would clearly be inoperative: a proposition which needs no authority in our law, and for which French authorities will be found in Paillet's edition of the *Code de Commerce*, art. 216, in the note.

For the defendants it was answered that, by the French law, they are absolved, and that that law, as being that of the ship, governs the case, either because of the character of the transaction itself shewing that the plaintiff impliedly submitted his goods to the operation of the law of the ship, or because the master who entered into the contract, though his doing so was within the scope of the authority which he was allowed by the owner to assume, was disabled by the French law from binding his owners otherwise than with the exception, expressed or implied, of exemption from liability by abandonment, and that of such disability or lack of authority his flag was sufficient notice.

Upon this latter ground the Court of Queen's Bench gave judgment for the defendants, not expressing any opinion upon the former, whereupon the plaintiff brought error, and the case was well argued at the sittings after Trinity Term last, before Erle, C.J., Pollock, C.B., Martin, B., Keating, J., Pigott, B. and myself, when we took time to consider.

In determining a question between contracting parties, recourse must first be had to the language of the contract itself, and force, fraud and mistake apart, the true construction of the language of the contract (*lex contractus*) is the touchstone of legal right.

It often happens, however, that disputes arise, not as to the terms of the contract, but as to their application to unforeseen questions which arise, incidentally or accidentally, in the course of performance, and which the contract does not answer in terms, yet which are within the sphere of the relation established thereby, and cannot be decided as between strangers. In such cases it is necessary to consider by what general law the parties intended that the transaction should be governed; or rather, to what general law it is just to presume that they have submitted themselves in the matter; a familiar illustration of this will be found in the rule that the lawful usages of a market are as much part of a contract entered into there which does not expressly exclude them as if they were set down at large. The binding force of such usages does not depend so much upon the knowledge of the parties as upon implied acquiescence, for "whoso goes to Rome must do as those at Rome do." So, in the absence of express provision or special usage, the general law itself, in many points of view only a more extended usage, supplies the gaps which the parties have left, and, in doing so, sometimes modifies the construction of general words in the contract. For instance, a common carrier, while, on the one hand, he is bound by stringent rules for the protection of his customers, on the other is allowed certain exemptions from liability, even upon an express contract if it do not exclude such exemptions. Thus, by the common law of England, a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by the act of God or the king's enemies—*Paradine v. Jane* (Ayleyn, 27); and yet, in

consideration of the risks to which common carriers are exposed, such prevention is, in their case, an implied exception. And in the case of ordinary bailees intrusted with the custody of goods, whether by express contract or not, the exceptions of overwhelming force (*vis major*) and accident without fault (*casus fortuitus*) are implied. In the case of carriers by sea, these latter expressions, *vis major* and *casus fortuitus*, are now, as to British ships stipulated for by the common exception in the charter-party or bill of lading, whilst, in foreign contracts of affreightment, even when made in British ports, such express stipulation is sometimes omitted, as, for instance, in the Spanish charter in *Blasco v. Fletcher* (14 Com. B. Rep. N.S. 147; s. c. 32 Law J. Rep. (N.S.) C.P. 284), because, by the law of many countries, such an exemption is implied (see *Casaregis*, Disc. 23; *Código de Comercio*, art. 985, *Allgemeines Deutsches Handels Gesetzbuch*, art. 703). So that, in the case just referred to, if the *lex loci contractus* were to prevail, the owner of a Spanish vessel, chartered at Liverpool for the Havana, might lose the protection which the owners of an English vessel would, of course, have stipulated for. And this diversity (or conflict) upon a point so important, shews that the present and like questions affect, not only contracts entered into by masters of ships the law of whose country distinguishes between the obligation of a contract by the master as such and that of the owner himself, or his broker, or of the master acting with a plenary authority, but touch all contracts of affreightment entered into in respect of any vessel in a port foreign as to her, whether the master happens to be an owner or not. Hitherto we have viewed the question generally; but, in order to its satisfactory solution as applied to the present case, we must deal with the operative facts that the contract of affreightment was made by persons of different nationalities, in a place where both of them were foreigners, to be performed partly there, by breaking ground in order to start for the port of loading, a place where both parties would also have been foreigners, partly at the latter port by taking the cargo on board, and partly on board a ship at sea, subject there to the laws of their own country, and never out of its jurisdiction as to acts done by those on board, and partly by final delivery in the port of discharge; that the principal subject-matter of the contract was the employment of a foreign ship for a voyage across the high seas; and that the question in dispute arose in consequence of sea damage to the ship and its ordinary results.

In the diversity or conflict of laws, which ought to prevail is a question that has called forth an amazing amount of ingenuity and many differences of opinion. It is, however, generally agreed that the law of the place where the contract is made is, *primâ facie*, that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or, that the subject-matter is immovable property situate in another country, and so forth, which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made, which intention is inferred from the subject-matter, and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract. The present question does not appear to have ever been decided in this country, and in America it has received opposite decisions equally entitled to respect. We must therefore deal with it as a new question, and endeavour to be guided in its solution by a steady application of the general principle already stated, namely, that the rights of the parties to a contract are to be judged of by that law by which they intended, or rather by which they may justly be presumed to have bound themselves. We must apply this test successively to the various laws which have been suggested as applicable; and first, to the alleged general maritime law. We can understand this term in the sense of the general

maritime law as administered in the English Courts, that being in truth nothing more than English law, though dealt out in somewhat different measures in the common law and Chancery Courts, and in the peculiar jurisdiction of the Admiralty. But as to any other general maritime law by which we ought to adjudicate upon the rights of the subject of a country, which by the hypothesis does not recognize its alleged rule, we are not informed what may be its authority, its limits, or its sanction. Passing over the common ground of ethics and the elementary ideas of natural law (*jus gentium*), such as the rights of prior occupancy and self-preservation, the privileges and exemption of necessity, the common duties of humanity, of more or less perfect obligation, the idea of property, including the obligation of contracts, and those obligations, for the most part conventional, upon which is based the modern system of international law (*jus inter gentes*), inasmuch as these supply no precise rule for the matter in hand, it would be difficult to maintain that there is as to such questions as the present, depending in a great measure upon national policy and economy, any general, in the sense of universal, law, binding at sea, any more than upon land, nations which either have not assented or have withdrawn their assent thereto. Moreover, we are not satisfied that there is any such general concurrence of mankind that shipowners should be absolutely answerable personally for the acts of the master. Pothier (*Sur la Charte-partie*, part. i. No. 34), was cited in the affirmative, and Emerigon (*Contrat à la grosse*, chap. 4, sec. 11) upon the negative side. Pothier, founding his interpretation upon the Civil law, *De exercitoria actione* (see Valin, *Sur l'Ordonnance*, livre 2, tit. 8, art. 2), thought that the clause of the celebrated *Ordonnance de la Marine*, of 1681, livre 2, tit. 8, art. 2, from which art. 216. of the *Code de Commerce* was taken, applied only to illicit acts of the master, and that upon his contracts the owner was liable, and could not get rid of the liability by abandonment. Emerigon, on the other hand, founding his opinion upon the general rule of maritime law as he understood it, thought that, from liability for all acts of the master, whether licit or illicit, including contracts, the owner could free himself by abandonment. The jurisprudence of the Court of Cassation leaned towards the opinion of Pothier, and that led in 1841 to the modification of art. 216. to its present shape,¹ by which, according to the statement of the learned annotator in *Sirey's Code de Commerce Annoté*, by Gilbert, note 18, upon art. 216, the opinion of Emerigon is now established in France. To this may be added, that similar though not identical provisions for the protection of the owner are to be found in other codes, for instance, that of Spain (*Código de Comercio*, art. 621, 622), and Prussia (*Allgemeines Deutsches Handels Gesetzbuch*, art. 451, 452, 453. and the following). This is sufficient to shew that there is no general uniform rule of maritime law upon the subject; indeed, looking at home, there seems little if any difference in principle between the French law under consideration and our own statutory provisions for limited liability in respect of obligations by reason of collision, which latter have now by express enactment been extended to collisions between British and foreign vessels—25 & 26 Vict. c. 63. s. 54; *The Amalia* (1 Moore's P.C.C. N.S. 471; s. c. 32 Law J. Rep. (N.S.) Pr. M. & A. 191). In truth, any general, much more any universal maritime law, binding upon all nations using the highway of the sea in time of peace, except when limited as administered in some Court, is easier longed for than found. Accordingly, we observe that both the very learned Judge of the Court of Admiralty and the Judicial Committee of the Privy Council in deciding in the case of the *The Hamburg Duranty v. Hart* (2 Moore's P.C.C. N.S. 289), that the validity of a bottomry bond given in a foreign port was to be determined by the general maritime law, and not by the law of the ship or the port where the bond was given, added to the expression "the general maritime law" this qualification, namely, "as administered in England." That case was cited

(1) Art. 216. "Toute propriétaire de navire est civilement responsable des faits du capitaine et pour des engagements contractés par ce dernier, pour ce qui est relatif au navire et à l'expédition. Il peut dans tous les cas affranchir des obligations ci-dessus par l'abandon du navire et du fret," &c.

as an authority, and at first sight it appeared to be one for applying English law to the present case, but upon consideration it appears altogether distinguishable. The alleged agency of the master in that case was founded upon necessity alone, and it was incumbent on the bondholder to establish such necessity by evidence, and in order to do that he was bound (according to the rules prevailing since the case of *The Buonaparte* (8 Moore's P.C.C. 459) to shew a communication with the owner of the cargo, that being, as the Court held, reasonably practicable, so that the *lex fori* was undoubtedly supreme upon the question which then arose, it being one of evidence and procedure. Had the decision been intended to go further, the Judicial Committee of the Privy Council would probably have considered and compared the case of *Cammell v. Sewell* (5 Hurl. & N. 728; s. c. 29 Law J. Rep. (n.s.) Exch. 350), and pointed out the distinction in this respect between an hypothecation in case of necessity and a sale in case of necessity, which, according to the decision of the majority of the Court in *Cammell v. Sewell* (against the opinion of Mr. Justice Byles) depends for its validity upon the law of the place where the sale was made, and not the general maritime law as administered in England, upon which, however, we offer no opinion.

In one other point of view the general maritime law as administered in England, or (to avoid periphrases) the law of England, namely, as to the law of the contemplated place of final performance, or port of discharge, remains to be considered. It is manifest, however, that what was to be done at Liverpool besides that it might, at the charterer's option, have been done at Havre, was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby. It is true that as to the mode of delivery the usages of Liverpool would govern, as those of Algiers did in *Robertson v. Jackson* (2 Com. B. Rep. 412; s. c. 15 Law J. Rep. (n.s.) C.P. 28), and as in the mode of taking on board the cargo, the usage of the port of loading would be regarded—see *Hudson v. Clementson* (18 Ibid. 213; s. c. 25 Law J. Rep. (n.s.) C.P. 234), and the custom set out in the pleadings in *Gattorno v. Adams* (12 Ibid. N.S. 560), which custom was proved at the trial, at the Guildhall sittings after Michaelmas Term, 1862, and made an end of the case; and in this point of view it seems impossible to exclude the law of England, or even that of Haiti, from relevancy in respect of the manner of performing that portion of the service contracted for, which was to be rendered in their respective territories, because the ship must needs for the time being conform to the usages of the port where she is; and for a like reason, the adjustment of a general average at the port of discharge according to the law prevailing there, is binding upon the shipowner and the merchant, who must be taken to have assented to adjustment being made at the usual and proper place, and, as a consequence, according to the law of that place—*Simonds v. White* (2 B. & C. 805). It is unnecessary, however, to discuss this point further, because we have been anticipated and the question set at rest in an instructive judgment of the Judicial Committee, delivered by Lord Justice Turner, since the argument of the present case, in that of *The Peninsular and Oriental Company v. Shand* (Privy Council, 20th July, 1865; Jurist for the 7th October), where a passenger in an English vessel from Southampton to the Mauritius, where French law prevails, sued the shipowners for the loss of his luggage upon an alleged liability by French law, from which liability the shipowner was exempt by the English law, and the passenger obtained judgment in his favour in the Mauritius Court, which judgment was reversed upon appeal by the Judicial Committee, their Lordships holding that the law of England governed the case. Next, as to the law of Portugal, the only semblance of authority for resorting to that law, as being the law of the place where the bottomry bond was given, is the case already referred to of *Cammell v. Sewell* (5 Hurl. & N. 728; s. c. 29 Law J. Rep. (n.s.) Exch. 350), and we consider that the judgment in that case, if applicable at all, as to which we say nothing, could only affect the validity of the bottomry, and not the duties imposed upon the shipowner towards the merchant, by the

fact of the bottomry, which duties must be traced to the contract of affreightment and the bailment founded thereupon.

The law of Haiti was not mentioned nor relied upon in argument, and there remain only to be considered the laws of Denmark and of France, between which we must choose. In favour of the law of Denmark there is the cardinal fact that the contract was made within Danish territory; and further, that the first act done towards performance was weighing anchor in a Danish port. For the law of France, on the other hand, many practical considerations may be suggested; and, first, the subject-matter of the contract, the employment of a sea-going vessel for a service, the greater and more onerous part of which was to be rendered on the high seas, where, for all purposes of jurisdiction, criminal or civil, with respect to all persons, things and transactions on board, she was as it were, a floating island over which France had as absolute, and for all purposes of peace as exclusive, a sovereignty as over her dominions by land, and which, even whilst in a foreign port, according to notions of jurisdiction adopted by this country (18 & 19 Vict. c. 91. s. 21, 24 & 25 Vict. c. 94. s. 9), and carried to a greater length abroad (*Ortolan, Diplomatie de la mer*, c. 13, the work of a French naval officer, but of which a jurist might be proud), was never completely removed from French jurisdiction.

Further, it must be remembered, that although bills of lading are ordinarily given at the port of loading, charter-parties are often made elsewhere; and it seems strange and unlikely to have been within the contemplation of the parties that their rights or liabilities in respect of the identical voyage should vary, first, according as the vessel was taken up at the port of lading or not; and, secondly, if she was taken up elsewhere according to the law of the place where the charter-party was made or even ratified. If a Frenchman had chartered the *Olivier* on the same terms as the plaintiff did, it should seem strange if he could appeal to Danish law against his own countrymen, because of the charter-party being made or ratified in a Danish port, though for service to be rendered elsewhere, by a transient visitor for the most part within French jurisdiction. Moreover, there are many ports which have few or no sea-going vessels of their own, and no fixed maritime jurisprudence, and which yet supply valuable cargoes to the ships of other countries. Take Alexandria for instance, with her mixed population, and her maritime commerce almost in the hands of strangers. Is every vessel that leaves Alexandria with grain, under a charter-party or bill of lading made there, and every passenger vessel leaving Alexandria or Suez, be she English, Austrian, or French, subject to Egyptian law? As to not a few half-savage places in Africa and Asia, with neither sea-going ships nor maritime laws, a similar question may be put,—what is the law in such cases, or is there none except that of the Court within whose jurisdiction the litigation first arises? Again, it may be asked, does a ship which visits many ports in one voyage, whilst she undoubtedly retains the criminal law of her own country, put on a new sort of civil liability at each new country she visits, in respect of cargo there taken on board? An English steamer, for instance, starts at Vigo, Lisbon, and Cadiz. A Portuguese going from Southampton to Vigo would naturally expect to sail subject in all respects to English law, that being the law of the *place and the ship*; but if the locality of the contract is to govern throughout, an Englishman going from Vigo to Lisbon on the same voyage would be under English law as to crimes, and all obligations connected with the contract of carriage, but under Spanish law as to the contract of carriage, and a Spaniard going from Lisbon to Cadiz during the same voyage would enjoy Portuguese law as to his carriage, and be subject to English law in other respects.

The cases which we have thus put are not extreme nor exceptional: on the contrary, they are such as would ordinarily give rise to the question, which law is to prevail? The inconvenience, and even absurdities, which would follow from adopting the law of the place of contract in preference to that of the vessel, are strong to prove that the latter ought to be resorted to.

No inconvenience comparable to that which would attend an opposite

decision has been suggested. The ignorance of French law on the part of the charterer is no more than many Englishmen contracting in England with respect to English matters, might plead as to their own law in case of an unforeseen accident.

Nor can we allow any weight to the argument that this is an impolitic law as tending to interfere with commerce, especially in making merchants cautious how they engage foreign vessels. That is matter for the consideration of foreigners themselves, and nothing short of a violation of natural justice or of our own laws could justify us in holding a foreign law void because of being impolitic. No doubt the French law was intended to encourage shipping, by limiting the liability of shipowners, and in this respect it goes somewhat further than our own, but whether wisely or not is within the competence and for the consideration of the French legislature, and upon which, sitting here, we ought to pronounce no opinion.

Exceptional cases, should they arise, must be dealt with upon their own merits. In laying down a rule of law, regard ought rather to be had to the majority of cases upon which doubt and litigation are more likely to arise, and the general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce.

In order to preclude all misapprehension it may be well to add, that a party who relies upon a right, or an exemption by foreign law, is bound to bring such law properly before the Court, and to establish it in proof. Otherwise, the Court, not being entitled to notice such law without judicial proof, must proceed according to the law of England—(see *Brown v. Gray*).²

For these reasons we have arrived at the same conclusion as the Court of Queen's Bench, and, without examining the grounds upon which the Court proceeded, we are of opinion that the judgment was right and ought to be affirmed.

Judgment affirmed.

[IN THE QUEEN'S BENCH.]

Nov. 9, 17, 25, 1865.

HAWKINS AND ANOTHER, *surviving partners of JOHN PARSONS, deceased*, v. CARR.

PARSONS AND ANOTHER, *executors of JOHN PARSONS, deceased*, v. CARR.

35 L. J. Q.B. 81; L. R. 1 Q.B. 89; 6 B. & S. 995; 12 Jur. N.S. 334; 13 L. T. 321; 14 W. R. 138.

Followed, *Hills v. Wates*, [1874] E. R. A.; 43 L. J. C.P. 380; L. R. 9 C.P. 688; 31 L. T. 407 (C.P.).

Interrogatories—Discovery in Equity—17 & 18 Vict. c. 125 s. 51.—*Appeal from Judge at Chambers—Costs.*

DISCOVERY.—*The Court allowed the plaintiff, under section 51. of the Common Law Procedure Act, 1854, to interrogate the defendant as to allegations in his plea, the interrogatories being on matters in respect of which, according to the practice of the Court of Chancery, discovery would be granted in equity.*

Where a rule nisi to rescind an order of a Judge, by way of appeal from the decision of the Judge, is discharged, it is the practice to discharge the rule with costs; but where the point raised was new and abstruse, the Court refused the costs.

(2) Note to *Lacon v. Higgins*, Dowl. & Ry. N.P. 41.

The above two actions had been commenced against the same defendant in respect of the same cause of action. The plaintiffs in the one action sued as surviving partners of John Parsons, deceased; and the plaintiffs in the other action sued as executors of the same person. Certain interrogatories were sought to be delivered to the defendant, pursuant to the Common Law Procedure Act, 1854, in each action, which were identical in their terms. Mr. Justice Blackburn, in chambers, had made an order allowing certain of the interrogatories in the action of *Hawkins and another v. Carr*.

Barnard obtained a rule calling upon the plaintiffs to shew cause why the above order of the learned Judge should not be rescinded.

The plaintiffs declared for money payable by the defendant to the plaintiffs for goods sold and delivered by the plaintiffs and the said John Parsons, and for work done and materials provided by the plaintiffs and said John Parsons, since deceased, in his lifetime for the defendant at his request, and for money paid by the plaintiffs and the said John Parsons, since deceased, in his lifetime for the defendant at his request, and for money found to be due from the defendant to the plaintiffs and the said John Parsons, since deceased, in his lifetime upon accounts stated between them in the lifetime of the said John Parsons, deceased, and also for money found to be due from the defendant to the plaintiffs as such surviving partners of the said John Parsons, deceased, upon accounts stated between the plaintiffs, as such surviving partners as aforesaid, and the defendant since the death of the said John Parsons. And the plaintiffs claimed 150*l*.

The defendant pleaded as to that alleged claim of the plaintiffs which is alleged to have accrued in the lifetime of the said John Parsons, deceased, that that alleged claim consisted of items of claim which were *bona fide* disputed by the defendant to be due to the said John Parsons and the plaintiffs, and items of claim of an unliquidated, unascertained and unknown amount, being items of claim to so much as the said John Parsons and the plaintiffs reasonably deserved to have of and from the defendant in respect of the subject-matter of those items, and which said items of claim, unless liquidated, ascertained and assessed in amount by the parties themselves, necessarily were and would be wholly uncertain, unknown and unliquidated in the amount, till liquidated, ascertained and assessed in amount by the verdict of a jury. And the defendant also said, that the said John Parsons in his lifetime had and made a certain other claim for and against the defendant for an unascertained amount due from the defendant to the said John Parsons, which said other claim also consisted of items of claim which were *bona fide* disputed by the defendant to be due to the said John Parsons; and of items of claim of an unliquidated, unascertained and unknown amount, being items of claim to so much as the said John Parsons reasonably deserved to have of and from the defendant in respect of the subject-matter of those items, and which said items of claim, unless as to their amount liquidated, ascertained and assessed by the plaintiffs themselves, necessarily were and would be as to amount wholly uncertain, unknown and unliquidated till liquidated, ascertained and assessed by the verdict of a jury. And the defendant further said, that thereupon, after the alleged accruing of the claim herein pleaded to, and in the lifetime of the said John Parsons, the defendant and the said John Parsons having notice of the premises, it was agreed by and between the defendant and the said John Parsons, that they should jointly ascertain and determine which of the said disputed items of both the said claims were or were not due, and should jointly liquidate, ascertain and assess the amount of the items of both claims which were of such uncertain, unknown and unliquidated amount as aforesaid, and should jointly ascertain, assess and fix a sum of money as the whole and joint amount due from the defendant upon and in respect of both the said claims, and that the defendant should accept and deliver to the said John Parsons, and the said John Parsons should receive for and on account of that amount, a bill of exchange, bearing date the 9th of October, 1861, drawn by the said John Parsons upon the defendant for the

payment by the defendant to the said John Parsons's order, of the said last-mentioned sum two years after the date of the said bill, and that the said John Parsons should accept the performance of the said agreement on the defendant's part in full and joint satisfaction and discharge of the claim to which this plea is pleaded, and of the said other claim of the said John Parsons in respect of any and every sum over and above and beyond the said sum for which the said bill of exchange was to be so accepted, delivered, and received as aforesaid. And the defendant further said, that the said agreement jointly ascertained and determined which of the disputed items of both of the aforesaid claims were or were not due; and did jointly liquidate, ascertain and assess the amount of the items of both claims which were of such uncertain, unknown and unliquidated amounts as aforesaid, and did jointly ascertain and fix 55*l.* 18*s.* 3*d.* as the whole and joint amount due from the defendant in respect of that claim to which this plea is pleaded, and of the said other claim of the said John Parsons; and thereupon, under and in pursuance of the said agreement, the defendant did then accept and deliver to the said John Parsons, and the said John Parsons received of and from the defendant, for and on account of the amount last aforesaid, a bill of exchange, bearing date the 9th of October, 1861, drawn by the said John Parsons upon the defendant for the payment by the defendant to the said John Parsons's order of the said sum of 55*l.* 18*s.* 3*d.*, two years after the date of the said bill; and the said John Parsons then accepted the defendant's performance of the said agreement in full and joint satisfaction and discharge of the claim to which this plea is pleaded, and of the said other claim of the said John Parsons in respect of any and every sum over and above and beyond the said sum for which the said bill of exchange was so accepted, delivered and received as aforesaid. And the defendant further said, that the said amounts in the declaration first mentioned were stated by and between the defendant and the plaintiffs and the said John Parsons by such ascertaining, assessing and fixing by the defendant and the said John Parsons of the said sum of 55*l.* 18*s.* 3*d.* as aforesaid, and by the drawing, accepting, delivering and receiving of the said bill of exchange as aforesaid, and no such accounts as in the declaration first mentioned were ever stated as therein alleged, save and except as aforesaid. And the defendant further said, that afterwards, and long before the said bill of exchange became due and payable, and while the said John Parsons was the holder of the said bill, it was agreed by and between the defendant and the said John Parsons, that the defendant should pay to the said John Parsons, and the said John Parsons should receive of the defendant, 30*l.*, parcel of the amount of the said bill, and that the defendant should accept and deliver to the said John Parsons, and the said John Parsons should receive for and on account of the residue of the said sum of 55*l.* 18*s.* 3*d.*, another bill of exchange drawn by the said John Parsons upon the defendant, for the payment, by the defendant, to the said John Parsons's order, of 25*l.* 18*s.* 3*d.*, the residue of the amount of the said first-mentioned bill, three years after the date of the said other bill, and that the said John Parsons should thereupon exonerate and discharge the defendant from all liability upon the said first-mentioned bill, and should deliver up the same to the defendant; and thereupon, under and in pursuance of the said last-mentioned agreement, the defendant paid to the said John Parsons, and the said John Parsons accepted and received of and from the defendant 30*l.*, parcel of the amount of the said first-mentioned bill, and the defendant accepted and delivered to the said John Parsons, and the said John Parsons received of and from the defendant, for and on account of the residue of the amount of the said first-mentioned bill, another bill of exchange drawn by the said John Parsons upon the defendant, for the payment, by the defendant, to the said John Parsons's order, of 25*l.* 18*s.* 3*d.*, residue of the said first-mentioned bill, three years after date of the said other bill, and the said John Parsons then exonerated and discharged the defendant from all liability on the said first bill, and delivered it up to the defendant. And the defendant further saith, that the said other bill had not at the time of the

commencement of this suit, nor hath it yet become due or payable, nor have the three years from its date yet elapsed.

And for a second plea to the whole declaration, the defendant says, that he never was indebted, as therein alleged.

On the 7th of June, 1865, a summons was served, by the plaintiffs, to submit interrogatories for the defendant's examination; and the application was heard, by Blackburn, J., on the 8th of June, when his Lordship struck out certain of the interrogatories then proposed, and made an order for the defendant to answer the residue.

Against that order the defendant appealed to the Court and obtained the present rule, upon the ground that the interrogatories were unreasonable, and solely related to the defendant's case, and not the plaintiffs', and that the order was a violation of the rule, by which the defendant is only bound to discover all such facts within his knowledge, and to produce all such documents in his possession as are material to the case of the plaintiff.

The interrogatories allowed by the order of the learned Judge were as follows:

5. When, where, and at what place, and at what time and hour of the day, did you and the said John Parsons, if at all, or if ever, meet to ascertain, settle and assess the respective amounts of the claims and demands mentioned in your plea?

7. At the time of the alleged adjustment or settlement of the accounts respectively mentioned by you in your plea, state what particulars or bills of account or books were before you and John Parsons, and whether or not the items of claim mentioned and comprised in the particulars of demand in this action of *Hawkins and another*, against you, were before you and John Parsons, and the subject of discussion and adjustment; if these items were not, state then what items, claims or accounts were. What was the whole and joint amount allowed by John Parsons, if at all, in your favour upon the two accounts?

8. Was or was not the bill of exchange for the sum of 55*l.* 18*s.* 3*d.*, mentioned by you in your plea, given and accepted by you upon, for and on another and different account and demand than that mentioned by you in your plea, and if so, on what other account, or in respect of what other demand?

9. Was not that bill accepted by you and handed to John Parsons for money lent and advanced by him to you, and when was this, and what was the amount of the advance and the discount he allowed on such advance, and who procured, purchased, or paid for the stamp on the bill, and what has become of this bill?

10. When and where, and under what circumstances, and for what account and consideration, and why, did you pay, as you have alleged in your plea, the sum of 30*l.* to John Parsons, and deliver to him the bill for 25*l.* 18*s.* 3*d.*, payable three years after date? State and set forth the particular place and time when you paid such sum and gave such bill, and the reasons and circumstances for paying such sum and giving such bill to John Parsons, and why you paid the 30*l.* during the currency of the first bill, and why so long a period as three years was chosen for the payment of the second bill of exchange.

11. Was not the sum of 30*l.* paid by you, and when, on account of a different transaction than that mentioned by you in the plea? State fully on what account the money was paid by you to John Parsons.

12. Did you ever, and state when, draw, accept, or deliver the bill for 25*l.* 18*s.* 3*d.* to the said John Parsons, as you have alleged in your plea, and, if so, when?

R. A. Fisher (Nov. 9) shewed cause against the above rule.—The interrogatories allowed by the learned Judge are unobjectionable. The rule is, that if a party administer interrogatories to his opponent, to inquire into what is exclusively his opponent's case, they are objectionable; but if they relate to the case so far as it is common to both parties, they are unobjectionable; and such is the case here. *Whateley v. Crawford* (5 El. & B. 709; s. c. 25 Law J.

Rep. (N.S.) Q.B. 163), *Moor v. Roberts* (2 Com. B. Rep. N.S. 671; s. c. 26 Law J. Rep. (N.S.) C.P. 246), *Bayley v. Griffiths* (1 H. & C. 429; s. c. 31 Law J. Rep. (N.S.) Exch. 477), *Zychlinski v. Maltby* (10 Com. B. Rep. N.S. 838), *Rew v. Hutchins* (Ibid. 829). The plaintiffs are in a difficult position by reason of the death of Parsons, and the materials for rebutting the defendant's case are in the possession only of the defendant.

Barnard, in support of the rule.—These interrogatories relate exclusively to the case of the defendant.

[COCKBURN, C.J.—An inquiry as to any fact tending to displace the plaintiffs' case would be pertinent to the case of the plaintiffs.]

It is submitted that what is substantially matter of replication to the plea may be asked about, but not what only goes to a traverse of the defendant's plea.

Cur. adv. vult.

The judgment of the Court (Cockburn, C.J., Mellor, J., Shee, J. and Lush J.) was now (Nov. 17) delivered by—

LUSH, J.—This was an action by the surviving partners of a firm to recover from the defendant a sum of money on the common counts, for goods sold and delivered, for work done, for money paid, and on accounts stated. The pleas set up a settlement with the deceased partner. An application was made for leave to deliver interrogatories. When the case was argued we had some doubt whether the interrogatories were within the statute, but we have ascertained that, according to the practice of the Court of Chancery, a discovery of this description would be allowed. In a case of this peculiar nature we are anxious not to abridge the powers which the Courts of law enjoy, and the application for leave to administer these interrogatories must therefore be granted.

Rule discharged.

On the 25th of November,

Fisher asked for a direction as to costs, and that the rules should be respectively discharged with costs, on the ground that they were moved for as an appeal against an order of a Judge, and that in such cases it is the usual, and almost universal, practice to discharge the rule with costs.

COCKBURN, C.J., said that although such was the rule, yet, that as the point discussed was perfectly new, and the interrogatories so very near the boundary line between what interrogatories ought and what ought not to be allowed, the Court refused the costs.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Queen's Bench.)

May 15, 1865.

HODGMAN v. THE WEST MIDLAND RAILWAY COMPANY.*

35 L. J. Q.B. 85; 5 B. & S. 173; 13 W. R. 758: affirming, 33 L. J. Q.B. 233; 10 Jur. N.S. 673; 10 L. T. 609; 12 W. R. 1054 (Q.B.).

Applied, *Gallin v. London and North Western Railway*, [1875] E. R. A.; 44 L. J. Q.B. 89; L. R. 10 Q.B. 212; 32 L. T. 550; 23 W. R. 308 (Q. B.); *Hill v. London and North Western Railway*, 1880, 42 L. T. 513 (C.P. D.).

Railway Company—Negligence—Horse—Statute 17 & 18 Vict. c. 81. s. 7.

CARRIERS.—*The plaintiff sent a horse, worth 1,000l., by a groom, to the*

* Decided in the Sittings after Easter Term, coram, Erle, C.J., Pollock, C.B., Channell, B., Byles, J., Keating, J., Pigott, B. and Montague Smith, J.

defendants' railway station, for the purpose of being carried. As the groom was leading it, by the direction of one of the railway porters, to a particular part of the yard, the horse was startled by another horse, and backed, in consequence, on some sharp iron girders, which seriously injured it, so that it was necessary to kill it. No declaration of value had been made, nor any ticket taken out, nor any fare demanded. It was the usual practice at that station to put the horses into the horse-box before taking the ticket. The jury found that the defendants were guilty of negligence in leaving the girders where they were lying:—Held, that the railway company were protected, by the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31. s. 7), from being responsible to the plaintiff for any greater damages in respect of the injury to the horse than 50l.

This was an appeal, by the plaintiff, from the decision of the Court of Queen's Bench, reducing the plaintiff's damages from 1,000l. to 50l.

The pleadings are set out fully in the report below (33 Law J. Rep. (N.S.) Q.B. 233). It will be sufficient now to state that the action was for negligence for placing certain iron girders in the railway station yard, so as to be dangerous to horses, whereby the plaintiff's horse, which had been brought to the station for the purpose of being conveyed by the railway, was injured.

On the trial, the evidence shewed that the plaintiff sent a race-horse, worth 1,000l., under the care of a groom, to the defendants' station, at Worcester, to be carried on the line from Worcester to London.

In order to get the horse to the horse-box in which it was to be carried, it was necessary to pass through the defendants' yard, in which were a quantity of sharp-edged iron girders, which narrowed to the space. The groom took the horse to the yard, and on one of the porters calling out "London horses this way," proceeded to lead him, in the direction pointed out, by the girders. Another horse, which was in front, became terrified and backed upon the plaintiff's horse. This caused the plaintiff's horse to back suddenly against the girders, by which it was so injured that it was necessary to kill it. The groom had not taken any ticket for the horse, nor had he declared the value of the horse to the company or their servants. The usual practice at the Worcester Station was to get the ticket after the horse had been placed in the horse-box. On these facts,

COCKBURN, C.J., directed the jury to find for the plaintiff if they thought that the defendants had been guilty of negligence in leaving the girders in such a position in the yard.

The jury found a verdict for the plaintiff for 1,000l.

LUSH (Wood with him), for the appellant, the plaintiff below.—The ruling of the Lord Chief Justice is right. The company are not protected by section 7. of the statute 17 & 18 Vict. c. 31, which relieves the company from liability in case of an act of neglect or omission in the receiving, forwarding, or delivering of horses. The facts do not shew that the loss occurred in the receiving, forwarding, or delivering the horse. The company did not receive the horse. There was no contract for carriage effected. The horse was still in the possession of its owner. The accident happened before the company's servant had any control over it. It was only on the company's premises, and it was being ridden by the plaintiff's servant. It was not in the company's possession any more than if the horse had not been going to be carried, but the master had merely ridden upon it to see another horse off. The words of the act are meant to limit the liability of the company as carriers only. The jury have found negligence in the company in having a dangerous station, but irrespective of their character of carriers, and no negligence on the part of the plaintiff. It is beside the question whether the horse was going there to be carried or not. If a third person had injured the horse while in the yard, the company at common law would not have been liable.

[MONTAGUE SMITH, J.—The porter says, "London horses this way," and the horse goes. Is not that horse in the course of receipt?]

The calling out of the porter had only the same effect as if the company had put up a board outside their station, saying, horses for London were to go to the furthest part of the station. If the porter had taken the horse and had tried to put it into the horse-box, that would have been in the course of receipt. The test is whether the owner has delivered the horse to the company. Suppose at the end of the journey the company had delivered the horse to the groom, and the groom had met with a similar accident as he was riding away, it could not be said that this would be injury in the delivery. The liability of the company as carriers would have ended before the accident. As long as the plaintiff had not delivered the horse to the company he might declare the value. The statute was not intended to protect the company from the consequences of their negligence in leaving dangerous articles lying about in their yard.

Hawkins (*H. James* with him), for the respondents, the defendants below. —The company are protected from any greater liability than 50*l.* in respect of the injury to the horse. The horse was on the company's premises for the purpose of being carried, and was in the course of receipt, and its value had not been declared when the accident happened. The moment that the horse came on the company's premises for the purpose of being then carried the statute applies to it. The porter directed the horse to be put into the dangerous position. The horse would not have been there except it had been in the course of receipt, having been moved to the place pursuant to the direction of the company's porter for the sole purpose of being placed in the horse-box which was close to it. The porter was in fact marshalling the traffic. The company have a right to have the value declared in order that they may take better care if the horse is very valuable.

Lush replied.

ERLE, C.J.—We affirm the judgment, for the reasons assigned by the majority of the Court below.

The other JUDGES concurred.

Judgment affirmed.

[IN THE EXCHEQUER CHAMBER.]

(*Error from the Court of Queen's Bench.*)

Nov. 27, 28, 1865.

WILSON v. RANKIN.*

35 L. J. Q.B. 87; 6 B. & S. 208; L. R. 1 Q.B. 162; 13 L. T. 564; 14 W. R. 198.

Followed, *Dudgeon v. Pembroke*, [1874] E. R. A.; 43 L. J. Q.B. 220; L. R. 9 Q.B. 581; 31 L. T. 31; 22 W. R. 914; (Q.B.): reversed, 1876, L. R. 1 Q.B. D. 96; 34 L. T. 36 (C. A.): the latter decision reversed, [1877] E. R. A.; 46 L. J. Q.B. 409; 2 App. Cas. 284; 36 L. T. 382; 25 W. R. 499 (H.L.).

Marine Insurance—Policy—Illegal Act of Master—Want of Authority from Owner.

MARINE INSURANCE.—*A master of a vessel, though acting within the scope of his ordinary authority as master, who does an act in contravention of the laws of his country without the express authority, knowledge or sanction of his owner, whether with or without a view to the owner's advantage, is guilty of an implied breach of his orders.*

Therefore, where a master of a vessel has sailed at a time and on a voyage,

* *Coram*, Erle, C.J., Pollock, C.B., Willes, J., Bramwell, B., Channell, B., Byles, J., Keating, J. and Pigott, B.

within the 16 & 17 Vict. c. 107. ss. 170-2, with a portion of his cargo stowed on board on deck and without a certificate of clearance, contrary to that statute, and without the knowledge or authority of the owner, though with a view to the benefit of such owner, the illegality of the voyage does not affect the owner so as to prevent his recovering against an insurer for the loss of the cargo on the voyage by the perils insured against on a policy of insurance on freight.

The declaration of this action was on an ordinary policy of insurance on freight at and from Restigouch to Liverpool, and is set out in the report of the case in the Court below (34 Law J. Rep. (N.S.) Q.B. 63).

The fourth plea, upon which the present argument was based, stated that the said policy of insurance was made, and the cargo—the freight in respect of which was insured as in the declaration alleged—was shipped on board the said ship, after the passing and coming into operation of the 16 & 17 Vict. c. 107, intituled ‘An act to amend and consolidate the laws relating to the customs of the United Kingdom,’ &c.; and that the aforesaid cargo consisted of timber and wood goods; and that Restigouch in the said policy mentioned was and is a British port in North America; and that the said ship, with the said cargo, cleared out and sailed from Restigouch aforesaid after the 1st of September, 1861, and before the 1st of May, 1862, to wit, on the 13th of November, 1861; and that before and at the time of the said ship so sailing as hereinbefore mentioned, the whole of the said cargo was not below deck, but, on the contrary thereof, the master of the said ship, before and at and after the time of the said ship so sailing as aforesaid, placed and permitted, and caused to be placed and to remain and be upon and above the deck of the said ship, part of the said cargo, contrary to the statute in that behalf made and provided; and that at the time of the said ship so sailing as aforesaid the master of the said ship had not obtained from the clearing officer any certificate that the whole of the cargo of the said ship was below deck, contrary to the statute in that behalf made and provided; and that before and at the time of the said ship so sailing as aforesaid, and until and at the time of the alleged loss, the plaintiff was the owner of the said ship, and the said freight so insured as aforesaid was payable to him as such owner in respect of the said cargo.

To this plea there was a demurrer and joinder in demurrer, and a traverse, on which issue was joined.

On the trial, before Shee, J., at Liverpool, it appeared that the vessel sailed on the 13th of November, 1861, with the whole of the cargo that was in freight properly stowed below deck; but that the master took on board a quantity of spars and other articles for his owner to be carried to Liverpool, which were placed on deck. This he did in the exercise of his general authority as master, without any instructions from the plaintiff, his owner, to do so; his object, it would appear, being to save expense to his owner in obtaining the materials necessary for refitting the vessel in Liverpool after the voyage. The jury found that the vessel was not in fact rendered unseaworthy by this deck load; and that the plaintiff was not aware of the conduct of the master till after the policy was made and the ship had sailed.

The learned Judge ruled that the spars, &c. were cargo within the 16 & 17 Vict. c. 107. s. 171, and he directed the verdict to be entered for the defendant on both pleas, giving the plaintiff leave to move to enter the verdict for him.

A rule was obtained accordingly, and the rule and the demurrer were argued together in the Court below, when the Court gave judgment for the plaintiff. The defendant then alleged error.

Cohen, for the defendant.—It is submitted that the plea is good, and that the plaintiff, the shipowner, cannot recover in this action, because the master of his ship, though without any authority from him, has violated the enactments of the 16 & 17 Vict. c. 107. ss. 170, 171, 172. This voyage was entirely illegal, and the insurance is void—*Marshall on Insurance*, 4th edit. 135. On the statute 26 Geo. 3. c. 40. s. 1, which required the master to make out and sign a manifest

of all goods shipped in British ships beyond sea for Great Britain, with the particulars of the cargo, before the ship cleared out, it was held that every part of the cargo, even that which was used for dunnage or ballast, must be inserted, and the omission of it rendered the voyage illegal—*Frean v. Dawson*, cited in *Marshall on Insurance*, 136, 4th edit. A violation of the Navigation Act, 6 Geo. 4. c. 109, by the master, in sailing without having the proper proportion of British seamen required by that act, would render the voyage illegal and the insurance void—*Suart v. Powell* (1 B. & Ad. 266), *Duer on Marine Insurance*, 377. The imposition of a penalty does not prevent the voyage being illegal. The case of *Cunard v. Hyde* (El. B. & El. 670; s. c. 27 Law J. Rep. (N.S.) Q.B. 408; in error, 2 El. & El. 1; s. c. 29 Law J. Rep. (N.S.) Q.B. 6) is explained on the ground that the master was not the agent of his owner; but it is submitted that he is his agent, and the loading of the cargo is within the scope of his authority. In *Bell v. Carstairs* (14 East, 374) a distinction was taken between owner and assured of ship and cargo, and a mere assured of cargo. The former could not recover when the latter could—*Smith's Mercantile Law*, 370, 5th edit. If it is said that no authority can be implied in the master to contravene the act,—see *Earle v. Rowcroft* (8 East, 126),—it may as well be said that no authority can be implied to do a careless or negligent act. *Hobbs v. Hannam* (3 Campb. 93) was decided on the ground that the owner was bound by illegal acts of the master, and could not recover on the policy of insurance, though, no doubt, there it was put on the ground that he acted by the express orders of the owner. Next, the ship was not seaworthy. The taking on board timber on the deck and sailing without a certificate of clearance constitutes statutory unseaworthiness, and discharges the insurer. The distinction between the cases which seem to say that the improper act of the master does not bind the owner, is not only that between owners of ships and owners of cargo, but also between cases where the risks of the insurance are increased by his act, and where they are not. If they are, the insurers are discharged—1 *Duer*, pp. 318, 320, 410. There is an implied warranty that the ship should be seaworthy, and that means that the assured will put the ship in such a condition as is usual and proper at the commencement of the voyage, and which a prudent uninsured owner would put her in—*Burges v. Wickham* (33 Law J. Rep. (N.S.) Q.B. 17, per judgment of Blackburn, J.) and *Dixon v. Sadler* (5 Mee. & W. 414; s. c. 9 Law J. Rep. (N.S.) Exch. 48). The carrying a deck cargo was found to be an unusual thing by the jury, and a ship not properly documented is legally unseaworthy. There is an implied warranty in every insurance that the provisions of the statutes shall be complied with.

Brett, Milward and Crompton were not heard.

Cur. adv. vult.

The judgment of the Court was now (Nov. 28) delivered by—

ERLE, C.J.—In this case it appeared in the plea, in an action on a policy for freight, that, contrary to the statute, the master had taken out a cargo in November or December, and part of the cargo he was taking out contrary to the provisions of the 16 & 17 Vict. c. 107. Now, it is clear that if Wilson, the shipowner, had done that or had been cognizant of it, according to the case of *Cunard v. Hyde* (El. B. & El. 670; s. c. 27 Law J. Rep. (N.S.) Q.B. 408; in error, 2 El. & El. 1; s. c. 29 Law J. Rep. (N.S.) Q.B. 6), it would have been an illegal voyage, and the policy thereon might have been rendered void; but the owner is not shewn to have known anything of it, or to have been a party to it in any way; and the judgment of the Court below was that by reason of knowledge and authority from him to the master not being shewn, the rule laid down in *Cunard v. Hyde* (El. B. & El. 670; s. c. 27 Law J. Rep. (N.S.) Q.B. 408; in error, 2 El. & El. 1; s. c. 29 Law J. Rep. (N.S.) Q.B. 6) did not apply to the present case. The Court was of opinion, upon that authority, that though the master had authority to load a cargo, it was not an authority to violate the statute in loading the cargo, nor was it an act of the master that the owner must

be presumed to have assented to. In that judgment we concur. We are also of opinion that the second ground taken in the Court below was a valid ground. Even if it had been shewn in fact that the master had rendered this an illegal voyage without the knowledge or authority of the owner, it would have been a barratrous act on the part of the master, and the insurers would have been liable by reason of the barratry, and on that ground the insurers or freight ought to be liable. There was a further contention, in the present case, that there was a statutory unseaworthiness shewn, because the ship had taken on board timber on the deck and had sailed from Canada without having a certificate of clearance; and it was urged, on the principle on which it had been held that if a ship sails without being provided with proper documents, and for that reason the risk of the insurers is increased, and the liability for loss greater than it would be if the ship had the documents, that the insurer is discharged; that therefore, as this ship sailed without the certificate of clearance required by the statute in Canada at the time of sailing, viz., that there was no cargo on deck, the absence of that document created a statutory unseaworthiness within this principle. It appears that the principle by no means applies; the document in question here is a document merely relating to the compliance with the requisition of the statute at the port of loading to secure a compliance with the provision of the statute there, and it does not at all bear upon the risk of the voyage after the ship is out of the port of discharge, and it does not at all bear upon the ship in the port of discharge. We think that though the argument was scarcely pressed by the learned counsel with any idea that it should succeed, there is nothing in the argument, and that the judgment should be affirmed. This was the only question brought before us, and we carefully limit the judgment to the exact question that is to be decided.

Judgment affirmed.

[IN THE QUEEN'S BENCH.]

Nov. 13, 1865.

MARSHALL v. THE EMPEROR LIFE ASSURANCE SOCIETY.

35 L. J. Q.B. 89; L. R. 1 Q.B. 35; 6 B. & S. 886; 12 Jur. N.S. 293; 13 L. T. 281.

Practice—Particulars—Action on Life Policy.

INSURANCE. PRACTICE.—*In an action on a life policy, a condition of which was that the person whose life was insured had not been afflicted with certain specified disorders or any other complaint, the defendants pleaded that the assured, at the time of the policy, had symptoms of disease in the stomach:—Held, that the defendants must deliver particulars under this plea.*

This was an action on a policy of insurance, effected by the plaintiff on the life of one Mason. The company pleaded, fourthly, that the proposal and declaration, the basis of the policy, stated that the assured had not been afflicted with or had any symptoms of gout, rupture, insanity, liver complaint, hæmorrhoids, fistula, consumption, asthma, spitting of blood, or any other complaint: whereas Mason, at the time of making the policy, had had symptoms of disease of the stomach.

Upon an application for particulars under this plea, Shee, J. made an order directing the defendants to deliver to the plaintiff particulars of the symptoms of the disease of the stomach mentioned in the plea.

Raymond now moved to rescind the order.—It is most unfair to require these particulars to be given. The particulars, through defects in technical phraseology, may inaccurately describe the disease, and be made the subject

of adverse criticism at the trial. The disorders of the stomach are numerous, and it may be difficult to give a name to each of them. In *Pylie v. Stephens* (6 Mee. & W. 813), an action for breach of warranty of a horse, the declaration stated simply that the animal was unsound; but particulars of the unsoundness were refused.

[SHEE, J.—The office ought not to have pleaded a plea of this description if they were unable to give particulars of the disease.]

COCKBURN, C.J.—There will be no rule. The order can be complied with if the defendants say that they do not know what is the particular disease, but that the symptoms were of some specified description. These particulars, if necessary, may be amended at the trial.

MELLOR, J., SHEE, J. and LUSH, J. concurred.

Rule refused.

[IN THE QUEEN'S BENCH.]

Nov. 27, 1866.

THE QUEEN v. THE RATEPAYERS OF NORTHOWRAM AND CLAYTON.

35 L. J. Q.B. 90; 7 B. & S. 110; L. R. 1 Q.B. 110.

Local Government Act, 1858 (21 & 22 Vict. c. 98), ss. 12, 13, 14, 16.—Proceedings necessary for adopting the Act—Ecclesiastical District, under 6 & 7 Vict. c. 37, a Place with "a known or defined Boundary."

LOCAL GOVERNMENT.—A district for spiritual purposes, formed under 6 & 7 Vict. c. 37. s. 9, is entitled, by resolution of its owners and ratepayers (without reference to the proceedings of townships out of which it is formed), to adopt the Local Government Act, 1858, as being a place with "a known or defined boundary" according to the provisions of the act.

Rule to shew cause why a *certiorari* should not issue to bring up certain orders of the Home Secretary relating to the adoption of the Local Government Act, 1858, by the ecclesiastical district of Queenshead, otherwise Queensberry. It appeared from the affidavits that the township of Northowram, in York, had an area of 3,419 acres, of which about 60 acres were within the borough of Halifax. The township of Clayton had an area of 1,743 acres, and was a place with "a known and defined boundary." Two churchwardens and two overseers of the poor were elected annually in the township. A board, according to the Highway District Act, was also annually elected in the township, and a poor and highway rate assessed on all property within its boundaries. Northowram also annually elected a churchwarden, overseers, and a highway board. In 1845 part of the parish of Bradford and part of the parish of Halifax were constituted a separate district for spiritual purposes, under 6 & 7 Vict. c. 37. s. 9, and named the district of Queenshead. This district comprised about 1,300 acres of Northowram and 290 acres of Clayton. In setting out the boundaries, no regard was had to the sanitary requirements of the district, or any local civil, or parochial purpose. On the 10th of October, 1864, a meeting of owners and ratepayers within the district of Queenshead, otherwise Queensberry, was held, at which a resolution was passed adopting the Local Government Act, 1858, within the district.¹ Previous to this meeting no meeting of the owners

(1) By 21 & 22 Vict. c. 98. s. 12. the act may be adopted: (1.) In corporate boroughs to which the Public Health Act, 1848, has not been applied by a resolution of the council assembled at a meeting held for the purpose: (2.) In other places under the jurisdiction of a Board of Improvement Commissioners, where all or part of the Commissioners are elected by ratepayers, or by owners and ratepayers, by a resolution of such Improvement Commissioners assembled at

and ratepayers of either Clayton or Northowram had been held for the purpose of adopting the act within these districts; and the Secretary of State had not determined that Queenshead, as being a less place included within the larger place, according to section 14. of the Local Government Act, ought, as respected the operation of the act, to be excluded from the limits of either Clayton or Northowram.

On the 15th of October, 1864, at a meeting of owners and ratepayers within Clayton, a resolution was passed, adopting the Local Government Act, 1858, for the whole of the district and township of Clayton. A petition of appeal was afterwards presented to the Home Secretary by more than one-twentieth of the owners and ratepayers of Clayton, praying that he would refuse his consent to Queenshead being constituted a district under the Local Government Act; or that he would, at least, exclude from such district that portion of Clayton which was comprised within it.

On the 15th of December, 1864, the Home Secretary determined "that the vote for the adoption of the Local Government Act by Queenshead or Queensberry was valid," and by his order of the same day directed "that the said petition from the owners and ratepayers of the said township of Clayton be dismissed, and that the Local Government Act, 1858, have the force of law in the said ecclesiastical district of Queenshead, otherwise Queensberry, from and after the date of this present order." A number of owners and ratepayers of Northowram (which had also passed a resolution adopting the act) presented a similar petition to the Secretary, but with the same result.

Bovill (*Maule* with him) shewed cause.—The ecclesiastical district is a place with a known and defined boundary, within the meaning of the Local Government Act. If Queenshead had petitioned the Secretary of State to settle its boundaries according to section 16. of the act, the answer would have been that they were already assigned.—(He was then stopped.)

Kemplay (*Mellish* with him), in support of the rule.—The orders are bad, as the ecclesiastical district in question is not a place with a "known or defined boundary" within the meaning of the act. The act by which ecclesiastical districts are created (6 & 7 Vict. c. 37. ss. 9, 11, 17.) shews that such districts are still to remain part of the mother parish. In *The Queen v. the Archdeacon of Exeter* (1 New Rep. 267) it was held, that the parishioners of a parish, for ecclesiastical purposes, were entitled to vote at the election of churchwardens for the mother parish. And in *The Queen v. the Overseers of Kingswinford* (3 El. & B. 688; s. c. 23 Law J. Rep. (N.S.) Q.B. 337), where a district within the parish of Kingswinford had been assigned for ecclesiastical purposes, under

a meeting held for the purpose: (3) In all other places having a known or defined boundary, by a resolution of the owners and ratepayers.—By s. 13. (1.) Meetings for the purpose of the preceding section shall be summoned on the requisition in writing of any twenty ratepayers or owners; In corporate boroughs, by the mayor; In other places under the jurisdiction of such Improvement Commissioners as aforesaid, by the chairman of the said Commissioners; In places having known and defined boundaries, not being corporate boroughs, or towns under the jurisdiction of such Improvement Commissioners as are hereinbefore mentioned, by the churchwardens or one of them, or if there are no churchwardens the overseers or one of them, or if there is none of the officers respectively above enumerated, or if such officer in any case neglects, is unable, or refuses to perform the duties hereby imposed on him, by any person appointed by one of Her Majesty's principal Secretaries of State.—By s. 14. In cases where any place hereby authorized to adopt this act includes within its limits any less place which, if it were not so included, would of itself be authorized to adopt this act, such less place shall not be entitled to adopt this act unless the greater place has refused to adopt the same, or unless it has been determined by one of the Secretaries of State that such less place ought, as respects the adoption of this act, to be excluded from the limits of such greater place.—By s. 16. (1.) Any place not having a known or defined boundary may petition one of the Secretaries of State to settle its boundary for the purposes of this act . . . (6.) Any place the boundaries of which have been so settled shall for the purposes of the act be deemed to be a place with a known and defined boundary, and may adopt this act accordingly; and for the purpose of enabling it to do so, a summoning officer shall be appointed by the order settling the boundary.—By s. 17. any number not less than one-twentieth of the owners and ratepayers may petition against the adoption of the act in any place; and the Secretary of State, after inquiry, is to make an order with respect to the matter in question on such appeal, such order to be binding on the place in respect of which it is made, and to state the time at which this act is to come into force.

the 1 & 2 Will. 4. c. 38, and two chapelwardens annually elected for the district, it was held that they could not lawfully give a notice convening a meeting of ratepayers to adopt the 3 & 4 Will. 4. c. 90, so far as lighting was concerned, as their powers were confined to ecclesiastical purposes. The places alluded to by the Local Management Act are all places having a civil jurisdiction; the words "or place" in section 16. meaning place with a civil boundary.

MELLOR, J.—If there had been any cause for doubt in this case, we should have been unwilling to decide it summarily; but I cannot help thinking that the arguments of Mr. Kemplay are not opposed to the construction which is contended for by his opponents. It seems that certain of the ratepayers of Northowram and Clayton are dissatisfied with the mode in which the Secretary of State has exercised his discretion in sanctioning the adoption of the Local Government Act by the district of Queensberry. By section 12. of this act it may be adopted in all places having a known or defined boundary by a resolution of the owners or ratepayers within that boundary. Then, is the district of Queensberry a place with a known and defined boundary? It is admitted by Mr. Kemplay that for some purposes it is. Now, section 13. contains provisions for summoning meetings for the purpose of adopting the act by places having known and defined boundaries, and all these provisions have been complied with by the district in question. Therefore, a place to which boundaries have been assigned by statute has duly adopted the act. But it is said that section 14. prevents Queensberry from adopting the act. But I think this section has no application to a case like this, where the Secretary of State must be taken to have sanctioned the exclusion of Queensberry from the limits of a greater place. It is further contended that the district ought to have petitioned the Secretary of State to settle its boundaries under section 16. But as we are of opinion that the boundary of the district is known and defined within the meaning of the act, the objection cannot of course be maintained. We think that the orders were good, and that the rule must be discharged.

LUSH, J., concurred.

Rule discharged.

[IN THE EXCHEQUER CHAMBER.]

(*Appeal from Court of Queen's Bench.*)

Nov. 28, 1865.

POLDEN v. BASTARD.*

35 L. J. Q.B. 92; L. R. 1 Q.B. 156; 13 L. T. 441; 14 W. R. 198.

Applied, *Watts v. Kelson*, [1871] E. R. A.; 40 L. J. Ch. 126; L. R. 6 Ch. 166; 24 L. T. 209; 19 W. R. 388 (L. JJ.). Principle applied, *Nichols v. Nichols*, 1899, 81 L. T. 811 (Ch. D.). Referred to, *Thomas v. Owen*, [1888] E. R. A.; 57 L. J. Q.B. 198; 20 Q.B. D. 225; 58 L. T. 162 (C. A.). Principle applied, *Roe v. Siddons*, 1889, 22 Q.B. D. 224 (Q.B.D. Div.); reversed, [1889], L. R. 22 Q.B. D. 224; 60 L. T. 345; 37 W. R. 228 (C. A.); *Taws v. Knowles*, [1891] E. R. A.; 60 L. J. Q.B. 641; [1891] 2 Q.B. 564; 65 L. T. 124; 39 W. R. 512 (Q.B. D. Div.); affirmed, [1891] E. R. A.; 60 L. J. Q.B. 644; [1891] 2 Q.B. 564; 39 W. R. 675 (C. A.). Not applied, *Phillips v. Low*, [1892] E. R. A.; 61 L. J. Ch. 44; [1892] 1 Ch. 47; 65 L. T. 552 (Ch. D.).

Devise—"As now in the Occupation of T. A."—*Easement*.

EASEMENTS AND PRESCRIPTION.—A devise by the owner of two adjoining

* *Coram*, Pollock, C.B., Willes, J., Bramwell, B., Channell, B., Byles, J., Keating, J. and Pigott, B.

houses of one of them, in the words "the house, outhouse and garden as now in the occupation of T. A," does not pass to the devisee a right to go to a pump in the yard of the adjoining house for the purpose of getting water, though T. A, the occupier of the devised house, had been in the habit, both before and at the time of the making of the will, of going to the above-mentioned pump, to the knowledge of the testatrix.

Error was brought by the defendant to reverse the judgment of the Court of Queen's Bench in favour of the plaintiff.

The declaration was for trespass in breaking open a door and cutting down, injuring and destroying a certain wooden fence, and taking and carrying away quantities of water belonging to the plaintiff.

The defendant pleaded, except as to the cutting down, injuring and destroying the said wooden fence, that before the committing of the acts complained of, and before the plaintiff had any estate or interest of or in the said close in which, &c., one Rachel Polden Bonnel was seised in her demesne, as of fee, as well of and in the said close in which, &c., and of a pump and well therein, as of and in a certain dwelling-house, outhouse and garden, and being so seised, and before the committing of the said acts complained of, she duly made and published her last will and testament in writing, and the same was then so duly made and published, and duly attested according to the law then in force relating to the making and publishing of wills, and by the said will the said Rachel Polden Bonnel gave and devised to Clementina Polden, and her heirs and assigns for ever, the said house, outhouse and garden, together with a way on foot from the said house, outhouse and land unto, into, through and over the said close of the plaintiff to the said pump and well, for the purpose of the said Clementina Polden, and her heirs and assigns, having, taking and fetching, and for her and them to have, and take and fetch water from the said pump and well, and so back again from the said pump and well, in, through, over and along the said close of the plaintiff, unto and into the said house, outhouse and garden of the said Rachel Polden Bonnel, at all times of the year, at their free will and pleasure, for the more beneficial use and enjoyment of the said house, outhouse and garden; and the said Rachel Polden Bonnel, being so seised, afterwards died, without revoking her said will as to the said devise, and thereupon the said Clementina Polden became seised in her demesne, as of fee, of and in the said house, outhouse and garden, with the appurtenances, together with the said right and easement so by the said will given and devised to her as aforesaid. And the said Clementina Polden being so seised, she afterwards and before the committing of the acts complained of, by deed made by her, duly bargained, sold, granted and assigned to the defendant the said house, outhouse and garden, with the appurtenances, together with the said right and easement. and she ceased to have any estate or interest therein. And the defendant became and was seised in his demesne, as of fee, of and in the said house, outhouse and garden, with the appurtenances, and the said right and easement. and at the times of the committing the acts so complained of continued so seised; and one James Dennis was in the occupation thereof as tenant thereof, together with the said right and easement, to the defendant, the reversion of and in the same belonging to the defendant, and the said trespasses complained of and to which this plea is pleaded were a use and exercise of the said way, right and easement, the said water being water in the said pump and well; and because the said door had been and was wrongfully erected and placed in the said close, and was locked and fastened so as to obstruct and did obstruct the said way, and the use and exercise of the said right and easement of having, taking and fetching water from the said pump and well as aforesaid, and injured and prejudiced the defendant's reversionary estate and interest therein, so that without breaking open the same the said way and the said right and easement could not be used and exercised, the same James Dennis having occasion to use the said way and exercise the said right and easement for the purpose aforesaid.

he, the defendant, as his servant and by his command and authority in that behalf, and in his own right as reversioner as aforesaid, did, for the purpose of using and exercising the same, and to protest maintain and preserve the same estate and interest, necessarily and unavoidably, and to a necessary degree break open the said door; and which are the trespasses complained of, and to which this plea is pleaded.

Upon which plea the plaintiff joined issue.

At the trial, before Williams, J., at the Dorsetshire Summer Assizes, 1862, the following facts appeared in evidence. R. P. Bonnel, at the time she made her will and until her death, was seised in fee of, and was also in the occupation of, a dwelling-house, with a yard attached thereto, in which yard was a well and a pump connected with the well, and which yard is the close mentioned in the pleadings in this action as the close of the plaintiff, and which well and pump are the well and pump respectively mentioned in the pleadings, and was also seised in fee of and in a certain other dwelling-house, outhouse and garden next adjoining the first-mentioned dwelling-house and yard, and which last-mentioned dwelling-house, outhouse and garden are the dwelling-house, outhouse and garden mentioned in the pleadings.

R. P. Bonnel, by her will, dated the 26th of May, 1834, devised to her nephew Robert Baker Polden "all that my freehold cottage and garden at Charlton Marshall, now occupied by William Wills, to him and his heirs and assigns for ever. To my nephew William Polden I give the house I now live in, with the outhouse and garden and orchard, in my own occupation, to him and his heirs and assigns for ever, and also the sum of 40*l*. I give to my niece Clementina Polden the house and outhouse and garden *as now in the occupation* of Thomas Answood, junior, to her and her heirs and assigns for ever."

The property devised to William Polden, who is the plaintiff, comprises the dwelling-house first mentioned and the yard attached thereto, in which the well and pump were situate; and the property devised to Clementina Polden comprises the dwelling-house secondly mentioned and the outhouse and garden.

For some time before the making of the will, Thomas Answood, junior, had been in the occupation of the dwelling-house secondly mentioned and the outhouse and garden as tenant to R. P. Bonnel, and during all the time of his occupation and at the time of the will he, with the knowledge of R. P. Bonnel, used a way on foot from the dwelling-house, outhouse and garden into, through and over the yard attached to the dwelling-house first mentioned to the well and pump, for the purpose of having, taking and fetching from the well and pump all the water required by him for the use of himself and his family for domestic purposes in his dwelling-house, outhouse and garden, and so back again at all times; and at the date of the will he had no supply of water on his own premises, and no other source from which he could obtain any water for such purposes, as R. P. Bonnel knew, but he might have obtained drinking water by digging a well from 18 to 20 feet deep on the premises occupied by him, or water from a river 150 yards off, which was used for brewing purposes, but which he said he should not like to drink.

R. P. Bonnel died in 1848, without altering or revoking her will, and the plaintiff and Clementina Polden then became by virtue of the devise seised in fee of the properties respectively, and the plaintiff has since occupied the same.

On the 21st of September, 1849, Clementina Polden, by deed, conveyed to the defendant all her interest in the real property devised to her by the will, and he has since continued to be the owner. It was described as "all that cottage or tenement situate in Charlton Marshall, in the county of Dorset, in the occupation of James Dennis, with the garden thereunto adjoining and belonging, and also the fuel-house or outhouse belonging thereto, but adjoining at the back and forming part of a cottage or tenement belonging to William Polden and occupied by the Widow Groves, which said cottage and premises hereby conveyed are bounded on the east, north, and west sides by the said cottage and a garden and orchard belonging to the said William Polden, and on

the south side by property belonging to Samuel White White, Esq., and all houses, outhouses, buildings, yards, gardens, ways, passages, waters, water-courses, easements, rights, members, privileges, hereditaments and appurtenances whatsoever to the said cottage, garden, fuel-house and premises hereby conveyed, belonging or appertaining, as the same were formerly held by Thomas Ainsworth, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, use, trust, benefit, claim and demand whatsoever, both at law and in equity, of the said Clementina Polden of, in or to the same."

The person Thomas Ainsworth mentioned in this description is the same person as the person Thomas Answood, junior, mentioned in the said last will and testament of Rachel Polden Bonnel, and the holding by the said Thomas Ainsworth referred to in the said description is the holding by the said Thomas Answood, junior, before mentioned.

The respective tenants of the said dwelling-house before secondly mentioned and the said outhouse and garden had from time to time since the making and publishing of the said last will and testament of the said Rachel Polden Bonnel until the month of October, 1861, enjoyed the use of the water from the said well and pump in the same manner and for the same purposes as the same was enjoyed by the said Thomas Answood, junior, as hereinbefore mentioned; but in the month of October, 1861, and whilst the said James Dennis was in the occupation of the said dwelling-house, outhouse and garden, as tenant thereof to the defendant, the plaintiff erected and fastened a door in the yard in such a position and manner as to prevent any access by the occupiers of the said dwelling-house, outhouse and garden to the said yard or to the said well and pump, and the defendant broke open the said door, and broke and entered the said yard, and took and carried away water from the said well and pump, which are the trespasses complained of in the pleadings in this action, so far as they relate to the present case, at the times and under the circumstances, and for the purpose and in exercise of the rights set forth in the pleadings in this action. as far as they relate to the present case.

Upon this evidence, the learned Judge, before whom this cause was tried, directed the jury to find, and the jury did find, a verdict for the defendant; but the learned Judge reserved leave to the plaintiff to move the Court of Queen's Bench to set aside the said verdict and to enter a verdict for the plaintiff, with 40s. damages, instead thereof, if the said Court should be of opinion that the right to use the said pump did not pass under the devise to the said Clementina Polden contained in the said last will and testament of the said Rachel Polden Bonnel, as hereinbefore mentioned.

A rule *nisi* having been obtained accordingly, the Court of Queen's Bench made such rule absolute.¹

Key, for the plaintiff in error, the defendant below.—The question turns on the construction of the will, and the effect to be given to the words, "as now in the occupation of Thomas Answood, junior." These words are evidently to have a special meaning from the variation in language used by the testatrix from the expressions in the other devises in the same will, namely, "now occupied" in the one devise, and "in my own occupation" in the other. In *Bodenham v. Pritchard* (1 B. & C. 350) the words, "as now enjoyed by me," applied to a house and lands, called D, were held to pass other fields, which belonged to another estate, which had been purchased by the testator, before the date of his will, but taken into occupation by him as part of D. In that case the testator owned and occupied the D. estate, with the mansion-house thereupon, till his death, and bought the adjoining estate twenty-two years before his death, and, for twenty years, took into occupation, along with his D. estate, three pieces of land belonging to the newly-purchased estate. The rest of the newly-purchased estate was leased out to other tenants; and it was held that the three pieces of land passed by a devise of his mansion-house, called D, "together with all

(1) *Polden v. Bastard*, 32 Law J. Rep. (N.S.) Q.B. 372; s. c. 4 Best & S. 258.

lands thereunto belonging, as now enjoyed by me." In *Press v. Parker* (2 Bing. 456), under a devise to A. of the messuage "wherein he now lives," and to B. of a messuage "now in the occupation of E," a coal-cellar within the boundary of the messuage, in the occupation of E, which had always been used and enjoyed with the messuage in which A. lived, was held to pass to A. In *Doe d. Clements v. Collins* (2 Term Rep. 498), the testator, who was a master bargeman, and tenant for years of a house, garden, stables, and coal-pen, bequeathed "the house I live in, and garden, to H. C."; and it was holden, the stables and coal-pen passed, though the coal-pen was situated on the other side from the house of a road running near it, and was used as a place to keep coals, not sold, out of his barges. Mr. Justice Ashurst there says, "The testator's intention appears to have been to give, by the bequest of his house, everything which was in his occupation, as proper and convenient for the occupation of the house." Further, the right to go to this pump to get water passed as an easement of necessity. In *Staple v. Heydon* (8 Mod. 1) it is agreed that by the grant of a house, to which there is a way of necessity without more, the grantee shall have the way as well as if it were specially mentioned in the grant. In *Pyer v. Carter* (1 Hurl. & N. 916) the right to the use of a drain through an adjoining house passed by a conveyance of a house without more, because it was necessary and given appendant thereto. Such easement need not be indispensably necessary; it is sufficient if it be an ordinary convenience and apparent. In *Ewart v. Cochrane* (4 Macq. Scotch App. Cas. 117) it was held, that where two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted, shall be considered to follow from the grant, if there are the usual words, and it was doubted whether the usual words even were essentially necessary. In *Hall v. Lund* (1 H. & C. 676; s. c. 32 Law J. Rep. (N.S.) Exch. 113; 11 W. Rep. 271) an easement which was intermittent passed; and it was held, that where premises have certain ordinary and common conveniences, such conveniences pass by the grant of the premises.

The Solicitor General and *H. T. Cole*, for the plaintiff above, were not heard.

ERLE, C.J.—I am of opinion that the judgment of the Court below should be affirmed. The testatrix, at the time of making her will, was in possession of two adjoining cottages, and devised them to two separate devisees. For some time before the date of the will, the occupier of one of the cottages used to go to a pump on the premises of the other cottage. By her will, she devised the cottage, "as now in the occupation of Thomas Answood, junior," to Clementina Polden. It is said that that cottage is the dominant tenement; and that the devise carries with it the right to go on the adjoining premises as the servient. The question is, whether the words "as now in the occupation" make it a dominant tenement, and carry with them such right. I think they do not. If they had amounted to such words of description as "as enjoyed by Thomas Answood, with all way, &c.," such general words might have carried the easement; but our judgment must be given upon the particular words of this will. There is a distinction between such rights, as rights of way, which may be used from time to time and discontinued, and between rights of necessity and continuous enjoyment, such as drains. The decisions go the length of saying that such easements as the latter would pass without particular words of description; but the easement now in question is only used from time to time, according to inclination—it may be every day, but it may also be from time to time, at intervals, and is not continuous or of necessity. The judgment of the Court below went upon that ground, and I found mine upon the same. In *Bodenham v. Pritchard* (1. B. & C. 350) the devise was of all lands "as now enjoyed by me"; and if, in the present case, there had been a devise of all lands as used or enjoyed by the testatrix, it would have been in point. That is a fact of description, and the jury are to ascertain to what lands the description

applies. There is no such question here, for the pump is no part of the cottage. On the ground, therefore, that there was no such continuous or necessary easement as to pass by a devise of the cottage, under the words of the above will, I think the judgment should be affirmed.

Judgment affirmed.

[IN THE QUEEN'S BENCH.]

Feb. 1, 1866.

JEFFS v. DAY.

35 L. J. Q.B. 99; L. R. 1 Q.B. 372.

Commented upon, *Slater v. Jones*, [1873] E. R. A.; 42 L. J. Ex. 122; L. R. 8 Ex. 186; 29 L. T. 56; 21 W. R. 815 (Ex.) Followed, *Bankes v. Jarvis*, [1903] E. R. A.; 72 L. J. K.B. 267; [1903] 1 K.B. 549; 88 L. T. 20; 51 W. R. 412 (K.B. D.).

Pleading—Equitable Plea—Assignment by Plaintiff of Defendant's Debt before Action—Liability of Defendant to Assignee—Unconditional and Perpetual Injunction in Equity—Res Judicata.

ASSIGNMENT. ESTOPPEL. MONEY COUNTS.—*To a declaration containing an indebitatus count for money awarded to be paid by the defendant to the plaintiff, the defendant pleaded, as an equitable plea to a certain sum, parcel of the money claimed in count, that before action the plaintiff assigned the said sum for a good consideration; that the assignees gave express notice thereof to the defendant and required him to pay the said sum; that the assignment was still in force, and the defendant remained liable to pay the said sum to the assignees; that the plaintiff was suing inequitably and in fraud of the assignment; that the action was not brought for the benefit or with the assent of the assignees, who still required the defendant to pay the sum to them; and that if the plaintiff recovered in this action the defendant would still be forced to pay the sum to the assignees:—Held, that the plea was good, since on these facts equity would grant an absolute, perpetual and unconditional injunction to the plaintiff not to sue for his own benefit, and if the plaintiff hereafter sued the defendant for the same debt for the benefit of the assignees, or if circumstances revested the debt in him and he sued the defendant for his own benefit, this judgment could not be pleaded as res judicata, and would be no bar to either of such actions.*

The declaration contained an *indebitatus* count for money awarded to be paid by the defendant to the plaintiff.

Plea, on equitable grounds, as to a certain sum, parcel of the money claimed, that after the accruing of the plaintiff's claim and before action, the plaintiff for a good and valuable consideration in that behalf assigned to certain persons trading under the name, style and firm of Messrs. F. Devas, Routledge & Co., the said sum, parcel, &c., to which this plea is pleaded; and the said persons then gave express notice to the defendant of the assignment, and they required the defendant to pay the said sum; and the assignment at the commencement of this suit remained and still remains in full force and unrevoked; and the defendant then remained and still remains liable to pay the same to the said persons; and this action is not brought in any manner or to any extent for the use or benefit of the said persons, or with their knowledge, privity or consent, but notwithstanding the same they have required and still require the defendant to pay the said sum to them; and in case the plaintiff recovers the same in this action the defendant will be

forced and obliged to pay the same notwithstanding such recovery to the said persons; and the plaintiff sues for the said sum inequitably and in fraud of the assignment and notice.

Demurrer to the plea, and joinder therein.

J. Brown (*Mathew* with him) appeared in support of the plea, but—

Thesiger (*Hawkins* and *B. Rigby* with him) was called on to support the demurrer.—This is not a defence at law, nor is it in equity, for it is laid down in the decisions that such a plea is good only where equity would grant an absolute, unconditional and perpetual injunction. There is here no extinction of the debt to the plaintiff, who remains liable to the assignees, and if the defendant became bankrupt and only paid 10s. in the pound, the plaintiff would have to pay the whole sum to the assignees, but would never recover it from the defendant. Equity would in this case only grant an injunction to the plaintiff not to sue on condition that the defendant paid the whole amount to the assignees, and would require the three parties to be brought before the Court.

[BLACKBURN, J.—Have you any authority that equity would not grant an unconditional injunction in such a case?]

No; but the decided cases always assume that in such a case the injunction would be conditional.

[BLACKBURN, J.—All that equity would do would be to enjoin the plaintiff not to sue for his own benefit, so long as things remain as they are.]

That is a condition.

[MELLOR, J.—“Unconditional” means so long as circumstances remain as they are at present. BLACKBURN, J.—A perpetual injunction could not prevent the plaintiff suing on a new right. If circumstances reverted the subject of the assignment in the plaintiff, the injunction would not be in his way.]

The plea alleges no promise by the defendant to pay *Devas & Co.*—*Cochrane v. Green* (9 Com. B. Rep. N.S. 448; s. c. 30 Law J. Rep. (N.S.) C.P. 97). *Devas & Co.* could not sue the defendant for money had and received—*Liversidge v. Broadbelt* (4 Hurl. & N. 603; s. c. 28 Law J. Rep. (N.S.) Exch. 332) and *Wharton v. Walker* (4 B. & C. 163).

J. Brown, in reply.—There is an absolute blank of decisions in cases where equitable assignees have resorted to equity for injunctions. It is admitted that the facts must be such as would induce equity to grant an absolute, unconditional, perpetual injunction, and a Court of equity would here decree that the plaintiff would not sue for his own benefit—*Wodehouse v. Farebrother* (5 El. & B. 277; s. c. 25 Law J. Rep. (N.S.) Q.B. 18).

BLACKBURN, J.—The time since the Common Law Procedure Act, 1854, was passed is so short that an absence of precedents is no argument for concluding that this plea is bad. What does the plea amount to? To this, that the plaintiff sues for a debt due to him from the defendant, which the plaintiff assigned before action to *Devas & Co.*, who gave notice of the assignment to the defendant. It is unnecessary to refer to the numerous cases where the question of the validity of the assignment has arisen on the subsequent bankruptcy of the plaintiff. All the cases, from *Winch v. Keeley* (1 Term Rep. 619), amount to this: that an assignment of a chose in action in equity after it has been perfected is good to transfer the equitable property. That being so, the plaintiff, having transferred the whole of his debt, sues inequitably when he sues for his own benefit. It is not disputed that this is a breach of the rules of equity, but Mr. Thesiger relies on the cases which have said that an equitable plea is only to be allowed where a Court of equity would grant an unconditional and perpetual injunction. The reason given for that in *Wodehouse v. Farebrother* (5 El. & B. 277; s. c. 25 Law J. Rep. (N.S.) Q.B. 18) is very well stated. Under the Common Law Procedure Act we can only admit an equitable defence where the sole judgment of the Court of law,

which is, that the defendant go without day, is equivalent in substance to a perpetual injunction in equity. In those cases where a Court of equity will stay proceedings on the terms that the three parties are brought before the Court, and then will make a conditional arrangement, there is nothing equivalent to a common law judgment. But here I do not think there is any such difficulty. This debt has become in equity the property of the assignees, and the plaintiff has no longer any right to it. And then when Devas & Co. institute an action in the name of the plaintiff he must carry it on, and equity will force him to do so on being indemnified for costs. But if the plaintiff sues for the benefit of any person other than his *cestuis que trustent*, he is suing wrongly, and equity will stop him.

This is very like the case of a bill of exchange which has been indorsed away, and of which the plaintiff is not the holder, in which case judgment would be for the defendant. But if under any circumstances the plaintiff again becomes the holder, and brings an action, the judgment in the former action would be no bar in the latter. So here, a Court of equity would say to the plaintiff.—You are suing inequitably, and would grant an injunction. If the right to sue for the debt is ever revested in the plaintiff then the injunction would no longer apply, or prevent the plaintiff from suing. This also is the effect of a judgment at common law. Our judgment here is simply for the defendant; but if the plaintiff at any future time sues for the benefit of Devas & Co., this judgment could not be pleaded in bar to the action as *res judicata*. Our judgment, therefore, on the demurrer is for the defendant.

MELLOR, J.—As to the goodness of the plea, if Mr. Thesiger were right in his contention as to what a Court of equity would do, I should have thought it a bad plea; but the term “unconditional injunction” I understand to be used with reference to the circumstances of the case remaining as they are at the time the injunction is granted. The plaintiff might have sued had not the Common Law Procedure Act been passed. If he ever acquires a right to this debt by a new title, then there is nothing in this judgment to prevent him from suing for it; but he has now parted effectually in equity with his property in the debt. I think, therefore, that this is a good plea.

SHEE, J., concurred.

Judgment for the defendant.

[IN THE QUEEN'S BENCH.]

Jan. 29, 1866.

In re the claim of WILLIAM BALLS v. THE METROPOLITAN BOARD OF WORKS.

35 L. J. Q.B. 101; L. R. 1 Q.B. 337; 13 L. T. 702; 14 W. R. 370;
12 Jur. N.S. 183.

Compensation—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 51, 52, 68.—Offer of a Sum including Plaintiff's Costs—Verdict for less than Offer—Time of Offer—Taxation of Costs.

COMPULSORY PURCHASE.—Upon a claim for compensation under section 68. of the Lands Clauses Consolidation Act, 1845, the promoters of the undertaking offered a sum for compensation, such sum to include the claimant's costs, and the jury gave a verdict for less than that sum:—Held, that the claimant was not deprived of his right to costs under section 51, inasmuch as the offer was bad because it included costs. Such an offer to be valid must be for that which is the subject of compensation merely, unclogged with conditions.

Quære—Whether a sum offered to a claimant under section 68, contem-

poraneously with the service of the notice of the time and place of inquiry, but after the claimant has incurred the expense of attending at the nomination of the special jury, is a sum "previously offered" within section 51.

Montagu Chambers had obtained a rule calling on the claimant *Balls* to shew cause why the *allocatur* of one of the Masters of this Court should not be set aside, or why the Master should not be at liberty to review his taxation of costs.

It appeared from the affidavits, that on the 7th of November, 1865, the claimant served on the Board of Works a notice in writing, whereby, after alleging that, in exercise of the powers contained in the Metropolis Local Management Act, 1855, and the acts amending the same, the Board had by their works connected with the Metropolitan drainage injuriously affected certain lands and buildings in Middlesex of which the claimant was owner in fee simple, and had also taken part of the lands for the execution of the works, he gave the Board notice that he required them to pay him compensation in respect of the injurious affection, and of his interest in the land taken, and that the amount of his claim for such compensation was 400*l.*; and he thereby required the Board, if they failed to pay the amount, or to enter into a written agreement for that purpose, within twenty-one days after the receipt of the notice, to issue their warrant to the Sheriff of Middlesex to summon a special jury to settle the amount of compensation for the injurious affection and the land taken. The Board declined to pay the amount, or to enter into the written agreement for its payment, and on the 24th of November issued their warrant to the sheriff to summon a special jury, in accordance with the above notice, and duly deposited the warrant with the sheriff on the 27th of November, and gave the claimant's attornies notice thereof on the 29th of November. On the 27th of November the sheriff served on the claimant's attornies, and on the 28th of November on the attorney for the Board, a notice that the sheriff had appointed the 4th of December ensuing, at eleven o'clock, at his office, for the purpose of nominating a special jury in pursuance of the warrant, and that he required both parties to appear before him by themselves or their agents for that purpose.

In pursuance of this summons a clerk of the claimant's attornies and the attorney for the Board attended at the sheriff's office on the 4th of December, and then and there nominated a special jury. On the same day, and after the special jury had been nominated, a notice in writing was served, on behalf of the board, upon the claimant, and a duplicate thereof upon his attornies. This notice was addressed to the claimant and signed "N. Lindo & Sons, 47a, Moorgate Street, for W. W. Smith, solicitor to the Metropolitan Board of Works, Spring Gardens," and contained an offer on behalf of the Board to purchase the claimant's interest in the premises at a price to be fixed by certain referees, and if the claimant declined that, an offer to make good the damage occasioned by the works of the Board, and if the claimant declined both the above offers, "then, under the provisions of the Metropolis Local Management Act, 1855, and the several acts amending the same relative to the drainage of the metropolis, the said Metropolitan Board of Works are ready and willing to pay to you 100*l.* in full satisfaction and discharge of all claims and demands of what kind or nature soever, on account of any damage or injury sustained by you through their said works in your said notice (of the 7th of November) mentioned, *such sum to include all costs, charges and expenses of, occasioned by, or incidental to your said claim, or the proceedings to enforce the same.*"

Together with this notice a notice in writing that the inquiry would be held at the sheriff's office on the 15th of December was served on behalf of the Board upon the claimant, and a duplicate on his attornies.

The claimant alleged that in consequence of the notice of the 29th of November of the deposit of the warrant and the sheriff's summons of the

28th of November, he incurred before the 4th of December considerable costs in preparing for the inquiry and to prove his claim.

On the 15th of December the inquiry was held, and the jury assessed the damages at 75*l*. The claimant's attorneys afterwards applied to one of the Masters of this Court to have the claimant's costs of the inquiry taxed, whereupon the attorney for the Board contended that the claimant had been deprived of his costs by reason of the offer of 100*l*. made within the 8 & 9 Vict. c. 18. The claimant's attorneys contended that the offer was too late, and was bad, both because it included the claimant's costs and also because it was not under the seal of the board. After hearing both parties, the Master held that the claimant was entitled to his costs of the inquiry, but declined to state the grounds of his decision, and he taxed the costs at 156*l*., and that part of them (including the costs of attending to nominate the special jury) which was incurred before the service of the notice of the 4th of December stating the time and place of inquiry, he taxed at 40*l*. 10*s*.

Section 51. of the Lands Clauses Consolidation Act, 1845, enacts that "on every such inquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking; but if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking, or if the owner of the lands shall have failed to appear at the time and place appointed for the inquiry, having received due notice thereof, one-half of the costs of summoning, impanelling and returning the jury, and of taking the inquiry and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking, and each party shall bear his own costs, other than as aforesaid, incident to such inquiry." The provisions of this act (except those with respect to the recovery of forfeitures, penalties and costs) are incorporated with the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120, by section 151; and the expression "the promoters of the undertaking" used in the former act is to mean the Metropolitan Board, or the district board of vestry, as the case may be.

Tindal Atkinson, Serj., and *Shaw* now shewed cause.—The offer is not such as is contemplated by section 51. of the 8 & 9 Vict. c. 18, for, first, it was not made in time. It is conceded that if this had been a common jury case, it would have been in time, but the claimant had incurred the expense of attending at the nomination of the special jury before the offer was made, and those costs are certainly recoverable under section 54, even if the other previous expenses were not. If, therefore, the claimant were forced to accept the offer, then he would be in a worse position than if he went to the jury, for in the latter case he recovers the costs as well as the compensation; but if he accepts the bare offer, he pays his own costs. The statute cannot therefore have intended to compel him to accept such an offer. According to the decisions the true test is that of reasonableness. In *The Metropolitan Railway Company v. Turnham* (32 Law J. Rep. (N.S.) M.C. 249) Chief Justice Erle said the offer should be made previous to the ten days' notice of inquiry, and Mr. Justice Willes said (p. 254), "no reasonable notice can be given after the time at which, by the practice of the common law Courts, the parties may incur the expense of preparing for trial." Here the offer was contemporaneous with the ten days' notice of inquiry, and the claimant had incurred the expense of preparing for trial. In *Hayward v. the Metropolitan Railway Company* (83 Law J. Rep. (N.S.) Q.B. 73; s. c. 4 Best & S. 787) the second offer was held in time, but there it was made before the special jury were nominated, and my contention is consistent with the principle of that case, and of *Yates v. the Mayor, &c., of Blackburn* (29 Law J. Rep. (N.S.) Exch. 447; s. c. 6 Hurl. & N. 61). Secondly, the offer was bad, because clogged with a condition as to costs. The jury can only consider the injury done and

the value of the land taken, and this offer might include subject-matter for which we had a right of action against the Board; and, thirdly, the notice of offer ought to have been under the seal of the Board, under the 18 & 19 Vict. c. 120. s. 149, or signed by the clerk of the Board or one of their officers, under section 222. "N. Lindo & Sons" are the agents of the solicitor to the Board, and neither a clerk nor an officer.

[LUSH, J.—Why should not Lindo be an officer *pro hac vice*?]

Montagu Chambers and Raymond, in support of the rule. As to the last point, the signature is sufficient.

[COCKBURN, C.J.—You need not notice that. There is nothing in it.]

First, the offer was in time. The claimant's original notice of claim was under section 68. of the 8 & 9 Vict. c. 18, and section 38 has been decided not to apply to such a case. The cases cited are in our favour. In *Hayward's case* (33 Law J. Rep. (N.S.) Q.B. 73; s. c. 4 Best. & S. 787), Chief Justice Cockburn cites the opinion of the Common Pleas, that "Any time beyond ten days (the time from notice of trial to the trial) is a reasonable period;" and Mr. Justice Blackburn says, "Any offer made by the company previous and up to the time of giving the notice of the time and place of inquiry, is an offer under section 51" (33 Law J. Rep. (N.S.) Q.B. 78, 79). The expenses of attending the nomination of the jury could only be 13s. 4d., and the claimant need not have incurred even that; but the Master has allowed many other expenses.

[BLACKBURN, J.—Yes; but in all actions many costs are necessarily incurred, which are recoverable if notice of trial is given, and not otherwise. It is one of the hardships on a suitor. A solicitor would be guilty of negligence if he did not prepare for trial and incur expenses which may never be recovered as costs.]

The rule laid down in *Hayward's case* (33 Law J. Rep. (N.S.) Q.B. 73; s. c. 4 Best & S. 787) is a simple one; but if the question of striking a special jury be introduced, then it may be necessary to inquire which party demanded a special jury. Here the expense of reducing the jury was not incurred. Moreover, sections 51. and 52. only contemplate the costs of "summoning, impanelling and returning the jury." The claimant had ample time to consider whether the offer of 100l. was enough before he incurred expenses and actual litigation had begun. Secondly, the words in the offer relating to the claimant's costs are to be rejected as mere surplusage. They could not have misled the claimant, who must be taken to know that they had no meaning. The only object of the offer was to come within section 51.

[BLACKBURN, J.—The words must either be a nullity, or make the offer bad; for the Master cannot know, on taxing, how much the jury intended for compensation; and how much for costs. The words, moreover, might mislead the claimant. If he accepted the offer he might be abandoning costs to which he was entitled.]

COCKBURN, C.J.—The rule must be discharged. I think it is very doubtful whether this offer was made in time, seeing that costs had been incurred which, if the case went on, and the jury found a verdict for a sum sufficient to entitle the claimant to his costs, would have been recoverable as costs. I doubt whether after the claimant has incurred such costs it is not too late to make an offer. The test which the authorities cited lay down is that of reasonableness. I doubt whether in this case it was made within a reasonable time; but it is not necessary to decide that here, for I think the offer is clearly bad, as being clogged with the condition that the offer of 100l. should include the claimant's costs as well as the compensation. The statute contemplates that, before the parties embark in active litigation, an offer should be made by the company of a reasonable compensation, so as to entail on the claimant all the consequences of having to pay his own costs if he refuses the offer. That means an offer simply of the compensation for the

matter which is the subject of inquiry before the jury. I cannot think that it should embrace anything else. I do not think that the Board were justified in putting into the offer a condition as to the costs. On that ground I think this offer was bad.

BLACKBURN, J.—I am of the same opinion. I quite agree with my Lord that an offer of compensation (at whatever time it ought to be made) should be made so that a claimant may be able to consider if it is his interest to accept it; and if the offer is made of a lump sum, not only for compensation, but also for costs, I think it might mislead the party, and not give him the means of making up his mind. A claimant has often incurred costs which, if the inquiry goes on, will be recoverable; and it would be very hard if by reason of the claimant being compelled to accept such an offer, these costs, which may be called inchoate costs, are not to be recovered. Here, where 100*l.* was offered he might say, “75*l.* was offered for compensation, and 25*l.* for expenses, which cost me 40*l.* 10*s.* I think that an offer to be valid must be plain. It is therefore unnecessary to say whether it was in time, and we do not decide that point.

LUSH, J.—I think the offer is bad, whether it was made in time or not, on the ground that it tendered a lump sum for the compensation, “such sum to include all costs, charges, and expenses of, occasioned by, or incidental to your claim.” The claimant’s right to costs is to be ascertained by comparing the amount of compensation awarded by the jury with the amount offered, but where a sum is offered for costs and compensation together, it is impossible to ascertain how much is for the costs and how much for the compensation. Again, I think it is very doubtful whether this offer was made in time.

Rule discharged.

[IN THE QUEEN’S BENCH.]

Feb. 10, 1866.

LUNN v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

35 L. J. Q.B. 105; (sub nom. Lunt) L. R. 1 Q.B. 277; 14 L. T. 225;
14 W. R. 497; 12 Jur. N.S. 409.

Distinguished, *Skelton v. London & North-Western Railway* [1867] E. R. A.;
36 L. J. C.P. 249; L. R. 2 C.P. 631; 16 L. T. 563; 15 W. R. 925 (C.P.).

*Railway Company — Negligence — Level Crossing — Occupation Way —
Railways Clauses Consolidation Act (8 & 9 Vict. c. 20.) ss. 47-68.*

RAILWAY.—A public way passing obliquely over a railroad, the company placed gates across the way, on either side of the line. Opposite to one of these gates, on the other side of the line, was a yard abutting on the rails. From this yard there was a private way over the rails, with but one outlet, by means of the gate opposite. The plaintiff’s carter having finished his work in the yard, drove his cart, after dark, to the entrance to the railroad, and called to the company’s keeper at the opposite gate to know if the road were clear. The keeper said, “Yes, come on.” The carter proceeded, when the cart and horses were struck by a passing train:—Held, that though section 47. of the *Railways Clauses Consolidation Act*, in the case of public roads crossed by a railway on a level, simply orders the company to maintain gates across the road and employ proper persons to open and shut the gates and keep the gates closed, except when horses, carriages, &c., have to cross the railway, yet that there is implied in those words a direction to the company

to keep persons from passing through such gates except when it is reasonably safe to do so, and that whatever might have been the case had the carter been using an ordinary private road over the railway, the fact that the only outlet to this road was by means of the public gate, placed him in the same position as if he had been using the public way; that the answer of the gatekeeper was equivalent to an invitation to come upon the railroad, and this was a breach of his duty in the service of the company for which they were responsible.

Declaration—that the plaintiff before and at the time of committing the grievances hereinafter mentioned was possessed of a certain cart or lorry, and, to wit, two horses, and the defendants were possessed of a certain line of railway, which said railway crosses at a level a certain public road. That the defendants, before and at the time when, &c., were in the habit of driving and running by their servants divers engines, tenders and trains along the railway and across the road, and it became and was the duty of the defendants to put and place proper and sufficient gates at the said crossing, and to keep the gates properly ordered and regulated, and to keep and maintain at the crossing proper and efficient officers and servants for the safety and protection of persons lawfully using the road. That at the time when, &c., the cart and horses were lawfully and properly using the road, and were being lawfully and properly drawn across the railway at the crossing, yet the defendants wholly failed to put and place at the crossing proper and sufficient gates, or to keep such gates properly ordered and regulated, and wholly failed to keep and maintain at the crossing proper or effectual officers or servants, and the defendants maintained and kept the crossing so negligently and improperly unprotected by gates, and provided such improper, inefficient and incapable officers and servants at the crossing, and so negligently and improperly conducted themselves in and about the premises, and so negligently, carelessly and improperly drove a certain locomotive engine, tender and train of carriages attached thereto over and across the road at the crossing while the plaintiff's cart and horses were so lawfully and properly using the road, and were so being lawfully and properly driven across the railway at the crossing as aforesaid, that the engine, tender and train struck, knocked down and upset the plaintiff's cart and horses, whereby the cart was crushed and broken and rendered altogether useless to the plaintiff, and one of the horses was killed, and the other of the horses was so damaged, wounded and injured that it became altogether useless to the plaintiffs, and it became and was necessary to put it to death, and it was accordingly put to death.

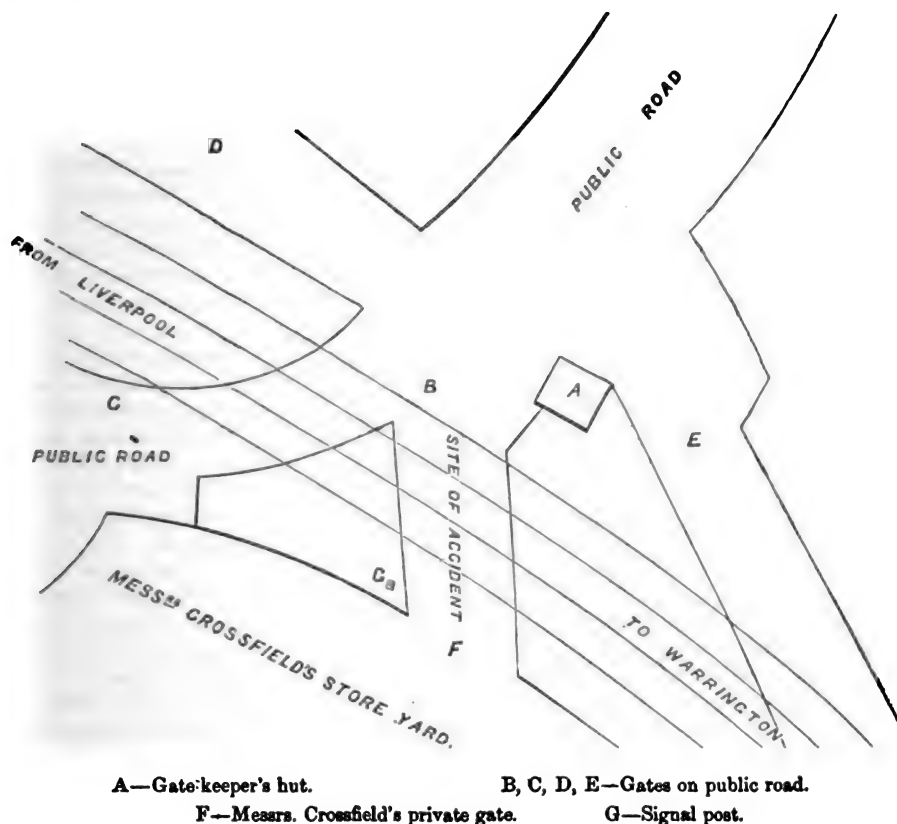
There was also a second count in general terms, ascribing the accident to the negligence of the defendants.

Pleas—First, not guilty. Secondly, that at the time when, &c., the said cart and horses were not lawfully and properly using the road and being lawfully and properly driven across the railway at the crossing as aforesaid.

Upon these pleas issue was joined.

At the second trial of the action, at the Liverpool Spring Assizes, before Shee, J., it appeared that a part of the defendants' line between Liverpool and Warrington passed obliquely over a carriageway. Across this way, on either side of the line, the company had placed gates, pursuant to the requirements of the Railways Clauses Consolidation Act, section 47. Opposite to one of these gates, on the other side of the line, was a yard belonging to one Crossfield, abutting on the rails. From this yard there was a private way over the rails, with but one outlet, by means of the gate opposite. Anybody using the private road in approaching Crossfield's yard entered at the public gate and passed through it on his return. Anybody using the public way from the north side of the railroad also entered at the public gate, but turned to the right of the private road in crossing the rails and went out at the opposite

public gate. The plan below will shew the position of the railroad and the two ways.



The plaintiff's carter, who had been working in Crossfield's yard, on the evening of the 23rd of November, 1863, drove, after dark, a lorry and two horses to the private gates, which he threw open, and called to M'Grath, the keeper placed by the company in charge of the opposite gate, to know whether the road was clear. M'Grath, according to the carter's statement, replied, "Yes, come on." The lorry and two horses were driven on to the line, when both were struck down by an express train, the lorry broken to pieces, one of the horses killed and the other seriously injured. M'Grath and other witnesses maintained that all he said was addressed to the driver of a luggage train which was just passing. It did not clearly appear that the public gate was open at the time of the accident. His Lordship left to the jury the question, was M'Grath guilty of negligence which caused the accident, or was it caused by the carter going across the rails without proper caution? The jury found in favour of the plaintiff, the damages being fixed by consent at 100*l.* Leave was reserved to the defendants to move to enter a verdict or a nonsuit, if the Court should be of opinion that there was no evidence of negligence to charge the defendants. The jury at the first trial had also found a verdict for the plaintiff.

A rule *nisi* having been obtained to enter the verdict for the defendants, or for a new trial,

Mellish and *Pope* now shewed cause.—From the verdict of the jury it must be assumed that M'Grath was guilty of negligence. It will be contended that for this negligence the company are not liable, as section 47. of the Railways Clauses Consolidation Act only casts upon them the duty of employing a keeper

to open and shut the gates at the level crossing, to employ proper persons to open and shut such gates and to keep such gates constantly closed across the road on both sides of the railway, except "when horses, cattle, carts or carriages have to cross the railway." But by employing a keeper of the gate the company make him their agent, to give information respecting it and respecting the state of the line. *Stapley v. the London, Brighton and South Coast Railway Company* (35 Law J. Rep. (N.S.) Exch. 7) is in favour of the plaintiff. There the person injured was a foot passenger, yet the company were held liable in consequence of the keeper of the carriage gate having left it open. In the case of *Stubley v. the London and North Western Railway Company* (Ibid. 3) the danger was manifest, and there was nothing to invite the deceased on to the railway. Neither can the company contend that their keeper has no duty towards a person using a private road. If they take upon themselves a duty which the law *prima facie* casts upon the individual, they are liable. The evidence adduced at the trial was sufficient to sustain the verdict.

Edward James, Aspinall and M'Rory, in support of the rule.—There was no breach of duty on the part of the company for which they are responsible in this action. No proof was given at the trial that the carriage gate which the carter attempted to pass through was open. The duty of M'Grath was merely to attend to the public crossing, and if people using the private road relied upon him to tell them when to come over they cannot throw the burden of any accident which has been caused thereby on the company. All that he had to do was to open or shut the gates; he is not required to say when the line is safe. If the defendants are liable, they would be liable if M'Grath refused to answer the question addressed to him. In the case of *Stapley v. the London, Brighton and South Coast Railway Company* (35 Law J. Rep. (N.S.) Exch. 7), the crossing was on a public road, thus distinguishing it from the present case. The case of *Stubley v. the London and North-Western Railway Company* (Ibid. 3) is in point, and explains the case of *Bilbee v. the London, Brighton and South Coast Railway Company* (18 Com. B. Rep. N.S. 584; s. c. 34 Law J. Rep. (N.S.) C.P. 182), shewing that that decision was founded on special circumstances and laid down no fixed principle. By section 68. of the Railways Clauses Consolidation Act, the company are required to erect gates for the accommodation of adjoining landowners, but they are not called upon to guard these gates. The verdict is directly in the teeth of the evidence adduced at the trial, and ought to be set aside.

BLACKBURN, J.—After considering both the grounds which have been relied upon, I think that this rule ought to be discharged. The question of fact is, whether the accident was owing to M'Grath's negligence. A new trial has already been obtained, on the ground that the verdict was against the evidence; and as this verdict has been supported by the finding of a second jury, I do not think that we ought to interfere with it. The other question, which is well worthy of consideration, is, whether the negligence imputed to M'Grath was negligence within the scope of his duty so as to make the company responsible. It appears that the company have constructed their line so as to pass transversely over a public highway, and that there is a private way from Crossfield's yard over the railway to a gate on the opposite side, which is one of the gates erected by the company for the purpose of guarding the level crossing. As to private ways, section 68. of the Railways Clauses Consolidation Act imposed upon railway companies the duty of erecting all necessary gates and other works for the accommodation of landowners adjoining the railway, and these gates are left under the control of those for whose benefit they are made, and who are liable to a penalty if they leave them open. And by section 47, where a turnpike or carriage road is crossed on a level, the company are to keep good and sufficient gates on each side of the road, and employ proper persons to open and shut the gates. The act does not say that these "proper persons" when they open such gates, are to look and see whether it is reasonably safe and proper to do so, and that if the line is in such a state that it would be dangerous to cross it they

are to exercise their discretion, and prevent it from being crossed; but it plainly means that the gate-keepers are to exercise reasonable diligence in keeping the line clear. In *Stapley v. the London, Brighton and South Coast Railway Company* (35 Law J. Rep. (N.S.) Exch. 7) the company had made regulations, by which they directed their gate-keepers to exercise their discretion, and look along the line and satisfy themselves that no train or engine was in sight. These were very proper regulations; but I think that the company were bound to observe them whether they so directed their servants or not, and that it is the duty of the keeper whom they employ to see that the line is clear. Here the occupation road crosses the line in such a way that on the west side of it there is a public gate, through which Mr. Crossfield (who is entitled to the private way) has no occasion to pass; but on the side opposite this gate, instead of making one outlet for the private way and another gate for the public road, the company have constructed one common gate for both ways. It may be that a different arrangement was impracticable; but whether this were the case or not, one gate has been constructed, and it is the duty of the keeper stationed at it to exercise the same discretion with regard to all persons who enter, whether for the purpose of going to Crossfield's yard or of passing over the public road. In the present case the matter is a little complicated, because the carter was going from Crossfield's yard; but as he could only clear the railway if the gate on the opposite side were kept open, it was absolutely necessary when he started from the private gate, to call to the keeper on the opposite side to open the public gate. According to the carter's evidence, he did call out, and the answer was, "Come on." Now, there can be no possible doubt that if M'Grath called out, knowing or having the means of knowing that the line was not clear, he was guilty of negligence. Whether, with any such means of knowledge, he did call out, is a question of fact; but if having the custody of the gate he is addressed in words which substantially amount to these, "Is the line clear?" and he answers "Yes," or words to that effect, it seems to me that he is acting in a matter which belongs to his regular duty, and that what he says is an invitation to the person who questions him to come upon the railway. I think, therefore, that this is a stronger case than *Stapley v. the London, Brighton and South Coast Railway Company* (35 Law J. Rep. (N.S.) Exch. 7). In that case the gate-keeper was absent, and had left the carriage gate open, and although the person injured was a foot passenger, on whom there was no duty to open and shut the gate, yet it was held that as he might reasonably think when he saw the gate open that this was an invitation to carriage passengers, and that the line was safe, there was evidence of neglect on the part of the company. Here the only gate which the carter could use was that placed for the public traffic, and it was much more within the duty of the gatekeeper to warn the man who could not pass without this gate being opened. I think, therefore, that there is evidence of negligence on the part of the company.

I wish to add this. I do not think that this case requires us to decide what would have been the liability of the defendants if the private road had been near M'Grath's hut, and had not passed through the public gate. It would have been his duty, as a matter of humanity, to have warned anybody proposing to cross the line; but I do not think it necessary to decide whether, if he had failed to do so, this would have been a breach of duty for which the company would be responsible.

MELLOR, J.—I am of the same opinion. A manifest miscarriage of justice would be required, to set aside the verdict as against evidence, and I cannot say that this verdict was manifestly wrong. The next thing which we have to consider is, was there any misdirection in the manner in which the case was left to the jury? It has been contended, by Mr. James, that the statute imposes only the naked obligation of opening and shutting the gates upon a level crossing. But this argument seems to me to lead to the absurdity of supposing that the gate-keeper must allow anybody who wishes to do so, to pass at the risk of being crushed by the approaching trains. This cannot be the

case. The gate-keeper is not a mere machine; he must exercise some judgment as to whether it is or is not safe to open the gates. There can be no doubt as to what is done in practice, as most persons who have passed through such gates will remember that they have been occasionally stopped by the keepers. It has been said, that whatever may be the rule as to gates across a public way, this rule does not apply to gates across a private way. But I think that we are relieved from the necessity of considering this question, for the gate was placed across both the public and the private way. Now, the company were not bound to keep one gate in front of both ways; they kept it in this position for their own convenience, and the obligation of the keeper is the same towards all persons who have a right to make use of the gate. I think, therefore, that the keeper might reasonably be expected to say to all proposing to cross the way by means of the gate, "Come on," or "Keep back," as occasion might require; and that as in *Stapley v. the London, Brighton and South Coast Railway Company* (35 Law J. Rep. (N.S.) Exch. 7), the circumstance that the gates were left open was said, by my Brother Channell, to amount to an invitation to passengers to cross the railway, so here the words used by M'Grath may be said to have the same effect. I think, therefore, that in calling out "Come on," he was not going beyond the line of his duties as servant to the company, and that they cannot escape from their liability in this action.

LUSH, J.—I am of the same opinion, on the ground that the conduct of the gate-keeper amounted to a breach of duty, for which the company are responsible. The defendants have asked for a literal interpretation to be put upon section 47. of the Railways Clauses Consolidation Act, which provides, "that if the railway cross any turnpike-road or public carriage-road on a level, the company shall erect and at all times maintain good and sufficient gates across such road on each side of the railway, where the same shall communicate therewith, and shall employ proper persons to open and shut such gates, and such gates shall be kept constantly closed across such road on both sides of the railway except during the time when horses, cattle, carts or carriages passing along the same shall have to cross such railway, and such gates shall be of such dimensions and so constructed as when closed to fence in the railway, and prevent cattle or horses passing along the road from entering upon the railway; and the person intrusted with the care of such gates shall cause the same to be closed as soon as such horses, cattle, carts or carriages shall have passed through the same." They contend that the words of this section only mean that the gates are to be opened or shut as occasion may require. But this is too narrow an interpretation; the section was framed to protect passengers using a level crossing, and the words "opening and shutting the gates" are the express formula, indicating a much larger amount of duty than is expressed in the bare words. It has also been said that the duty imposed by the section is only to keep, when necessary, cattle from crossing the railway, and that there is no duty with regard to foot passengers, and no duty with regard to persons using a part of the line in the exercise of a private right of way. But the object of the act is to prevent persons from crossing the railway upon occasions when it would be dangerous to do so. Now, suppose a person on horseback and a foot passenger arrived at one of these gates at the same time, went through and both perished, are the company to be held liable for the death of the man on horseback but not liable for what happens to the other? Suppose a person is going to these premises, instead of coming from them, is he to be entitled to protection on the first part of his journey but not on his way back? The statutory regulations are for the benefit of persons who have passed through any one of the public gates, and it can surely make no difference if such a person, instead of going straight to the public gate opposite, turns aside and passes over the railroad by means of a private road. Assuming, therefore, that the company would have been liable for the act of the gate-keeper, if at the time of the accident he had thrown the gate open and invited the lorry to pass over the public way, I think that the

same consequence would attend an invitation to pass over this private way. But if the keeper, by words or gestures, gave the carter reason to conclude that the way was safe, he did the same, in fact, as if he had invited him upon the line. I think, therefore, that there is evidence of a breach of duty on the part of the company by their servant, for which they are liable. With regard to the verdict, I agree with my Brother Blackburn in thinking that the evidence does not justify us in sending down the case to be re-tried, now that two juries have arrived at the same decision.

Rule discharged.

[IN THE QUEEN'S BENCH.]

Feb. 2, 1866.

WILLIAMS AND OTHERS v. EVANS.

35 L. J. Q.B. 111; L. R. 1 Q.B. 352; 13 L. T. 753; 14 W. R. 330.

Principal and Agent—Authority of Auctioneer to take Payment by Bill of Exchange—Conditions of Sale.

AUCTIONEERS AND VALUERS. PRINCIPAL AND AGENT.—*An auctioneer sold at an auction some goods on conditions which required the purchaser to make full cash payment to the auctioneer or the clerk of sale before delivery of the goods. Before the goods were delivered the auctioneer received from the purchaser a bill of exchange in part payment of the goods, and agreed to take it as cash, and it was discounted for him at his banker's. After this, but before the bill came to maturity, the vendor gave the purchaser notice not to pay any money to the auctioneer. The bill was paid at maturity. The auctioneer having failed to pay over the whole of the receipts of the sale, the vendor sued the purchaser for payment for the goods:—Held, that the auctioneer had no authority to take payment by a bill, and that the vendor was therefore entitled to a verdict for the amount of the bill.*

Semble, per Blackburn, J.—that if the bill had come to maturity before the vendor revoked the authority of the auctioneer to receive payment, the payment by the bill would have been a good payment.

The declaration contained the common counts for goods sold and delivered and money due on accounts stated, and claimed 48*l.* 11*s.* 8*d.*

Pleas, except as to a certain sum, parcel, &c., first, never indebted; and secondly, payment; and as to the said sum, payment into court.

Issue on the first and second pleas.

The money claimed was in respect of malt and other goods sold to the defendant at an auction on the 2nd of November, 1864. The plaintiffs gave credit for certain sums received in cash, and claimed a balance of 48*l.* 11*s.* 8*d.*

At the trial, before Shee, J., at the Summer Assizes, 1865, for the county of Carmarthen, the plaintiffs proved that they instructed Leyshon, an auctioneer, to sell certain goods upon conditions of which the parts material to this report were as follows:

“ 3. Each purchaser to furnish his or her name and residence, and to pay down into the hands of the auctioneer or Mr. George Griffiths, the clerk of sale, a deposit of 5*s.* in the pound in part payment of each lot; remainder or balance to be paid on or before delivery of the goods or lots purchased.

“ 4. The lots sold will be at the purchaser's risk from the fall of the hammer, and must be taken with any faults and errors of any description, and be duly paid for on delivery to the auctioneer or clerk. The goods may remain on the premises till Thursday evening, the 3rd of November, 1864.

"5. On failure of complying with any of these conditions, or in the event of any purchaser failing to make full cash payment within stated time for delivery, the lots, &c. to be forfeited with the deposit, and the vendor or auctioneer to resell," &c.

Evidence was given, on the part of the plaintiffs, that Leyshon was instructed to pay the money into a bank to the plaintiffs' account as he received it; that the sale took place on the 2nd of November, when the malt and other goods mentioned in the particulars of demand were purchased by the defendant; that on the 7th of November Leyshon paid into the bank to the credit of the sale account a large sum, part of which was the defendant's cheque for the goods (excluding the malt) bought by him; that on the 7th of November the plaintiffs desired the defendant not to pay Leyshon any money, but to pay the rest to them; that the malt was delivered to the defendant on the 7th of November; that the defendant afterwards produced a receipt from Leyshon for 47*l.* 4*s.*, dated the 9th of November, and that Leyshon was a defaulter.

On the part of the defendant, evidence was given that the real purchaser of the malt was James Hall, whom the defendant allowed to buy in the defendant's name; that Hall paid Leyshon part of the money due for the malt by 32*l.* in gold, on account, on the 4th of November, and a further part on account on the 5th of November, by an accepted three months' bill of exchange, dated the 20th of October, 1864, for 15*l.* 7*s.*, drawn and indorsed by Hall; that Leyshon agreed to take the bill as cash, and that it was discounted for him at his banker's, and that it was paid on the 24th of December ensuing. The receipt for 47*l.* 4*s.* was not produced at the trial; but the defendant's counsel contended that the receipt, even if dated the 9th of November, was in respect of the payments of the 4th and 5th of November. The defendant swore that he "thought" the day on which the plaintiffs desired him to pay no more money to Leyshon was the 9th of November.

Mr. Justice Shee directed the jury that if they believed Hall had paid the sum of 32*l.* in gold and the bill for 15*l.* 7*s.* on the 4th and 5th of November respectively, and that Leyshon's authority to receive money was not revoked till the 7th of November, they must find a verdict for the defendant; but reserved leave to the plaintiffs to move to enter a verdict for them for 15*l.* 7*s.* if the jury found for the defendant.

The jury found a verdict for the defendant.

Giffard having accordingly, on the 6th of November, 1865, obtained a rule *nisi* calling on the defendant to shew cause why the verdict should not be set aside and a verdict for 15*l.* 7*s.* entered for the plaintiffs, on the ground that Leyshon had no authority to give credit to a purchaser at the sale,—

J. W. Bowen now shewed cause.—(It was conceded that the balance due from Leyshon for the receipts of the sale exceeded the amount sued for in this action, and that the defendant was liable for the malt purchased by Hall.)—I contend that the bill for 15*l.* 7*s.* was a good payment, since Leyshon, the auctioneer, agreed to take it as cash. It was, therefore, equivalent to a cash payment. But, further, an auctioneer has authority to take payment in any way he pleases, subject to his responsibility to his principal if a default occurs.

[BLACKBURN, J.—It may be an important question whether or not the bill was duly paid at maturity.]

Here no default occurred, for the bill was duly met at maturity.

[BLACKBURN, J.—Had the auctioneer authority to consent to take a bill instead of cash?]

The third condition of sale does not specify *cash* before delivery. In *Robinson v. Rutter* (24 Law J. Rep. (N.S.) Q.B. 250; s. c. 4 El. & B. 954) a plea of payment to the principal was held no answer to an action by the auctioneer, for an auctioneer is not an ordinary agent, but has a lien on the goods sold, and on the proceeds of the sale. *Sykes v. Giles* (9 Law J. Rep. (N.S.) Exch. 106; s. c. 5 Mee. & W. 645) is distinguishable, for there the auctioneer was restricted by special conditions, and he had no authority to

receive payment at all. Here the plaintiffs were not in any way prejudiced by the auctioneer's taking the bill, for he expressly agreed to take it as cash, and paid it into his own private account at his banker's, and it was duly paid at maturity. The plaintiffs would not have been better off if the auctioneer had taken gold instead of a bill, for he might have spent the money immediately afterwards, and would have been equally a defaulter.

[SHEE, J.—If the auctioneer agreed to take the bill as cash, he could not have sued upon it had it been dishonoured.]

Giffard and H. G. Allen, in support of the rule.—The point is concluded by *Sykes v. Giles* (9 Law J. Rep. (n.s.) Exch. 106; s. c. 5 Mee. & W. 645), which is an authority that an auctioneer, as such, has no right to take a bill of exchange instead of cash. Mr. Baron Parke, after deciding that the conditions of sale did not authorize the auctioneer to receive payment at all, says, "But even if the auctioneer had had authority to receive the remainder of the purchase-money, he had no authority to receive it in this way, by means of a bill of exchange. Cash payment was intended, and not a bill of exchange."

[BLACKBURN, J.—If my banker chooses to take bills for money due to me, and gives me his personal liability, I never could see that I am worse off than if the banker takes gold and gives me his personal liability. There are many expressions of very learned Judges that might lead me to think that that is not law; but it has always seemed to me to be common sense.]

This was a ready money sale according to the conditions. What right had the auctioneer to suspend the vendor's right to immediate payment? If he might suspend it for the few weeks this bill had to run, he might do it for twelve months or any length of time.

[BLACKBURN, J.—How is the vendor's right suspended if the auctioneer makes himself personally liable? If your argument is good, a cheque which cannot be cashed for twenty-four hours is equally a suspension of the right.]

There the money is supposed to be lying at the banker's at the moment of taking the cheque.

[SHEE, J.—*Story on Agency* says, section 98, "An agent authorized to receive payment has not an unlimited authority to receive it in any mode which he may choose; but he is ordinarily deemed intrusted with the power to receive it in money only"; and see section 181.]

Bunney v. Poyntz (4 B. & Ad. 568; s. c. 2 Law J. Rep. (n.s.) K.B. 55) is in point. In *Barker v. Greenwood* (2 You. & C. 414) it was held, that a debtor must pay his creditor's agent in cash unless he can shew that the agent had authority to receive payment in any other way.¹

BLACKBURN, J.—On the point reserved at the trial, whether the payment to the auctioneer by the bill of exchange was a good payment, I think *on authority* that it was not. If the bill had matured before the authority to the auctioneer to receive payment had been revoked, I think then the payment by the bill would have been equivalent to money handed to the auctioneer. Here the authority was revoked after the bill was handed to the auctioneer, but before its maturity. The general rule is, that an agent to receive payment must receive it in money, and not in a bill of exchange, unless a custom is proved which establishes that such a payment is good usage. We are not now concerned as to whether this is a good rule, but there is authority for it, and that is sufficient for this case. The passage cited from *Story* shews his opinion of the rule. In *Sykes v. Giles* (9 Law J. Rep. (n.s.) Exch. 106; s. c. 5 Mee. & W. 645) Mr. Baron Parke, though it was not necessary for the decision, expressed a strong opinion that the auctioneer in that case could not receive payment by a bill. There are many cases, and one so long ago as *Sir Charles Thorold v. Smith* (11 Mod. [87]), where the question has been raised whether a payment in the city to merchants otherwise than by cash

(1) The attention of the Court was not drawn during the argument to the fifth condition of sale.

was good or not, and it has been held, that it would not be good on a general authority to receive money, but that it would be good if authority could be implied from the course of trade. Chief Justice Holt in that case "thought that this was more matter of evidence than law; and any jury at Guildhall would find payment by a bill to be a good payment, it being the common practice of the city." In such a case probably no jury would have any doubt that a payment by a cheque was good. But in the case of an auctioneer, *Sykes v. Giles* (9 Law J. Rep. (N.S.) Exch. 106; s. c. 5 Mee. & W. 645) is an authority to shew that payment by a bill is not a good payment. The rule must therefore be made absolute.

MELLOR, J.—I am of the same opinion. Before the authority was revoked the auctioneer received the bill; but when the bill came to maturity the authority had been revoked. The general rule is, that an agent to receive payment must not receive it so as to tie up the right of his principal to immediate payment. The rule seems to be clearly established, unless the authority is extended, and there is nothing in this case to shew that it was.

SHEE, J.—I am of the same opinion.

Rule absolute.

[IN THE QUEEN'S BENCH.]

Feb. 2, 1866.*

KEMP v. WADDINGHAM AND OTHERS.

35 L. J. Q.B. 114; L. R. 1 Q.B. 355; 13 L. T. 709; 14 W. R. 390.

The Law of Property Amendment Act (23 & 24 Vict. c. 38) ss. 1-5 was repealed by 63 & 64 Vict. c. 26. s. 5 (sched.), the latter section being repealed by S.L.R. 1908.

Priority—Judgment Debt—Registration of Judgment under 18 & 19 Vict. c. 15. s. 4.—Death of Judgment Debtor after 23 & 24 Vict. c. 38. s. 3.—Writ of Revivor.

JUDGMENT.—*K. obtained, in 1854, a judgment against W, who died intestate in 1862. K. registered the judgment in 1863, and sued out a writ of revivor against W's administrators, who had before the judgment was registered exhausted the assets in payment of simple contract debts. K. brought an action against the administrators on the writ of revivor:—Held, that since the judgment had not been registered under the 18 & 19 Vict. c. 15. s. 3, until 1863, and the intestate died in 1862, after the 23 & 24 Vict. c. 38. came into operation, the effect of section 3. of the latter act was to deprive the judgment debt of all priority over simple contract debts.*

This was an action on a writ of revivor, sued out by the plaintiff against the defendants, as such administrators, &c., on the 17th of April, 1863, of a judgment obtained by the plaintiff on the 29th of June, 1854, against the intestate Thomas Waddingham for 204l.

The defendants pleaded that they had fully administered all the personal estate, &c., and that they had not at the time of the suing out of the writ of revivor, nor at any time since, any personal estate, &c.

Issue thereon.

At the trial, before Erle, C.J., at the Summer Assizes, 1865, for Cambridge-shire, the following facts were proved. The debtor, Thomas Waddingham, died, intestate, on the 14th of November, 1862. The judgment was registered

* Decided in the Sittings after Hilary Term.

on the 25th of February, 1863. The defendants exhausted the whole of the assets, 189l. 8s., in payment of the funeral and testamentary expenses and of the simple contract debts of the intestate, which payments were all made before the judgment was registered.

The defendants' counsel contended that, by virtue of the 23 & 24 Vict. c. 38. s. 3, the judgment had no priority over the simple contract debts. Erle, C.J. directed a verdict for the defendants, reserving leave to the plaintiff to move to enter a verdict for her on the statutes, and if the plaintiff should be right in her construction of the statute, then a verdict for the plaintiff for 185l. 4s. 6d., less certain sums to be agreed upon by the counsel for the parties.

O'Malley, having accordingly on the 6th of November, 1865, obtained a rule nisi to set aside the verdict for the defendants, and to enter it for the plaintiff for 185l. 4s. 6d. less certain sums,

Keane and Douglas Brown now shewed cause.—The only important dates are, the judgment obtained in 1854, the passing of the 23 & 24 Vict. c. 38 (Royal Assent 23rd of July, 1860), and the death of the intestate in 1862. The registration of the judgment in 1863, after the intestate's death, was of no use whatever. 23 & 24 Vict. c. 38. had been in force more than two years before the intestate died. That statute was passed in consequence of *Fuller v. Redman* (26 Beav. 600; s. c. 29 Law J. Rep. (N.S.) Chanc. 324), which decided that an unregistered judgment had priority over simple contract debts paid without notice of the judgment. Section 3. of that act, after reciting 4 and 5 W. & M. c. 20, which protected heirs, executors and administrators against undocketed judgments, and that the dockets under that act had been finally closed; and that in consequence of certain later acts which restored docketing, but did not expressly restore the protection to executors, &c., the latter persons had been held to have lost the protection which they enjoyed under the 4 & 5 W. & M. c. 20, and that it was expedient that the same should be restored, enacts, "That no judgment which has not already been, or which shall not hereafter be entered or docketed under the several acts now in force, and which passed subsequently to the said act of the 4 & 5 W. & M., so as to bind lands, tenements or hereditaments, as against purchasers, mortgagees or creditors, shall have any preference against heirs, executors or administrators, in their administration of their ancestors', testators' or intestates' estates." In *re Turner* (33 Law J. Rep. (N.S.) Chanc. 232) decided that this section absolutely deprives unregistered judgments of all priority over debts of a lower degree. As to judgments against administrators, see *In re Rigby* (33 Law J. Rep. (N.S.) Chanc. 149). In *Evans v. Williams* (34 Law J. Rep. (N.S.) Chanc. 661) it was held that section 4. did not deprive a judgment creditor who had registered, but had not re-registered within five years before the debtor's death, of his priority over creditors of a lower degree. But that was on the ground that the statute must not be construed to take away a right existing at the time the act was passed. Here the plaintiff had no existing rights to be taken away.

[BLACKBURN, J.—The intention of the legislature seems quite plain—to patch up a hole left open by the 18 & 19 Vict. c. 15. s. 4. The only question is, have they mended it?]

O'Malley and Lumley Smith, in support of the rule.—The plaintiff contends that the hole was not effectually stopped. The judgment was obtained in 1854, and then, without registration, affected purchasers, and had priority over simple contract debts—2 *Lush's Practice*, 3rd edit. by Dixon, p. 574.

[BLACKBURN, J.—It had not actually priority; but if the intestate had then died, it would have had priority.]

Then, in 1855, came the 18 & 19 Vict. c. 15. s. 4, which said: Register, and if you do not register, your judgment shall not affect purchasers or mortgagees. That statute did not touch the force of the judgment as against executors, and we therefore had a vested right of preference to simple contract creditors. Then comes the 23 & 24 Vict. c. 38. s. 3, and says, no judgment which is not registered so as to bind purchasers shall bind executors. It is impossible that that statute

can have been intended to apply to such a judgment as this; for no statute is to be construed so as to destroy vested rights, unless it is expressly so enacted.

[BLACKBURN, J.—Why should it not be construed as retrospective if the intention be clear? If the intestate had died before the passing of 23 & 24 Vict. c. 38, then I think your argument might have been good, but that act gave the plaintiff full warning. You cannot deny that there never was a case in which the intention of the legislature was so plain.]

The judgment was good as a judgment “entered and signed” under the 4 & 5 W. & M. c. 20, and since that statute was made perpetual by the 7 & 8 Will. 3. c. 36. s. 3, it comes within the exception of the 23 & 24 Vict. c. 38. s. 3, as a judgment entered and docketed under an act passed subsequently to the 4 & 5 W. & M. c. 20. If the 23 & 24 Vict. c. 38. s. 3. has the construction contended for by the defendants it would equally apply if the intestate had died one day after that statute had come into force, and that would be a monstrous injustice on a judgment creditor.

BLACKBURN, J.—I think the matter is perfectly clear, and that the intention of the legislature is so expressed as to leave no real doubt about it. The state of the law was this: owing to mistakes committed in earlier acts, a judgment bound lands in the hands of purchasers who bought without notice after the judgment had been obtained, and this even when the judgment was not registered; and if an executor exhausted the estate in paying other debts, he committed a *devastavit*, though he was not aware of the existence of the judgment. This was so in 1854, and then it was thought hard on a purchaser, without notice, that he should be liable to the extent of half his lands to a judgment though not registered. In order to prevent this hardship, the 18 & 19 Vict. c. 15. enacted, that after the passing of that act, unless the judgment was registered previously to the purchase, the purchaser should not be liable. If the judgment was registered then it was the purchaser’s own fault if he did not discover it. But this statute left untouched the case of the executor, who, having looked for a judgment in the registry and not finding it might, nevertheless, after paying simple contract debts, be liable to the judgment. This was thought very hard, and in 1860, the 23 & 24 Vict. c. 38. s. 3, after reciting former acts, and saying, “whereas the said several later acts do not expressly enact that judgments not docketed as thereby required shall not have any preference against heirs, executors, or administrators in their administration of their ancestors’, testators’, or intestates’ estates, in consequence whereof such heirs, executors, or administrators have been held to have lost the protection which they enjoyed under the said first-recited act, and it is expedient that the same should be restored”—that is, in effect, that executors should have this protection in paying simple contract debts—proceeds, “Be it therefore enacted, that no judgment which has not already been, or which shall not hereafter be entered or docketed under the several acts now in force, and which passed subsequently to the said act of 4 & 5 W. & M. so as to bind lands, tenements, or hereditaments, as against purchasers, mortgagees, or creditors, shall have any preference against heirs, executors, or administrators, in their administration of their ancestors’, testators’, or intestates’ estates.”

This judgment was good for one year after it was obtained, and would for that time have bound lands in the hands of a purchaser or mortgagee, but it would not have done so when the 23 & 24 Vict. c. 38. was passed. Once it had that effect as against purchasers, but when that act passed it had not, because it was not registered, and the legislature expresses its intention clearly that this provision should apply to judgments already existing. The object was plain, namely, that a judgment which is not registered so as to bind subsequent purchasers, shall not bind executors or administrators. This construction does not deprive any one of any vested right. If the intestate had died in 1860, before the passing of that act, then it might have taken away a vested right; but it was not so. The effect of the act, then, is, that until a judgment is so

registered as required, an executor need not regard it as having any priority over simple contract debts.

MELLOR, J.—I am of the same opinion. Mr. Lumley Smith's very ingenious argument did not produce any impression on my mind that the statute can be made to bear any other construction than that which my Brother Blackburn has given to it.

SHEE, J. concurred.

Rule discharged.

[IN THE QUEEN'S BENCH.]

Jan. 30, 1866.

COBB v. THE MID-WALES RAILWAY COMPANY.

35 L. J. Q.B. 117; L. R. 1 Q.B. 342; 14 W. R. 775;
12 Jur. N.S. 228.

Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), ss. 34, 51, 52, 68, 93, 94.—Costs of Inquiry whether Value of Land intersected by Railway Company's Works is greater than Expense of making a Communication with it.

RAILWAY.—A railway company is not liable to the costs of an inquiry (under section 94. of the Lands Clauses Consolidation Act) as to whether land intersected by the works of the railway is of less value than the expense of making a communication between it; as the sections of the statute which award costs apply only to cases where the obligation of the company to take land is not in question.

This was a motion for a rule for a direction to the Master to tax the plaintiff his costs of an inquiry, under section 94. of the Lands Clauses Consolidation Act, as to the cost of making a communication between the plaintiff's land, and as to the value of the land.

The facts were as follows:

J. R. Cobb, the plaintiff, was the owner of two fields, the first consisting of something more and the second of rather less than two acres. One field lay on the north side and the other on the south side of the Hay tramroad. Access to each field was obtained by the tramroad only (over which the owners and occupiers for the time being of each field had a right of way to the public road). The access was through gates opening on the road.

The Mid-Wales Railway Company, by their special acts, acquired the tramroad and strips of each of these two fields adjoining it. On a portion of the land so acquired, the company constructed their line of railway, in such a manner as to destroy all access from one to the other of the two fields, or from either field to a public road. Besides this the wire fences inclosing the company's land had no gates, so that the occupier of the fields had no means of getting into or out of them with cattle. The plaintiff took proceedings, under sections 70. and 71. of the Railways Clauses Consolidation Act, and obtained an order from two Justices directing the company to make good the interruption to the use of one of the fields caused by the railway, and to make a convenient passage or way from that field to the other, carried by an arch or tunnel of at least 9 feet in breadth and 9 feet in height. The company thereupon, on the 11th of July, 1865, gave the plaintiff notice that if he required the company to make such arch, tunnel or communication, the company would require him to sell to them one of the pieces of land (numbered 46), and that if after ten days from the notice he failed to agree with the company as to the sale of this piece of land, and any dispute should arise as to its value, or what would be the expense of making the arch, tunnel or communication, or failed to satisfy

the company that he had other lands adjoining this piece of land, the company, in pursuance of the statutes in such case made and provided, would proceed to have the value of the piece of land, and what would be the expense of making the arch, tunnel or communication, duly ascertained.

On the 25th of July the plaintiff gave the company notice (without prejudice to his right at any future time to contend that section 94. of the Lands Clauses Act had no application to the case, and that the company were bound to make the arch, &c.) that they had no such right as claimed under the notice; that he required the company to make the arch, tunnel or communication; that he was not willing to sell the piece of land No. 46; that he did not admit that this land was of less value than the expense of making the communication; and that he required the company to issue their warrant to the sheriff to summon a jury for ascertaining and determining the question; and that if the company did not proceed with all due despatch, he would himself (under section 70. of the Railways Clauses Consolidation Act) begin to execute the works directed by the order of Justices.

On the 14th of August the warrant of the company was delivered to the sheriff, requesting him to summon a jury to assess and give a verdict for the sum of money which they should consider the value of the piece of land No. 46, and also to assess and give a verdict for the sum of money which would be the cost of making the arch, &c.

On the 5th of September the inquiry was commenced before a special jury, who found that the piece of land was of less value than the expense of making a communication with it. They assessed the value of the land at 268l. 1s. 6d., and the cost of making the arch, &c. at 300l.

The plaintiff thereupon applied to a Master of the Court, under section 52. of the Lands Clauses Act, to tax him the costs of the inquiry; and it was agreed that the Master should refuse, in order that the opinion of the Court might be at once taken.

Tindal Atkinson, Serj. (H. Lloyd with him) now moved for a rule in the terms above stated.—The plaintiff is entitled to his costs under the express words of section 94,¹ which provides that the value of the land and the cost of the communication between it shall be ascertained as in cases of disputed compensation. The costs in ordinary compensation cases are regulated by sections 34. and 51, which provide that the costs are to fall on the company, unless they have previously offered a sum less than the amount recovered. Here no offer has been made by the company, and they are clearly liable.

(1) By the Lands Clauses Act (8 & 9 Vict. c. 18) section 93, with respect to small portions of intersected land, "If any lands not being situate in a town or built upon shall be so cut through and divided by the works as to leave, either on both sides or on one side thereof, a less quantity of land than half a statute acre, and if the owner of such small parcel of land require the promoters of the undertaking to purchase the same along with the other land required for the purposes of the special act, the promoters of the undertaking shall purchase the same accordingly, unless the owner thereof have other land adjoining to that so left into which the same can be thrown, so as to be conveniently occupied therewith; and if such owner have any other land so adjoining, the promoters of the undertaking shall, if so required by the owner, at their own expense, throw the piece of land so left into such adjoining land, by removing the fences and levelling the sites thereof, and by soiling the same in a sufficient and workmanlike manner."

By section 94, "If any such land shall be so cut through and divided as to leave on either side of the works a piece of land of less extent than half a statute acre, or of less value than the expense of making a bridge, culvert or such other communication between the land so divided as the promoters of the undertaking are, under the provisions of this or the special act, or any act incorporated therewith, compellable to make, and if the owner of such lands have not other lands adjoining such piece of land, and require the promoters of the undertaking to make such communication, then the promoters of the undertaking may require such owner to sell to them such piece of land, and any dispute as to the value of such piece of land, or as to what would be the expense of making such communication, shall be ascertained as herein provided for cases of disputed compensation; and on the occasion of ascertaining the value of the land required to be taken for the purposes of the works, the jury or the arbitrators, as the case may be, shall, if required by either party, ascertain by their verdict or award the value of any such severed piece of land, and also what would be the expense of making such communication."

Karslake and *Littler* shewed cause in the first instance.—The plaintiff is not entitled to his costs. All provisions as to costs in the Lands Clauses Act stop with section 68, and there is nothing afterwards to give a right to them. These earlier sections relate to disputed compensation, where the company is empowered to take the land.

[MELLOR, J.—This is only an incidental inquiry as to the value of the land. Could the company have protected themselves by making an offer for the purchase of it?]

They could not. The landowner raises the question by saying that the communication will cost less than the value of the land. He makes no claim for any sum as the value of the land. This is the question which the jury have to try, and it is in no respect like an ordinary case where nothing but the amount of compensation is in dispute. The value of the land may not be questioned.

[BLACKBURN, J. referred to *Corrigal v. the London and Blackwall Railway Company* (5 Man. & G. 249; s. c. 12 Law J. Rep. (N.S.) C.P. 209), where it was held (before the Lands Clauses Act) that the plaintiff was not entitled to costs, as his case did not fall within those specified in the special act, in which the company were made liable to the costs.]

The legislature could never have contemplated this case. Section 38. applies only to cases where the company are about to take land—*Railstone v. the York, Newcastle and Berwick Railway Company* (15 Q.B. Rep. 404; s. c. 19 Law J. Rep. (N.S.) Q.B. 464).

Tindal Atkinson, Serj., in reply.—The landowner may be right in the main issue which has arisen between him and the company. The value of the land may be less than the cost of the communication, and yet the construction contended for would deprive him of his costs. An offer by the company has always been considered an important element in questions relating to costs—*Richardson v. the South-Eastern Railway Company* (11 Com. B. Rep. 154; s. c. 20 Law J. Rep. (N.S.) C.P. 236).

[MELLOR, J.—It may be that the words “shall be ascertained as herein provided for cases of disputed compensation” may mean “so far as the value of the land is concerned.”]

The plaintiff was compelled to go on with the inquiry, as no offer was made to him.

COCKBURN, C.J.—I have come to the conclusion (but not without considerable hesitation) that this rule must be discharged. The 94th section of the Lands Clauses Act does undoubtedly provide that the inquiry to be held under that section, as to the value of a piece of land intersected by the company's works, shall be conducted and the result ascertained as provided by the statute for cases of disputed compensation. Now, in cases of disputed compensation, the owner of the land is entitled to his costs of the inquisition, if no offer has been previously made by the company for the purchase of the land. Here no offer was made by the company; and it would seem to follow, according to the practice in other cases, that the claimant must have his costs. But, when we come to look more closely at the language of the 94th section, it seems to me that the only conclusion at which it is possible to arrive is, that there has been *casus omissus*; and that when the framer of the act inserted the words, “shall be ascertained as herein provided for cases of disputed compensation,” the provisions of the act with reference to such cases were not present to his mind. Now, the inquiry under the 94th section has two main branches—First, whether the expenses of the communication which the owner of the land insists upon having made are greater than the value of the land. If this is proved to be the case, the company have the option of taking the land. The second branch of the inquiry is a question of compensation: what is the value of the land, assuming that the company are bound to take it? If the present case could be considered to belong to the latter branch of inquiry, it might be regarded as a question of compensation. But here, unfortunately, we are dealing with what belongs to the first branch of the inquiry, and in such circumstances the

legislature seems to have made no provision for costs. If the value of the land had been greater than the expense of the desired communication, a question of compensation might have arisen. But the jury have found that the value of the land is less than the cost of the communication, so that there never has been any question of compensation, and there is therefore no right to costs. There can be no doubt that it would have been much better if the 94th section had stated in express terms whether or not the landowner was to be entitled to costs; but in the absence of anything to throw light upon the words of the section, we must take them by themselves; and all we can say is, that the regulations of section 51, concerning costs where a previous offer has or has not been made by the company, are not applicable here, and that it is not for us to supply any deficiency in the statute.

BLACKBURN, J.—I have come to the same conclusion,—like my Lord, with considerable doubt and hesitation. It seems to me that this is *casus omissus*, and that the legislature has not provided for the costs. Costs, I need hardly say, are not matter of right unless the intention of the legislature to give them has been made plain. Now the 94th section provides—[His Lordship read the section].—The value of the land intersected and the expense of making a communication with it are to be ascertained as provided in the statute for cases of disputed compensation. Now, where the company have only to consider the price to be paid for the land, they may readily make an offer; but where the landowner does not assent to the company's proposals, no offer can be made so as to supersede the necessity of an inquiry. The company may offer ten times the value of the land; but they have no right to take possession of it, so as to dispense with the inquiry. Now, what says the 94th section?—that the costs are to be ascertained as provided for in cases of disputed compensation. There are a number of sections in the act applicable to cases of disputed compensation; but the two sections relating to costs are section 34,—which provides (where any disputed compensation is referred to an arbitrator) that "all the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions,"—and section 51,—which provides, in the case of an inquiry before a jury, that where the verdict shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of the inquiry shall be borne by the promoters of the undertaking, but if the verdict be given for the same or a less sum than the sum previously offered by the promoters of the undertaking, &c., one-half the costs of summoning, impanelling and returning the jury, and of taking the inquiry and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking; and each party shall bear his own costs, other than as aforesaid, incident to such inquiry. In each section the legislature makes the right to costs dependent on the making of an offer. And it has been held that in a case where notice is given to the company by persons injuriously affected under the 68th section, the company have the same privileges as to costs as are given by section 51, if they make an offer within a reasonable time, although the legislature has made no express provision to this effect.² But in both these instances the right to costs depends on the amount of the offer; and under the 94th section, as I have already pointed out, no offer can supersede the necessity of an inquiry, and the legislature cannot be said to have incorporated the provisions of the statute as to costs into every part of this section. I can imagine cases where our decision may cause hardship; but the legislature has made no express allusion to the subject; and whether this

(2) His Lordship referred to the recent cases of *The Metropolitan Railway Company v. Turnham*, 14 Com. B. Rep. N.S. 212; s. c. 32 Law J. Rep. (N.S.) M.C. 212, and *Hayward v. the Metropolitan Railway Company*, 4 Best & S. 787; s. c. 33 Law J. Rep. (N.S.) Q.B. 73.

omission was caused by the parliamentary draughtsmen having overlooked the effect of the previous sections, or whether it was intentional, is no concern of ours. The rule must be discharged.

MELLOR, J.—I am of the same opinion. There seems to me to be an unsurmountable difficulty in endeavouring to apply the whole of the provisions of the statute as to costs in compensation cases to the words of the 94th section. It would appear that no offer can be made which would have the effect of protecting the company from their liability to costs, and I am therefore induced to think that the section was intentionally made silent as to costs. But whether this was the case or not, it seems to me that the words of the section do not incorporate the clauses giving costs. The value of the land is only collateral to the inquiry, and section 68. deals only with compensation for taking land or injuriously affecting it. A case of great hardship may be suggested, if a company, after paying compensation for injury to land by severance, were called upon years afterwards by a new owner to make communication between different parts of it, and made liable to the costs of a second valuation, which only proved that their own estimates were correct. The case is one of great difficulty; but I am unable to put any other construction upon the section than that adopted by my Lord and my Brother Blackburn.

Rule discharged.

[IN THE QUEEN'S BENCH.]

Jan. 25, 1865.

VALENTIN v. HALL.

35 L. J. Q.B. 121; 14 W. R. 606.

Witness, Commission to examine—Alleged Prejudice on the part of Judge of a Foreign Court—Cross-Interrogatories.

EVIDENCE.—Upon application for a commission to issue directed to the Judges of a foreign Court, to examine witnesses on the part of the defendant, it appeared that the action was brought, in forma pauperis, to recover the value of certain shares and coupons, and it was objected by the plaintiff's attorney that she had already been interrogated by one of the Judges (whose name appeared in the commission) in the course of proceedings taken against her abroad, respecting the same shares and coupons; and it was stated, that this Judge had put questions to her suggesting that she had been guilty of fraud; that he had threatened her with imprisonment, and refused to hear evidence on her behalf; and it was requested that, even if the commission were allowed, she might be at liberty to exhibit cross-interrogatories to the witnesses for the defence:—Held, that the commission might issue, the name of the Judge complained of to be omitted from it, and the foreign Court to be requested not to allow him to take part in the examination. The plaintiff to be at liberty to cross-examine on interrogatories, if the foreign Court would allow such interrogatories to be used.

Rule to shew cause why a commission should not issue, directed to M. Benoit-Champy, President, M. Bedel and M. Bertrand, Vice Presidents, and the Judges of the Tribunal Civil of the Seine, in France, for the examination at Paris of witnesses on the part of the defendant, and why another commission should not issue, directed to M. Puissegur, President, M. Rességuier, Vice President, and the Judges of the Tribunal Civil of Saint Gaudens, in the department of the Haute Garonne, for the examination at Saint Gaudens of witnesses on the part of the defendant.

It appeared from the affidavits that the action was brought by the plaintiff,

in forma pauperis, for the alleged seizing and taking of coupons and certificates of shares, negotiable securities and other papers and documents, and for the detention of certain notes of the Bank of France, coupons of the Orleans Railway, Crédit Mobilier, &c. The affidavits in support of the commission stated that two commissions in the cause had been already issued, directed to Mr. Maugham, of Paris, but that several witnesses, whose evidence was material, had refused to attend before him, though they were ready to be examined before any tribunal or Judge authorized to require their attendance and take evidence according to the law of France. The affidavits further stated that the Judges to whom the commission was proposed to be directed had power to compel the attendance of the witnesses and the production of their books, which contained entries relating to the title to the shares and coupons in question.

The commission was opposed by the plaintiff in an affidavit by her attorney, which stated, among other matters, that M. Bertrand, one of the proposed Commissioners, was not only mentioned in an affidavit by the defendant as intended to be examined as a witness for the defence, but that he was (according to the deponent's belief) the *Juge d'Instruction* by whom the plaintiff had been examined in France in proceedings against her relating to the shares and coupons in question. The affidavit went on to state, that it appeared from those proceedings themselves that M. Bertrand, in the course of the inquiry, had put questions to the plaintiff, suggesting that she had fraudulently attempted to prevent the shares and coupons from being traced. It also charged M. Bertrand with having kept the plaintiff in confinement, and otherwise endeavoured to intimidate her, and with having refused to hear evidence on her behalf. And it declared that, if the commission were directed to any Court of which M. Bertrand was a Judge, any witnesses who might be desirous of deposing in favour of the plaintiff would be intimidated, and their words and statements twisted and falsified to the prejudice of the plaintiff. In the event of either of the commissions being granted, the affidavit requested that it might be executed upon interrogatories and cross-interrogatories only (as the plaintiff was unable to afford the expense of employing any person to cross-examine the witnesses for the defence), and that the names, addresses and a full description of each witness intended to be examined on behalf of the defendant might be communicated to the plaintiff a sufficient time before the examination of these witnesses, to enable inquiry to be made about them. The cross-interrogatories not to be communicated to the defendant nor to the witnesses until their examination in chief was concluded, when they should be exhibited to them singly.

Quain now shewed cause.—The case of *Lumley v. Gye* (2 El. & B. 216; s. c. 23 Law J. Rep. (N.S.) Q.B. 112) will be relied upon by the defendant in support of the commission. In that case a commission was directed to the Judges of a foreign Court, the witnesses having refused to be examined except by a foreign Judge. Here, however, there are additional objections to the proposed commission. It may possibly be entrusted to M. Bertrand, who has already examined the plaintiff and charged her with fraud and dishonesty. But if the Court are disposed to allow the commission, on the authority of *Lumley v. Gye* (2 El. & B. 216; s. c. 23 Law J. Rep. (N.S.) Q.B. 112), then it is submitted that the plaintiff ought to be allowed to exhibit cross-interrogatories to the defendant's witnesses. It cannot be presumed that the French Court will refuse to administer these interrogatories.

J. D. Coleridge, in support of the rule.—With regard to the objection that the commission ought not to be directed to the Tribunal Civil of the Seine, of which M. Bertrand is a member, it has been ascertained that this tribunal, is composed of seventy-five members, and that it is the only one which would have jurisdiction to take the evidence which is required.

[BLACKBURN, J.—It would cause much delay if we were to direct inquiries as to the existence of any other competent tribunal.]

*Per Curiam*¹.—The rule must be made absolute for the commission to issue. The name of M. Bertrand to be left out of the commission to the Tribunal of the Seine, and that Court to be requested not to allow him to take part in the examination. The plaintiff to be at liberty to cross-examine on interrogatories, if the French Court will allow such interrogatories to be used. Copies of these interrogatories to be delivered to the defendant before the commencement of the examination.

Rule absolute.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Queen's Bench.)

Feb. 1, 2, 1866.

M'CREA v. HOLDSWORTH AND OTHERS.

35 L. J. Q.B. 123; L. R. 1 Q.B. 264: affirmed, [1867] E. R. A.; 36 L. J. Q.B. 297; L. R. 2 H. L. 380; 14 W. R. 374 (Exl. Ch.).

Copyright of Designs—Registration by Deposit of Pattern with the Registrar—21 & 22 Vict. c. 70. s. 5.—5 & 6 Vict. c. 100. s. 3.

COPYRIGHT.—By the Copyright of Designs Act, 1858, section 5, the registration of any matter or portion of article of manufacture to which a design is applied instead or in lieu of a copy, drawing, &c., shall be as valid and effectual as if such copy, drawing, &c. had been furnished to the registrar under the "Copyright of Designs Act":—Held, that a design formed by the combination of shaded and bordered stars upon an ornamented chain surface might be registered under this section, by simply depositing with the registrar a piece of woven cloth to which this combination had been applied; as the design, which must be taken to be the combination of ornaments on the cloth, was sufficiently disclosed.

Whether a design is sufficiently disclosed by a pattern or piece of cloth, is a question for the Court.

This was an appeal from the decision of the Court of Queen's Bench, discharging a rule to enter a verdict for the defendants. The facts and pleadings will be found in the report of the decision appealed from (5 Best & S. 495; s. c. 33 Law J. Rep. (N.S.) Q.B. 329), and it will be sufficient, in order to understand the nature of the appeal, to state that the action was brought for infringing a design of which the plaintiff claimed to be the proprietor under 5 & 6 Vict. c. 100²; and that the material plea was, that there had been no sufficient registration of the design according to the provisions of the statute.

(1) Cockburn, C.J., Blackburn, J., Mellor, J. and Lush, J.

(2) By 5 & 6 Vict. c. 100. s. 3. it is provided, that the proprietor of any new and original design not previously published in Great Britain and Ireland or elsewhere (whether the design be applicable to the ornamenting of any article of manufacture, or of any substance artificial or natural, or partly artificial and partly natural, and whether such design be so applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means such design may be so applicable, separate or combined), shall have the sole right to apply the same to any article of manufacture or to any such substances as aforesaid, provided the same be done within the United Kingdom of Great Britain and Ireland (for the respective terms given in a table in the act). The section specifies a number of classes of articles, of which class 12. is "Woven fabrics not comprised in any preceding class."

By section 4, no person is to be entitled to the benefit of the act unless the design is duly registered.

By section 15 (prescribing the mode of registration), the inventor is to furnish the Registrar with two copies, drawings or prints of his design previous to registration.

By 21 & 22 Vict. c. 70. s. 5 (the Copyright of Designs Act), the registration of any pattern

On the second trial of the case, on the 18th of February, 1864, before Cockburn, C.J., at Guildhall, it appeared that the plaintiff had registered his design by furnishing to the registrar of designs (appointed under the act) two similar rectangular pieces of a woven fabric to which the pattern which he claimed had been applied. The registrar was furnished with the name, style and address of the plaintiff as proprietor of the design, and with the number of the class (class 12.) in respect of which the registration was made; but he was furnished with neither copy, drawing, print, specification or description in writing of the patterns. He gave to the plaintiff a certificate of registration with one of the pieces of the fabric annexed to it. The plaintiff before trial delivered as particulars of the novelty of his design, "the particular collocation of the shaded and bordered stars upon the ornamental chain surface as shewn in the registered pattern, thus forming together the ornamentation of the woven fabric." At the trial, the plaintiff claimed the combination of the particular stars on the particular groundwork in the manner shewn by the registered pattern, as forming one design applicable to the formation of woven fabrics comprised in class 12, but did not contend that the groundwork of the pattern was new or original.

It was contended by the defendants that they were entitled to have the verdict entered in their favour on the question of registration, as the plaintiff by his peculiar mode of registration had not clearly indicated the design which he intended to register.

The jury in answer to questions put to them by the Chief Justice, found that the star in question was new and original; that the combination of the star in question on the particular groundwork as shewn in the registered pattern was a new and original design, applicable to the ornamenting of woven fabrics comprised in class 12, and that this combination was the design which the plaintiff intended to register and had in fact registered. A verdict was entered for the plaintiff, with leave for the defendants to move to set it aside. A rule *nisi* for that purpose was accordingly granted by the Court of Queen's Bench, on the ground that the registration was bad. This rule was discharged by the Court in Trinity Term, 1864, and the present appeal was thereupon instituted.

Manisty (*Denman* and *Kemplay* with him), for the appellants, the defendants.—It is submitted that the decision of the Court below cannot be supported, as there has been no registration of the design in question within the meaning of the statutes. It is not easy to say what pattern is delineated on the piece of fabric which was registered, and it must be left to the jury to say what is the design which the plaintiff intended to register. A description in writing and by drawings is required by the 5 & 6 Vict. c. 100. before a design can be properly registered. The later act, the 21 & 22 Vict. c. 70. s. 5, allows the registration of a pattern or portion of an article of manufacture to be substituted for the previous mode of registration. Where the new practice is not closely adhered to, the old one still exists. Registration of a pattern or portion of an article to which a design is applied, must mean the registration of something which discloses beyond a doubt the pattern or design. It is otherwise, the alternative description would be inferior to the former one, and the legislature never intended that this should be the case. In *Norton v. Nicholls* (1 El. & El. 761; s. c. 28 Law J. Rep. (N.S.) Q.B. 225) it was laid down by Lord Campbell that in order to register a design under the former act, the inventor must give satisfactory information of the nature of his claim.

[ERLE, C.J.—In that case the Court expressed an opinion that the registration of the design was insufficient, saying that the article of manufacture, and not the design, was registered. Is it not for the Court to say whether the pattern or piece of cloth sufficiently describes a design?]

It would be necessary for the Court to receive evidence as to the different

or portion of an article of manufacture to which a design is applied, instead or in lieu of a copy, drawing, print, specification or description in writing, shall be as valid and effectual to all intents and purposes as if such copy, drawing, print, specification or description in writing had been furnished to the registrar under the "Copyright of Designs Acts."

parts of it, and this evidence might be conflicting. The 21 & 22 Vict. c. 70. did not intend to reform the provisions of the 5 & 6 Vict. c. 100, but applied only to 6 & 7 Vict. c. 65, which extended the protection given by the former act to articles which were not of an ornamental character. Such articles, which have no complicated pattern, might perhaps be registered in the mode adopted by the plaintiff; but the same rule does not apply to a design made of many pieces and ornaments.

Mellis (Gray and Philbrick with him) was not called upon to argue.

ERLE, C.J.—We are of opinion that the judgment of the Court below ought to be affirmed. It seems to me that each and every part of the article deposited with the registrar must be taken to be part of the design which the plaintiff intended to register. It is the combination as described in the particulars, that is, the collocation of stars upon the ornamental chain surface as shewn in the pattern, which makes up the whole of the design, and a piece of cloth which did not shew the whole of the pattern would not be sufficient for a complete registration. I think that our decision will be productive of no disadvantage to the interests of the public at large. If a person took the star alone, no action would lie against him; nor, on the other hand, if he took the chain, though each of these ornaments might be new. There would be no infringement of the design, unless the particular combination were appropriated by the defendant. Whether the design or any part of it, is new or old is a question for the jury; but it is for the Court, looking at the words of the statute and at the particular pattern which is brought before them, to say whether the plaintiff has duly and properly registered his design. We are of opinion that what he has done is sufficient.

POLLOCK, C.B., MARTIN, B., PIGOTT, B., WILLES, J., KEATING, J. and MONTAGUE SMITH, J. concurred.

Judgment affirmed.

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Queen's Bench.)

Feb. 3, 1866.

THE QUEEN v. THE LOCAL BOARD OF HEALTH OF THE
BOROUGH OF GODMANCHESTER.

35 L. J. Q.B. 125; L. R. 1 Q.B. 328; 14 L. T. 104; 14 W. R. 375: affirming,
34 L. J. Q.B. 13; 13 W. R. 155; 5 B. & S. 886 (Q.B.).

Public Health Act, 1848 (11 & 12 Vict. c. 63), ss. 2, 43, 58.)—Meaning of Word "Sewer"—Rights of Local Board over Natural Streams or Brooks.

LOCAL GOVERNMENT.—SEWERS AND DRAINS.—A natural stream or water-course, of about a mile and a half in length, from 15 to 14 feet in breadth, and from 5 to 3 feet in depth, flowed through arable land into a river. It received at one point the drainage of two or three houses:—Held, that it was not a "sewer," within the meaning of the Public Health Act, 1848.

A mandamus directed to a local board of health, stating that a sewer is in such a state as to be a nuisance, and commanding the local board to cleanse it, cannot be enforced, as it does not shew (according to the Public Health Act, 1848, s. 58.) that the person causing the nuisance, or the owner or occupier of the premises where it exists, have failed to comply with notice to remove it.

This was an appeal from a decision of the Court of Queen's Bench,

directing the verdict on the issues raised by the first and second pleas to the return to a mandamus directed to the local board of health of the borough of Godmanchester, to be entered in favour of the defendants.

This mandamus recited that a drain, sewer or watercourse in the borough of Godmanchester, and known by the name of Stonehill Brook, which was vested in and under the management of the local board, whose duty it was, under the Public Health Act, 1848, to cause this drain, sewer or watercourse to be properly scoured, cleansed, emptied and kept, so as not to be a nuisance or injurious to health, had been for some time past in a foul, unclean and improper state, so as to be a nuisance and injurious to health, and that it had caused damage to landowners by overflowing. It then enjoined the local board to cause the drain, &c., to be properly cleansed and kept.

Return—That Stonehill Brook was not a sewer vested in the local board, according to the Public Health Act, 1848; that it was a sewer made and used for the purpose of draining, preserving or improving land, under a local act of 43 Geo. 3; and that the sewer ought to have been repaired and kept at the expense of the proprietors of lands which were divided and inclosed under the act.

Pleas—First, that the drain, sewer and watercourse in the writ mentioned was a sewer vested in and under the management and control of the local board, and that it was their duty, according to the Public Health Act, 1848, to clean and keep it so as not to be a nuisance or injurious to health; secondly, that it was not a sewer made and used under the local act, and liable to be repaired and kept at the expense of the proprietors of lands adjoining.

Upon these pleas issue was joined.

The facts are stated in a special case, which will be found in the report of the decision of the Queen's Bench (34 Law J. Rep. (N.S.) Q.B. 13).

It will be sufficient for the purposes of this report to say that Stonehill Brook is a stream or watercourse within the parish of Godmanchester, a district within the meaning of the Public Health Act. The whole length of its course between the London road and the river Ouse is about a mile and a half. The water of the brook between the London road and West Street is solely supplied by the drainage, natural and artificial, of a considerable area of cultivated soil, but at one point the drains of two or three inhabited houses empty themselves into the brook; but with the exception of these drains, no drains, other than the drains underground and open of purely agricultural land, discharge themselves into the brook. The channel of the brook is the natural channel of a certain natural stream, except so far as its character has been altered by the acts of the Inclosure Commissioners, acting under a local Inclosure Act of 43 Geo. 3. These persons, between 1802 and 1809, cleared out the channel of the natural stream, and in various places along its course somewhat widened and deepened it, to render it more efficient as a means of draining a portion of the tract of land, subject to the provisions of the act. Afterwards, the owner of a neighbouring farm diverted the course of the stream into an artificial channel, which ran on for a length of seven chains, and re-entered the old channel. About the same time another landowner also diverted the course of the stream into an artificial channel, running to the length of about eighteen chains, and then re-entering the old channel. The width of the brook varies from about fourteen feet at its upper extremity to about fifteen feet at its lower, and its depth from about three feet to about five feet between the same limits. Stonehill Brook, before the Inclosure Act, was cleared out and repaired sometimes at the joint expense of all the owners of the land, subject to the provisions of that act, and sometimes by paupers of the parish of Godmanchester, under the direction of the overseer of the poor of the parish for the time being, and paid by him out of the general poor-rates of the parish. After the inclosure, the brook was for a short time cleared out and repaired, when necessary, by the paupers of the parish of Godmanchester, under the direction of the overseer of the poor of that parish

for the time being, and paid by him out of the general poor-rates of the parish; but for the last thirty years or thereabouts it has been cleared out and repaired by the owners of the lands through which it passes, each doing that portion of it which traverses his own land.

It was admitted that Stonehill Brook was and is in a foul, unclean and improper state and condition, so as to be a nuisance and injurious to health, as alleged in the writ of mandamus, and that for want of being properly scoured, cleansed, emptied and kept, it had become and was at the time in the writ mentioned and still was liable to overflow and damage, and then had overflowed and damaged the land adjoining it and the public way.

The question for the opinion of the Court was, whether the prosecutor or the defendants were entitled to the verdict on the first and second pleas to the return to the writ.

Keane (D. Brown and Markby with him), for the appellant.—In the first place, the judgment of the Court below cannot be supported if it be shewn that on the face of the record Stonehill Brook is a "sewer," within the meaning of the Public Health Act.¹ It is submitted that this stream is not within the exceptions of either section 2. or section 43. By section 2. the word "drain" is limited to the meaning house-drain. The word "sewer" is declared to mean and include sewers and drains of every description, except drains to which the word "drain," interpreted as above, applies. "District" is to comprise the entire area of places within the limits of any district to which the act shall be applied. It will be said that these definitions are explained by the preamble, which limits the operation of the act to towns and populous places. But section 88. prescribes the mode of rating the occupiers of arable land. The definition in *Callis on Sewers*, 4th edit., by Broderip, p. 99. is still applicable. *Callis* says that it is a freshwater trench, compassed on both sides, and a diminutive of river. With regard to the objection that this is a sewer for draining, &c., land under a local act, in *Coulton v. Ambler* (13 Mee. & W. 403; s. c. 14 Law J. Rep. (N.S.) Exch. 10), it was held that a stream like the present one was not a drain within the meaning of a local

(1) The 11 & 12 Vict. c. 63. (the Public Health Act) recites "that further and more effectual provision ought to be made for improving the sanitary condition of towns and populous places in England and Wales, and it is expedient that the supply of water to such towns and places, and the sewerage, drainage, cleansing and paving thereof should, as far as practicable, be placed under one and the same local management and control, subject to such general supervision as hereinafter provided."

By section 2. "the word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom, with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed. The word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies."

By section 43. "all sewers, whether existing at the time when the act is applied, or made at any time thereafter (except sewers made by any person or persons for his or their own profit, or for the profit of proprietors or shareholders, and except sewers made and used for the purpose of draining, preserving or improving land under any local or private act of parliament, or for the purpose of irrigating land, and sewers under the authority of any Commissioners of Sewers appointed by the Crown), together with all buildings, works, materials, and things belonging or appertaining thereto, shall vest in, belong to and be entirely under the management and control of the local board of health."

By section 58. "the local board of health shall drain, cleanse, cover, or fill up, or cause to be drained, cleansed, covered or filled up all ponds, pools, open ditches, sewers, drains and places containing or used for the collection of any drainage, filth, water, matter or thing of an offensive nature or likely to be prejudicial to health, and they shall cause written notice to be given to the person causing any such nuisance, or to the owner or occupier of any premises whereon the same exists, requiring him within a time to be specified in such notice to drain, cleanse, cover or fill up any such pond, pool, ditch, sewer, drain or place, or to construct a proper sewer or drain for the discharge thereof, as the case may require; and if the person to whom such notice is given fail to comply therewith, the said local board shall execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be recoverable by them from him in a summary manner, or, by order of the said local board, shall be declared to be private improvement expenses, and be recoverable as such in the manner hereinafter provided."

act, giving powers over public and parish drains—see also *Stracey v. Nelson* (12 Ibid. 535; s. c. 13 Law J. Rep. (N.S.) Exch. 97. Secondly, the brook is not within any of the exceptions in section 43. It is not a sewer made by private persons for their profit; since it is for the equal advantage of all who dwell near it—*The Queen v. Whitmarsh* (15 Q.B. Rep. 600; s. c. 19 Law J. Rep. (N.S.) Q.B. 469) and *Bear v. Bromley* (18 Ibid. 271; s. c. 21 Law J. Rep. (N.S.) Q.B. 354); and the profit is derived by each person who uses it from his land, not from the sewer. Neither is it a sewer made and used for draining, preserving and improving land, under the Godmanchester local act, 41 Geo. 3. c. cix.—*Logan v. Burton* (5 B. & C. 513). It is made under an award which was not in accordance with the provisions of that act.

[WILLES, J.—I find that, in *Com. Dig.* tit. 'Sewers,' C. 1), the word "sewer" is extended to arms of the sea, creeks, havens and ports.]

But, lastly, the appellants are entitled to judgment under section 58, for it is admitted that the stream is offensive and injurious; and the local board are, therefore, bound to cleanse it. He also referred to *Ostler v. Cooke* (13 Q.B. Rep. 143; s. c. 22 Law J. Rep. (N.S.) Q.B. 71), *Lord Falmouth v. Richardson* (3 B. & C. 837) and *Paul v. James* (1 Q.B. Rep. 832; s. c. 10 Law J. Rep. (N.S.) Q.B. 246).

J. Brown (*Metcalfe* with him), for the respondents.—If Stonehill Brook is a "sewer," within the meaning of section 2, there is hardly a natural stream in England that will not come within the definition. The old definitions of the word "sewer" cannot be applied to this case. It appears from the passage which has been referred to in *Com. Dig.* that this word extended to arms of the sea, and had a larger meaning than that which was intended by the Public Health Act. The preamble of the act shews that it was intended for the benefit of towns and populous places, and the statutory meaning of "sewer" must therefore be taken to be "town sewer." As to the last point taken by the appellants, section 145. forbids the local board to interfere with private streams and watercourses without the consent in writing of the persons interested in them. But there is no allusion to persons so interested in the mandamus.

Keane, in reply.—"Sewer" is *nomen generalissimum*, and refers to every sort of sewer. Arable lands are made ratable by and are clearly within the contemplation of the act.

EARLE, C.J.—I think that the judgment of the Court below ought to be affirmed. I agree with the reasons which they have assigned for their judgment, and particularly in thinking that Stonehill Brook is not a sewer, within the meaning of the Public Health Act. That statute, when the preamble is considered, appears to have been intended to apply to towns and populous places; and I do not think that the section vesting sewers in the local board can extend to a natural stream of the extent and description of that which is the subject of this appeal. If it were necessary, the respondents might resort to other objections, as that this was a stream made and used for the purpose of draining, preserving or improving the land, within the exception in section 43. But I need not enter upon this part of the question. The third point upon which Mr. Keane has relied for some time weighed considerably with me. He argued that as this brook was acknowledged to be a nuisance, section 58. afforded a remedy by directing the local board to drain, cleanse, cover or fill all ponds, pools, open ditches, sewers, drains and places containing or used for the collection of any drainage, filth, water, matter or thing of an offensive nature or likely to be prejudicial to health. But we cannot give judgment for the appellants on that ground, because the section does not impose on the local board the duty of removing the nuisance except in this sense—that the board is bound to give written notice to the person causing the nuisance, or to the owner or occupier of the premises where it exists, requiring him to do what is necessary; and upon default it is empowered to

execute what works are required, and charge the expenses on the defaulting person. Now, the commands of this mandamus are not framed in accordance with the provisions of this section; for the local board are themselves directed to remove the nuisance without shewing how they are liable to do so. In no respect, therefore, can the arguments of Mr. Keene be supported.

POLLOCK, C.B., WILLES, J., CHANNELL, B., PIGOTT, B. and MONTAGUE SMITH, J. concurred.

Judgment affirmed.

[IN THE QUEEN'S BENCH.]

April 16, 1866.

HOLMES AND OTHERS v. JAKES.

35 L. J. Q.B. 130; L. R. 1 Q.B. 376; 14 L. T. 252; 14 W. R. 584;
12 Jur. N.S. 486.

Promissory Note—Alternative Payee—Uncertainty.

BILLS OF EXCHANGE.—*The defendant gave to the trustees of a chapel a document as follows: "On demand, I promise to pay to the trustees of, &c., or their treasurer for the time being, the sum of," &c.:—Held, in an action by the trustees, that there was no uncertainty as to the persons to whom the money was to be paid, so as to make the document had as a promissory note.*

Declaration, that the defendant by his promissory note promised to pay to the plaintiffs the sum of 100*l.* by certain instalments, and that he had not paid the same.

Plea, denying the making of the note. Issue joined.

At the trial, which took place at the last Spring Assizes for Yorkshire, before Shee, J., it appeared that the action was brought by the plaintiffs, who were the trustees of the Wesleyan Chapel at Harrogate, to recover the amount of a promissory note made by the defendant; one of the plaintiffs was the treasurer as well as a trustee. The note in question was as follows:

"Harrogate, March 18, 1861.

"£100.

"On demand, I promise to pay to the trustees of the Wesleyan Chapel, Harrogate, or their treasurer for the time being, the sum of 100*l.*, in four equal instalments of 25*l.* each, each of such instalments to be due and payable on the 1st day of October annually, for value received. As witness my hand,

"Williams Jakes."

The verdict was entered for the plaintiffs for 100*l.*, and the learned Judge gave leave to the defendant to move to set that verdict aside, and enter a verdict for the defendant instead thereof.

Manisty now moved accordingly.—The document declared on is not a promissory note at all. It is in the alternative, the promise being to pay the trustees or their treasurer for the time being. In order that such a document should be good as a promissory note, it is necessary that the payee should be a person or body certain, and not fluctuating. The same kind of question was before the Court in *Blanckenhagen v. Blundell* (2 B. & Ald. 417). There the declaration alleged that the defendant made a promissory note, by which he promised to pay to J. P. Damer or to the plaintiffs 250*l.*, and the Court held that it was not a promissory note, Chief Justice Abbott saying, "I have no doubt that this instrument, in the form in which it is declared on, is not a promissory note within the statute of Anne; for if a note is made payable to one or other of two persons, it is payable to either of them only on the

contingency of its not having been paid to the other, and is not a good promissory note within the statute."

[LUSH, J.—Was there not a case something like the present recently determined in this court, where the note was held bad because the payee was uncertain?]

Yes, *Cowie v. Stirling* (6 El. & B. 333; s. c. 25 Law J. Rep. (N.S.) Q.B. 335).

[COCKBURN, C.J.—But the question here is, whether the mention of the treasurer for the time being is anything more than a matter of convenience. Would such a note be bad where the two parties named in the alternative are substantially the same persons? The trustees and the treasurer were intended to be connected.]

Still there are the two payees; and if payment had been made to the treasurer, how could that be pleaded in an action by the trustees?

[COCKBURN, C.J.—No doubt, in one sense, the promise is in the alternative; but it is not so in another sense, for the treasurer is the agent of the trustees.]

In *Yates v. Nash* (8 Com. B. Rep. N.S. 581; s. c. 29 Law J. Rep. (N.S.) C.P. 306) it was held, that to constitute a valid bill of exchange the payee must be a person who is capable of being ascertained at the time the instrument is drawn.

[BLACKBURN, J.—I do not quarrel with the law laid down in that case, but here it is only a lengthened way of stating, "I promise to pay to the trustees." LUSH, J.—If the instrument is construed to mean, "I will pay the trustees by the hand of their treasurer," is there any reason why it should not be a good note?]

COCKBURN, C.J.—I think that there must be no rule. I fully concur in the proposition stated by Mr. Manisty, that the payee of a promissory note must be a person certain; but it appears to me that all that this promissory note shews is, that the amount was payable to the trustees in the first instance, but that the payment might be made through the medium of their treasurer, as the agent of the trustees. His authority, derived from them, was not to bring an action upon the note, but to receive the money. Suppose the promise had been to pay to the trustees, or to their bankers, or to their agents in that behalf, would not that be a valid promissory note? We should introduce an unnecessary degree of strictness if we held that this was not a good note, as there is no uncertainty as to who the payees were.

BLACKBURN, J.—I am of the same opinion. I think that this instrument means, "I promise to pay to the trustees or to their servant, and I give you notice that I will pay to the treasurer for the time being." I notice that in *Blanckenhagen v. Blundell* (2 B. & Ald. 417), Mr. Justice Bayley said, in his judgment, "If there had been any community of interest stated between the payees, so as in any respect to identify Damer and Blackenhagen, it is possible that an action might have been maintained upon this note." Now, here, there being a community of interest, there is no uncertainty, and therefore the note appears to me to be good, though I agree with the law as stated by Mr. Manisty.

SHEE, J.—I also think that this note means, "I will pay to the trustees or their treasurer for the time being, who is authorized to receive the payment."

LUSH, J.—In the two cases of *Blanckenhagen v. Blundell* (2 B. & Ald. 417) and *Cowie v. Stirling* (6 El. & B. 333; s. c. 25 Law J. Rep. (N.S.) Q.B. 335) there were no persons named as those certainly to whom the payment was to be made; but in the present case there are persons particularly specified, and I think that the note ought to be construed to mean, "I promise to pay to the trustees or their agent, the treasurer, for the time being."

Rule refused.

[IN THE QUEEN'S BENCH.]

April 18, 1866.

Ex parte SAMUEL FORREST.

35 L. J. Q.B. 131; 14 L. T. 285; 14 W. R. 607; 12 Jur. N.S. 499.

Attorney and Solicitor—Articled Clerk—Form of Articles—Indenture of Apprenticeship—6 & 7 Vict. c. 73. ss. 8, 9.

SOLICITOR.—*In the year 1847 F, being then in his sixteenth year, was, with the consent of his father, bound by indenture to serve H, an attorney, for a period of more than five years. The indenture was in the form of an indenture of apprenticeship, but contained the usual covenants inserted in articles of clerkship; and it was stamped with a 1l. stamp. After F. had served under it for two years, he discovered that it was not in the proper form, and he applied to H. to cancel it, and enter into proper articles. Although H. was willing that this should be done, it was not carried out, in consequence of the inability of the father of F, and also of F. himself, to find the money for the stamp and penalty. F. served H. as a clerk until 1858, when H. died, and he afterwards continued to serve the successor of H. until 1864. He was competent to carry on the business of an attorney and solicitor:—Held, that the indenture might be treated as articles of clerkship, and upon its production, properly stamped, it might be enrolled, and the service allowed to count from the time at which F. entered upon the service with H.*

This was an application to obtain the opinion of this Court that an indenture of apprenticeship, under which Mr. Samuel Forrest had served as an articled clerk, might be treated as articles of clerkship, and that, upon its production, properly stamped, it might be enrolled *nunc pro tunc*, and that the service might be reckoned from the date of the indenture.

It appeared that in the year 1847, when Mr. Forrest was only in his sixteenth year, he was, with the consent of his father, bound to serve Mr. Hamp, an attorney, at Liverpool, for a period of more than five years. The document, instead of being in the usual form, was in the form of an ordinary indenture of apprenticeship, and was stamped with a 1l. stamp. There was a covenant by Mr. Hamp to instruct him in the usual form, and Mr. Forrest served under it for the whole period and up to the death of Mr. Hamp in 1858, after which time he continued to serve his successor till the year 1864. His affidavit shewed that he served for two years before he discovered that the indenture was not in the proper form, that he then applied to Mr. Hamp to cancel it, which he was willing to do, and to execute proper articles. This, however, was not done, in consequence of want of means in his father; and, subsequently, in consequence of his marriage, he himself was unable to bear the expense. He was now able to pay for the stamp and the penalty, and was fully competent to carry on the business of an attorney and solicitor. His father had advised him to continue to serve under the indenture. Upon application to the Commissioners of Stamps, with a view of making an application to this Court, he was informed that, in consequence of the lapse of time, the indenture could not be stamped without an order from the Treasury, and the Treasury refused to make such an order unless this Court should express an opinion that the indenture could properly be construed as articles of clerkship.

Joseph Brown now moved accordingly.—It must be admitted that the document under which Mr. Forrest has served is in a form most unusual; but it is also clear that it contains all the material parts which are contained in the regular forms of articles of clerkship, and which are required under the 6 & 7 Vict. c. 73. ss. 8. and 9. He was bound by "contract in writing to serve," and he has served more than five years under the contract. These sections referred to do not shew that any particular form is necessary.

[COCKBURN, C.J.—We think that we may treat this as an exception to the general rule, and we state our opinion that there is no objection to the Treasury making the order required by the Commissioners of Stamps; but, of course, we must be satisfied that it is a proper case for the interference of the Court before the rest of the application can be granted.]

It is submitted that the case falls within the rule which has been laid down by the Courts upon this subject. The affidavits shew that the reason why articles were not regularly and properly entered into, after the discovery was made that the indenture was not in the usual form, was, that neither the father nor the son were in circumstances which would enable them to bear the expense. There has been no speculation as to avoiding the payment of the duty, in case the prospect of success in the profession should appear to be indifferent, neither has there been any intention to defraud the revenue. The rule is laid down by Chief Justice Erle, in *Ex parte Bishop* (9 Com. B. Rep. N.S. 150; s. c. 30 Law J. Rep. (N.S.) C.P. 48), "If the non-payment of the duty was the result of some unforeseen contingency, something over which the party had no control, I should be disposed to assist him; but if the omission was intentional, and part of a scheme to make use of the service under the articles, in the event of its proving a promising speculation, I should decline to grant the application." And this ruling was approved of by the Lord Chief Justice in this Court in *Ex parte Wilson* (4 Best & S. 889, 895; s. c. 33 Law J. Rep. (N.S.) Q.B. 89). *Ex parte Edwards* (32 Law J. Rep. (N.S.) C.P. 213) is to the same effect—see, also, *In re Breden* (12 Com. B. Rep. N.S. 351; s. c. 31 Law J. Rep. (N.S.) C.P. 321); and the law is settled by all the three Courts, as appears from *Ex parte Wilson* (4 Best & S. 889, 895; s. c. 33 Law J. Rep. (N.S.) Q.B. 89). Mr. Forrest has suffered from the negligence of his father and of Mr. Hamp, not from any misconduct of his own.

COCKBURN, C.J.—I think that this case falls within the decisions which Mr. Browne has referred to. The discovery of the mistake was not made till late after the service began under the indenture, and the parties were not then able to pay the penalty and the duty. As far as I can see, there has been no intentional default on the part of the applicant, and I think that we may direct that, upon the indenture being brought in, properly stamped, it may be enrolled, and the service allowed to count from the date in the year 1847.

BLACKBURN, J. and SHEE, J. concurred.

Application granted.

[IN THE QUEEN'S BENCH.]

April 23, 1866.

STRAUSS v. FRANCIS.

35 L. J. Q.B. 133; 6 B. & S. 365; L. R. 1 Q.B. 379; 14 L. T. 326;
14 W. R. 634; 12 Jur. N.S. 486.

Applied, *Holt v. Jesse*, [1876] E. R. A.; 46 L. J. Ch. 254; L. R. 3 Ch. D. 177;
24 W. R. 879 (Ch. D.). Discussed, *Neale v. Lady Gordon Lennox*, [1902]
E. R. A.; 71 L. J. K.B. 536; [1902] 1 K.B. 838 (C. A.): reversed, [1902]
A.C. 465; 87 L. T. 341; 51 W. R. 140 (H.L.).

Counsel, Duty of—Trial—Withdrawal of Juror—Settlement of Cause.

BARRISTER. COMPROMISE.—*In the course of the trial of an action for libel the plaintiff's counsel proposed to the counsel for the defendant that a juror should be withdrawn. The proposal was accepted, and the cause thus settled. The plaintiff had not been consulted by his counsel, and had given no authority*

for such a step being taken, but wished the case to go to the jury. The counsel had also been requested by the clerk to the plaintiff's attorney, who had the management of the cause, to let the case go to the jury, as the plaintiff would not consent to the withdrawal of a juror:—Held, that this was a step in the cause which the counsel had authority to take, and a rule to set aside proceedings and for a new trial was refused.

The declaration charged the defendant with having published a libel concerning a book written by the plaintiff, and called "The Old Ledger."

The defendant pleaded not guilty.

At the trial, which took place at the last Surrey Assizes, before Erle, C.J., it appeared that the defendant was the publisher of the *Athenæum*, in which had appeared a review of the book, and which was alleged to be an unfair and malicious libel.

The plaintiff proved his case by putting in the alleged libel, and by calling a witness to prove that it applied to the book written by the plaintiff. The defendant's counsel then proceeded to address the jury, and in the course of his address he read certain extracts from the book. It was sworn by the plaintiff, that in the midst of the address of the defendant's counsel, he was beckoned out of court by his attorney's clerk, who informed him that his counsel intended to throw up the case, and to propose that a juror should be withdrawn; that he at once energetically protested against this intended proceeding of his counsel, and insisted that the book should be put in evidence; that he told his attorney's clerk that no consideration should induce him to withdraw the case from the cognizance of the jury, or to consent to such withdrawal. When he returned into court he was just in time to hear the reply of the defendant's counsel to the proposition to withdraw a juror, and the concluding observations of the Judge. If he had been in time he would have protested against the proposed abandonment, and would have asked his counsel for the brief and that he would allow him to conduct his own case. That he was not consulted by the counsel, who acted throughout upon his own personal responsibility. That he never authorized him to withdraw a juror, but intended him to let the case go to the jury.

It was also sworn by the clerk to the plaintiff's attorney that he did not in any way sanction the withdrawal of a juror, but that he requested his counsel to let the case go to the jury, as the plaintiff would not consent to the withdrawal of a juror.

The counsel for the plaintiff and defendant respectively agreed that the cause should be settled by the withdrawal of a juror, and this was done.

Kenealey now moved for a rule calling upon the defendant to shew cause why the proceedings should not be set aside and a new trial had. No counsel can take the step of withdrawing a juror without authority given him by his client to take such a step. Here it was done against the consent of the plaintiff. There can be only one *dominus litis* of a cause, and the counsel cannot be such *dominus litis*. The plaintiff's counsel has consented to a compromise, which has the effect of putting an end to the plaintiff's right of action altogether if such compromise can be sustained. A counsel has less authority than an attorney, but an attorney would be liable to an action if he settled a cause without the authority of his client; and if so, a counsel cannot have such power unless it be expressly given to him by his client. When a brief is accepted by counsel he contracts to employ his eloquence and his skill for the benefit of the client, but he has no right to take upon himself to act upon his own judgment, and settle a cause against the will of his client. The judgment of Mr. Justice Crowder in *Swinfen v. Swinfen* (1 Com. B. Rep. N.S. 364; s. c. 26 Law J. Rep. (N.S.) C.P. 97) shews what the law is, and that learned Judge there held that the agreement which had been come to by the counsel was not binding upon the plaintiff.

[MELLOR, J.—In that case the arrangement was as to the partition of an estate, and differs much from dealing with a cause by withdrawing a juror.]

It is submitted that there is no real difference; the arrangement here amounts to a dealing with the reputation and character of the plaintiff. The view taken by the Master of the Rolls, and also by the Lords Justices, is substantially the same—*Swinfen v. Swinfen* (24 Beav. 549; s. c. 27 Law J. Rep. (N.S.) Chanc. 490). If the counsel conceived that he had any authority in the first instance to settle the cause he received notice that such authority had been withdrawn. His authority was to go to the jury and nothing else. In delivering judgment in *Swinfen v. Swinfen*, Mr. Justice Crowder says (26 Law J. Rep. (N.S.) C.P. 104), "If, therefore, in any such cases a counsel, under a misapprehension of his client's instructions, and believing himself to have authority, acts in fact without it, he cannot, in my opinion, bind his client. Where a litigant party in a cause entrusts his brief to a counsel, his object is to have the benefit of his advocacy, and not to employ an agent to negotiate terms of compromise."

BLACKBURN, J.—I think that we should not be acting rightly if we granted a rule in this case. At the trial, the counsel for the plaintiff thought that he was doing the best thing for his client in proposing that a juror should be withdrawn. He did propose it; the counsel on the other side consented to that course being taken, and it was done. The plaintiff says that he did not consent to this being done; but there is nothing upon the affidavits to shew that the authority which was originally conferred upon the counsel was withdrawn, and nothing to shew that the counsel had received his brief with the understanding that he was to be a mere tool in the hands of his client, and a mere mouthpiece for the purpose of making a speech and examining the witnesses. To take a brief under such circumstances would be most unprofessional, and it cannot be supposed that anything of the kind had taken place. Mr. Kenealey says, that the counsel only contracts to use his skill and his eloquence on behalf of his client; but I think that he also contracts to supply his judgment and discretion in the conduct of the cause, and the attorney is supposed to select such persons as his counsel as he thinks will be likely to conduct the cause properly. The case of *Swinfen v. Swinfen*, which has been referred to, was peculiar; an issue had been directed to try the validity of a will, and for the purpose of informing the conscience of the Court of Chancery, and at the trial it was thought, by counsel of great eminence, that it was for the interest of both parties that a settlement upon certain terms should take place. When the case came before the Court of Common Pleas, according to the report of it in the 25 *Law Journal Reports*, page 303, all the members of the Court, consisting of Cresswell, J., Williams, J. and Willes, J., considered that the counsel had full authority to make such an arrangement and to bind the clients; but afterwards another motion for an attachment was made against Mrs. Swinfen, and Mr. Justice Cresswell and Mr. Justice Williams still retained their former opinion, but Mr. Justice Crowder, who was then a member of the Court, dissented, and in accordance with the usual rule, there being no appeal, and it being a motion for an attachment, the rule was discharged; but I find that even Mr. Justice Crowder puts it upon the ground of its being a collateral matter. He says, that counsel "professes in conducting a cause to act entirely on his own judgment and discretion, uncontrolled by his client, and the client leaves the whole management of the cause to counsel. But where a compromise is contemplated and litigation is to cease upon terms to be arranged, counsel then can only act, as I believe, under special instructions." When the matter came before the Courts of equity, they seem to have gone partly on the ground of its being a proceeding to inform the conscience of the Court, and partly on the ground that it was not a case in which specific performance of the agreement ought to be decreed. Then, in *Swinfen v. Chelmsford* (29 Law J. Rep. (N.S.) Exch. 382), the Lord Chief Baron takes the same distinction as that which had been taken by Mr. Justice Crowder. He says, "We are of opinion that although counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as

withdrawing the record, withdrawing a juror, or calling a witness, or selecting such as in his discretion he thinks ought to be called, and other matters which properly belong to the suit, and the management and conduct of the trial, he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it." Then comes the case of *Prestwick v. Poley* (34 Law J. Rep. (N.S.) C.P. 189), which has been referred to by my Brother Shee. It was an action for a piano, and the plaintiff's attorney agreed to settle the action by the return of the piano and the payment of the costs by instalments. The Lord Chief Justice said, "The plaintiffs repudiate this agreement, and say it was made without authority. The defendant says that the defendant had authority. The question is here between third parties, but I do not limit my judgment to that. It is clear that there was no express prohibition in this case, and the question is, whether his employment gave the plaintiffs' attorney a general authority to compromise as he did. It is admitted that he has a general authority over the common procedure of the suit. It is admitted that he might agree to take a lesser amount after verdict; and in my mind there is no distinction in the present case." This is followed by the other Judges. It seems to me that *Swinfen v. Swinfen* is an extremely analogous case to the present. If a step is taken in the cause and notice is given to the other side that the authority originally conferred on the counsel has been revoked, it would be another thing; but by well-known usage counsel has an apparent authority in the conduct of the cause so far as regards the other side, whether or not it be restricted as between counsel and client. In the ordinary management of the cause, we may rely upon the discretion and judgment of the counsel, and that he has authority to take such a step.

MELLOR, J.—I am of the same opinion. At the time of the juror being withdrawn, the matter was apparently within the authority of both counsel, and unless it could be shewn that the attempt to revoke the authority of the counsel for the plaintiff had been brought to the notice of the counsel on the other side, I think that we ought not to interfere. I am quite sure that the counsel for the plaintiff would not have taken the brief upon the terms of hiring out his skill and eloquence, and upon the express understanding that he was not to be at liberty to exercise his judgment and discretion. The only course, if a client was to insist upon such a thing, would be to say at once, if you are not prepared to take my advice, and if you object to my having the conduct of the cause, I give you back your brief. Now, I think, that what was done in the present case was really a step in the conduct of the cause, and a thing to be done in the ordinary exercise of the judgment of the counsel. I have no doubt, after the decision in *Lord Chelmsford's case* (29 Law J. Rep. (N.S.) Exch. 382), that the rule is as there laid down, and that withdrawing a juror is really a matter in the conduct of the cause, and that really the meaning of the judgment of Mr. Justice Crowder is, that the arrangement was somewhat collateral to the cause. The position of the other side is also to be considered. The defendant, on the faith of the agreement, gave up his chance of the verdict, which he might perhaps otherwise have obtained. It would be most unfair and improper to disturb such an arrangement.

SHEE, J.—I am of the same opinion. On the question before us, we are bound by authority to hold that the counsel had power to bind his client. It would be very inconvenient if it were not so, and much against the interests of the client. A counsel would never be able to consent to a juror being withdrawn unless his client was present at the time and gave his consent; or at all events it would be done at great risk where the client was an unreasonable man. It would be most inconvenient to hold that a juror could never be withdrawn unless the client gave his consent that it should be done. In *Swinfen v. Lord Chelmsford* (29 Law J. Rep. (N.S.) Exch. 382) the question was whether the defendant was liable for having entered into the compromise without authority, and all that was decided was that no action would lie against him as no legal damage was proved. *Prestwick v. Poley* (34 Law J. Rep.

(N.S.) C.P. 189) is also strong against the view now presented to the Court. There might be cases where it would not be right to make such an arrangement, and if counsel differed from his client, he could throw up his brief.

Rule refused.

[IN THE QUEEN'S BENCH.]

April 24, 1866.

FOSTER v. DODD AND ANOTHER.

35 L. J. Q.B. 136; L. R. 1 Q.B. 475: affirmed, [1868] E. R. A.; 37 L. J. Q.B. 28; L. R. 3 Q.B. 67; 8 B. & S. 842; 17 L. T. 614 (Ex. Ch.).

Burial Acts (20 & 21 Vict. c. 81. s. 23; 22 Vict. c. 1. s. 1.)—Powers of Churchwardens over Land formerly used for the Burial of the Dead—Meaning of Statutory Description "Vaults or Places of Burial."

BURIAL AND CREMATION.—By 20 & 21 Vict. c. 81. s. 23. authority is given to the Crown by Order in Council, upon the representation of one of the Secretaries of State, to cause acts to be done, by or under the directions of churchwardens or other persons having the care of "any vaults or places of burial" for preventing them from becoming or continuing dangerous or injurious to the public health. A piece of land which, though unconsecrated, had been used by its lessees for upwards of 150 years as a burial ground, came into the possession of the freeholder, who brought building materials upon the soil and let it to persons who covered it with bricks and rubbish. At the time the act passed no burials had taken place in the land since the freeholder came into possession, a period of several years:—Held, that an Order in Council directing churchwardens to cause the bricks, rubbish, &c., to be removed was invalid, and could not justify an entry upon the land, as the section must be taken to apply only to places which, at the time of the passing of the act, were held in trust or distinctly appropriated for the burial of the dead.

Trespass for breaking and entering land in the City of London, belonging to the plaintiff, abutting, on the east side, on ground belonging to Bridewell Hospital, breaking open gates and doors belonging to the walls and fences of the land, destroying the locks and fastenings of the gates and doors, pulling down and destroying a building on the land, &c. Second count, for the wrongful conversion of bricks, mortar and building materials belonging to the plaintiff.

Pleas—to the first count, not guilty (by statutes 7 Jac. 1. c. 5; 21 Jac. 1. c. 12. s. 3); to the second count, payment into court.

Issue was joined on the first plea and on the sufficiency of the amount paid into court, and the cause came on for trial at the London Sittings, after Trinity Term, 1860, before Cockburn, C.J., when, by consent, a verdict was taken for the plaintiff, subject to the opinion of the Court on a case to the following effect.

The plaintiff was a builder, and the acts complained of were done by the defendants as churchwardens of the parish of St. Bride. The land is situate within that parish and not within Bridewell precinct. Edward the Sixth, by charter, gave the palace of Bridewell with its precinct to the City of London as a house for the committal and correction of vagabonds, strumpets and other idle persons.

From 1679 to Lady-day, 1844, the mayor, commonalty and citizens of London, Governors of Bridewell Hospital, held the land under leases, granted to them from time to time by the freeholder for the time being, namely,

Earl De la Warr and his ancestors and predecessors, for the successive terms of 41 years, 41 years, 41 years, 21 years and 21 years, at the annual rent of 35*l*. The first of these leases was granted in 1679, and the last of them in 1823. In the first the land was described as "all that piece or parcel of ground then lying waste on the west side of the said hospital of Bridewell," and in each of the subsequent leases as "all that piece or parcel of ground now in the occupation of the governors of the said hospital, and used as a burial place." In the last two leases a plan of the land was drawn in the margin, and referred to in the second lease, with the words "the burial ground" written on the plan. In all the leases, except the first, was a reservation to the lessor of the use of a large sewer running through the land. The second and succeeding leases contained a covenant not to build on the premises demised. In the last of these leases, which expired on Lady-day, 1844, was a covenant not to assign. From 1844 to 1855 the governors continued to hold the land under the freeholder as tenants from year to year. On Lady-day, 1855, the tenancy was terminated by notice to quit, and the key of the burial ground delivered up to Lord De la Warr.

The case here gave a description (omitted as immaterial) of a piece of land coloured yellow, in a ground-plan annexed to the case. The portion of land coloured green, on which the argument mainly turned, and which will be afterwards called "the land," contained about 748 square yards.

The Governors of Bridewell have always provided a chapel, as part of the buildings of the hospital, and a chaplain, an ordained clergyman of the Church of England, who resided within the precinct; and during the whole time that the land was under lease to the Governors of Bridewell Hospital, down to Lady-day, 1844, it was used in the first instance as a burial ground for the inmates of the hospital who died there, and afterwards, occasionally, for other persons, some inhabitants, and others not inhabitants, of the district, as well as for the inmates of the hospital, and burials in the ground have so far back as living memory goes been conducted according to the forms, ceremonies, and discipline of the Church of England, and it did not appear that they were at any time conducted in any other manner; but there was no record among the archives of the diocese of London that the land had ever been consecrated. No burial has taken place in any part of the land since 1844. There was an old burial ground belonging to the hospital situate within the precinct which was formerly used as a place of sepulture, but buildings were erected upon it more than fifty years ago which entirely covered it. About ten years ago it was let by the Governors of Bridewell Hospital to Messrs. Spicer & Co., wholesale stationers, who have pulled down the former buildings and built warehouses in their place.

From Lady-day, 1855, until the entry of the defendants, the land was used for no other purpose than that of the deposit thereon of building materials, and the old materials of adjoining houses which had been pulled down by Mr. Soward as hereafter mentioned.

On the 1st of December, 1857, the land, together with several houses, premises, &c., was leased by Lord De la Warr, the freeholder, to Mr. Soward for a term of ninety-nine years, from the previous Michaelmas. On the 9th of June, 1859, Mr. Soward leased the land and other premises to the plaintiff for fifty years from the previous Midsummer; and at the time of the alleged trespasses the plaintiff was in possession under the lease.

Before granting this lease, Mr. Soward pulled down some of the houses adjoining the land, and put the materials, consisting of old bricks, timber, &c. upon it. He also made an opening in the western wall of the land, and put and fixed gates therein, which were the only entrance to the land. The plaintiff, upon the execution of the lease to him, at once took possession, and after removing the iron railings and a portion of a dwarf wall upon the soil, commenced building a boundary wall. The old materials placed by his lessor on the land he left where they were, and also brought further quantities of timber, bricks, &c., for the purpose of making a hard surface over the land,

and using the timber, bricks, &c., in the erection of a workshop or shed adjoining it.

On the 18th of February, 1854, an Order in Council was made, upon the representation of one of the Secretaries of State. This order recited that the secretary, under 15 & 16 Vict. c. 85,¹ had represented, that for the protection

(1) The following extracts from the Burial Acts were referred to during the argument. By 15 & 16 Vict. c. 85, "The Metropolitan Interments Act, 1850," is repealed. By section 2, "In case it shall appear to Her Majesty in Council, upon the representation of one of Her Majesty's principal Secretaries of State, that for the protection of the public health burials in any part or parts of the metropolis, or in any burial grounds or places of burial in the metropolis should be wholly discontinued, or should be discontinued subject to any exception or qualification, it shall be lawful for Her Majesty by and with the advice of her Privy Council, to order that after a time mentioned in the order burials in such part or parts of the metropolis, or in such burial grounds or places of burial, shall be discontinued wholly or subject to any exceptions or qualifications mentioned in such order, and so from time to time as circumstances may require; provided that notice of such representation and of the time when it shall please Her Majesty to order the same to be taken into consideration by the Privy Council shall be published in the *London Gazette* and shall be affixed on the doors of the churches or chapels of the parishes in which any burial grounds or places of burial affected by such representation, shall be situate or on some other conspicuous places within the part or parts of the metropolis affected by such representation, one calendar month, or where any order made under 'The Nuisances Removal and Diseases Prevention Act, 1848,' directing the provisions of that act for the prevention of epidemic, endemic and contagious diseases to be put in force, is in force within such part or parts, then seven days at the least before such representation is so considered: Provided always, that no such representation shall be made in relation to the burial ground of any parish until ten days' previous notice of the intention to make such representation shall have been given to the incumbent and vestry clerk of such parish. By section 3, no such Order in Council is to extend to the burial grounds of Quakers or Jews unless they are expressly included."

By section 4, "It shall not be lawful after the time mentioned in any such order in Council for the discontinuance of burials, to bury the dead in any church, chapel, churchyard, or burial place, or elsewhere within the part or parts of the metropolis, or in the burial grounds or places of burial (as the case may be) in which burials have by any such order been ordered to be discontinued except as in this act or in such order excepted; and every person who shall after such time as aforesaid bury any body, or in anywise act or assist in the burial of any body contrary to this enactment, shall be guilty of a misdemeanor."

By section 9, "no new burial ground or cemetery (parochial or non-parochial) shall be provided and used in the metropolis, or within two miles of any part thereof, without the previous approval of one of Her Majesty's principal Secretaries of State."

By 18 & 19 Vict. c. 128. s. 1, "It shall be lawful for Her Majesty, by and with the advice of her Privy Council, from time to time to postpone the time appointed by any Order in Council for the discontinuance of burials, or otherwise to vary any Order in Council made under any of the said recited acts, or this act (whether the time thereby appointed for the discontinuance of burials thereunder, or other operation of such order shall or shall not have arrived) as to Her Majesty, with such advice as aforesaid, may seem fit; and every order of Her Majesty in Council made before the passing of this act for varying any order previously made under the said acts, or any of them, shall be deemed valid and effectual in law."

By 20 & 21 Vict. c. 81. s. 8, "It shall and may be lawful for the vestry of any parish in which any burial ground closed by Order in Council may be situate, and which does not belong to such parish, by resolution of a vestry, at a meeting called for that purpose, to purchase such burial ground, and from the time of such purchase such burial ground shall belong to such parish, and be subject to all the conditions affecting the burial grounds of the parish in which the same is situate."

By section 23, "It shall be lawful for Her Majesty, upon the representation of one of Her Majesty's principal Secretaries of State, by and with the advice of her Privy Council, from time to time to order such acts to be done by or under the directions of the churchwardens or such other persons as may have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health, and every such Order in Council shall be published in the *London Gazette*, and such churchwardens or other persons shall do or cause to be done all acts ordered as aforesaid, and the expenses incurred in and about the doing thereof shall be paid out of the poor-rates of the parish: provided always, that no such representation shall be made until ten days' previous notice of the intention to make such representation shall have been given to the churchwardens or other persons, or one of the churchwardens or other persons having the care of the vaults or places of burial to which the representation relates."

By 22 Vict. c. 1. s. 1, "Where it appears to one of Her Majesty's principal Secretaries of State, on the representation of any person authorized by him to inspect any vaults or places of burial in relation to which an Order in Council has been or shall have been issued under the 20 & 21 Vict. c. 81. s. 23, that any acts which by such Order in Council are ordered to be done by or under the direction of persons other than churchwardens having the care of such vaults or places of burial, are not done or performed within a reasonable time, and according to the

of the public health burial should be discontinued in the under-mentioned places, and that such representation was to be taken into consideration by the Privy Council on the 10th of March, then next. Among the places mentioned in the order was St. Bride's, Fleet Street. Burials in the churchyard, in the vaults under the church, and in the pauper burial ground of St. Bride's, and in the precinct of Bridewell, to be wholly discontinued. On the 29th of March, 1854, a final order was made, adopting the representation, and directing burials to be discontinued. Accordingly, on the 23rd of July, 1859, the Home Secretary caused notice to be delivered to the person or persons having the care of the burial ground of the precinct of Bridewell, Blackfriars, of his intention to represent to the Queen in Council, that for the purpose of preventing the burial ground of the precinct of Bridewell, Blackfriars, from becoming or continuing dangerous or injurious to the public health, an order should be issued for the adoption of the following measures :

First. That the whole of the rubbish, building materials, &c., which have been deposited on the burial ground of the precinct of Bridewell, Blackfriars, be completely removed under suitable supervision, care being taken not to disturb or damage the head and foot stones or tombs.

Secondly. That the whole surface of the ground be levelled, with the exception of tombs and gravestones, and be covered with a layer of fresh earth, of the thickness of at least a foot.

Thirdly. That the surface be sown with grass seed and that the vegetation be maintained in a proper state, and the surface be never disturbed.

The case stated facts respecting the service of the notice, into which it is unnecessary to enter. On the 12th of August, 1859, an Order in Council was made adopting this representation, and directing it to be carried into effect. On the 15th of September, 1859, the Home Secretary, upon receipt of an official report stating that the Bridewell burial ground remained in the same state as before, gave a written authority to the defendants, the churchwardens of St. Bride, directing them to do and complete the acts mentioned in the Order in Council relating to the burial ground; and Lord De la Warr, Mr. Soward and the plaintiff having failed to comply with a notice addressed to them by the defendants on the 5th of October, 1859, and stating that unless the directions in the Order in Council were carried into effect within fourteen days, the defendants would proceed to execute them; the defendants on the 24th of October, 1859, entered the land and committed the trespasses complained of. These trespasses were in substance an execution of the directions of the Order in Council. The defendants also took the padlocks from the gates, fastened them, and the plaintiff was excluded from the land, the building materials removed, the surface levelled, &c. The Court was to be at liberty to draw any inference of fact from the facts above stated, which a jury might draw. The pleadings to be taken as part of the case.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover upon the first count in respect of any part, and if any which part of the alleged acts of trespass. If the Court should be of opinion that he was so entitled, then judgment was to be entered for the plaintiff on that count, with such damages as should be determined by the arbitrator already appointed in pursuance of the Order of Nisi Prius, with costs of suit, the arbitrator to decide whether any and what further sum should be paid to the plaintiff under the second count beyond the sum paid into court, and verdict and judgment then to be entered accordingly. If the Court should be of

intent of such Order in Council, it shall be lawful for such Secretary of State by writing under his hand to authorize and direct the churchwardens of the parish in which such vaults or places of burial may be situate forthwith to do and complete the acts in such Order in Council mentioned, or such of them as remain undone, and such order of the Secretary of State shall be obeyed by such churchwardens, and they and all persons acting under their direction shall have the same power of entering and doing all such acts upon the premises to which the Order in Council relates, as if the said acts had, by the Order in Council, been directed to be done by such churchwardens, and such vaults or place of burial had been under their care," &c.

opinion that the plaintiff was not entitled to recover under the first count, then judgment of *non pros.* should be entered to that count, and the question as to the sufficiency of the sum paid into court to be decided by the same arbitrator, and judgment entered accordingly.

Mellish (*Bullar* with him), for the plaintiff.—Whether the Order in Council was valid or not the defendants have exceeded their jurisdiction by removing the padlocks, as the order could only justify matters necessary for the preservation of decency.

[BLACKBURN, J.—If that were the case you could only recover a farthing damages.]

It is submitted, however, that the Order in Council was clearly invalid, as the land in question is not a "vault or place of burial" within the meaning of the 20 & 21 Vict. c. 81. s. 23; so that directions under the 22 Vict. c. 1. s. 1. could not be supported. There is no evidence to shew that the ground was ever consecrated, and the inference is strongly against such a supposition, as the land was only leasehold property.

[LUSH, J.—Do you admit a power to forbid further burials in this land?]

Yes; that is given by the 15 & 16 Vict. c. 85. But powers which can only be exercised for the preservation of health do not apply to this case, where there is no finding that the land trespassed upon was injurious to health. There was no intention to divest any man of his property, and in the 20 & 21 Vict. c. 81. s. 8. power is given to purchase burial grounds. If the words of the 20 & 21 Vict. c. 81. s. 23. be examined, it will be seen that they order acts to be done under the directions of churchwardens and such other persons as have the care of any vaults or places of burial, shewing that the act is limited to cases where such persons have the custody of a place "as a burial ground." It can hardly be contended that these words apply to every case where land has once been used as a place of burial.

[LUSH, J.—One might at least have expected that the words "owners or those in whom the property is vested," would have been added to the words "churchwardens, &c."]

It is contended that the section applies only to cases where land is in the custody of churchwardens or other persons, with a trust or duty to take care of it as burial officials.

[BLACKBURN, J.—Burials may have ceased and there may be no evidence of an intention to continue them, but the legislature might have thought it important to create a preventive, instead of the usual common law jurisdiction over a place of burial.]

The words of the section do not support such a view.

Bovill (*Rochfort Clarke* with him), for the defendants.—The order was quite valid. The preamble of 15 & 16 Vict. c. 85. shews that the legislature intended to provide for the public health. That object is worked out by the succeeding sections, which intended to prevent the disturbance of a burial ground in the future. The words are wide, and in section 3. there is an express exemption in favour of the burial grounds of Quakers.

[BLACKBURN, J.—Although the acts are incorporated, we cannot help seeing that the material one here came after the rest.]

The act, 20 & 21 Vict. c. 81, must be taken to have been framed, because of the insufficiency of the previous enactments to prevent certain burial grounds from becoming dangerous. However large the compulsory powers may appear to be, they are justified by a consideration for the public health. It cannot be presumed that the Secretary of State would exercise a wrong discretion.

Mellish, in reply.

BLACKBURN, J.—I am of opinion that the plaintiff is entitled to judgment. The case has been argued at considerable length, and I do not think we should gain much benefit by taking time to consider, as the whole matter depends upon the construction of 20 & 21 Vict. c. 81. s. 23. By what section it is made lawful for Her Majesty, upon the representation of one of the Secretaries and

with the advice of the Privy Council, from time to time to order such acts to be done by or under the directions of the churchwardens or such other persons as may have the care of any *vaults or places of burial*, for preventing them from becoming or continuing dangerous or injurious to the public health. We must take no notice of the word "such," as there is nothing in the section which is correlative to it. But the object of these Orders in Council is clearly to direct churchwardens and other persons to take such steps as may be necessary to prevent vaults and burial grounds from becoming injurious to public health. Now, the argument for the defendant goes this length (as was almost admitted by their counsel), that if at any time land has been used for the purposes of burial, it must continue to be "a place of burial" within the meaning of the act. So that in the case of the Pest Fields, in the parish of Marylebone, where those who died of the plague were buried, we should have to admit that the Secretary of State could remove the squares and streets which have been built on the ground. It seems to me that we cannot give so extensive a meaning to the words of the section as to make them comprise every place which has once been a burial ground; but that the directions are to be given to persons who at the time when the act became law had the care of any land *as* a place of burial. I do not mean that it is necessary that burials should then have been going on in these places, but that it must appear that they are still dedicated and appropriated for the holding of dead bodies, and that persons have the custody of them as places of burial, as in the case of a burial ground of Dissenters or grounds in the hands of trustees for the purposes of burial, or appropriated for those purposes by some private individual. It is not necessary to say that these places must have been burial grounds at the time of the Order in Council, but they must not have ceased to be so used at the time of the act, that is, in 1857. Now, it seems to me that the land in question had ceased to be a place of burial in 1857. The Governors of Bridewell, as lessees of the ground, used it as a burial place, and I think that the lessors must be taken to have assented to this user. But after 1844 we find nothing to shew an intention that burials shall continue. The lease was succeeded by a tenancy from year to year, which lasted till 1855, when the land was surrendered to Lord De la Warr, and there is nothing to shew any intention on his part that it should still be "a place of burial." It was unconsecrated, and all that the common law could require was, that there should be no nuisance; no indecent interference with the bodies of the dead. The defendants, however, contend that the statute confers on the Secretary of State a superintending power over what may become dangerous and injurious, and to take measures for preventing any such possible danger or injury. But in my opinion the statute can have that effect only where a nuisance is probable, and not where, as here, the only object seems to be to keep it open to the public view. It is, no doubt, very desirable that places where bodies have been buried should not be used for any other purpose; but I think that all the statute intended was, to keep them from becoming dangerous and injurious to the public health. It was contended that the later act, 22 Vict. c. 1. s. 1, compelled the defendants to enter upon the land after the plaintiff had refused to comply with the directions of the Order. Here, however, the order has gone beyond mere sanitary purposes, so that it is invalid, and cannot be used in support of any subsequent proceedings. The judgment must therefore be for the plaintiff.

SHEE, J.—I am of the same opinion. The defendants are sued for trespasses upon the land of the plaintiff, and they are liable as trespassers, unless they have acted under the lawful authority of the Secretary of State. The fact of the case appear to be these. For many years previous to 1855 the land in question had been held by the Governors of Bridewell. Up to 1844, it was in lease, and on the expiration of the lease, the governors held the premises up to 1855, on a tenancy from year to year. When they ceased to be lessees, that is, in 1844, all burials had entirely ceased on the land in question. The tenancy from year to year came to an end in 1855; and

Lord De la Warr, the freeholder, granted a lease of ninety-nine years to Mr. Soward, who entered upon it, and made two gates, both opening on the western boundary of the land, through which was the only entrance. Having done this, he demised the land, in 1859, for a term of fifty years. No burials had taken place on the land since 1844. Previous to making the order, the land had been completely converted from the purposes for which it had been used up to 1844 by the Governors of Bridewell, for their convenience, as a place of burial, and applied to entirely different purposes, and there was nothing to shew that the freeholder, who was released from all engagements to the Governors of Bridewell, by reason of the termination of the lease, was in any way precluded, independently of these acts of parliament, from dealing with this land otherwise than he would any other place. That being the case, we have to consider whether the Secretary of State had power, under 20 & 21 Vict. c. 85. s. 23. and 22 Vict. c. 1. s. 1, to issue these orders, obedience to which constitutes the trespass of which the plaintiff complains. Section 23. of 20 & 21 Vict. c. 85. provides "that it shall be lawful"—[His Lordship read the section].—The question is, what is the true meaning of these words? In my judgment they apply only to vaults and places which were, at the time of the act, in the care of persons for the purposes of burial, that is, in the care of persons superintending them for the purposes of burial. Now I think that the place in question was not, when the act passed, in the care of any one for the purpose of burial. It was in the possession of the freeholder, who was absolute owner of it. It therefore does not appear to me that the words "churchwardens or other persons," in section 23, are satisfied by the position in which the plaintiff stood. That being so, the order, in my judgment, was not properly made, and our judgment must be against the defendants.

LUSH, J.—I also am of opinion that the order of the Secretary of State was in excess of the authority conferred by the statute, and was therefore void. It appears that the land in question had been used during the time it was in lease for the purposes of interring those who had died in the hospital. From 1844, ten years before the order for discontinuing burials in the land, the place had ceased to be used as a burial ground; in fact, nothing was done by the freeholder, when the land came into his possession, to shew that he approved of the purpose for which it had been used. The words "vaults or places of burial" seem to me only to apply to those public burial grounds which have impressed upon them the character of places of burial, and cannot properly be used for any other purpose. If the legislature had meant to give powers over the owners of private property, the words, "owners of the land or those in whom the property is vested," would have been inserted in section 23. But I think that the words "churchwardens, or such other persons as may have the care of vaults or places of burial," point to a class of places irrevocably appropriated as places of burial, by consecration or otherwise. It is true that the act, 15 & 16 Vict. c. 85, enables Orders in Council to be made forbidding the continuance of burials in any ground. But section 23. of the 20 & 21 Vict. c. 81, upon which this case depends, can only apply to lands appropriated as burial grounds.

Judgment for the plaintiff.

[IN THE QUEEN'S BENCH.]

May 5, 1866.

CHAPMAN v. GWYTHER.

35 L. J. Q.B. 142; 7 B. & S. 417; L. R. 1 Q.B. 463; 14 L. T. 477; 14 W. R. 671.

Not applied, *Moore v. Harris*, [1876] E. R. A.; 45 L. J. P.C. 55; 34 L. T. 519; 24 W. R. 887 (P.C.). Referred to, *Gorton v. Macintosh*, 1882, 31 W. R. 232 (Q.B. D. Div.): reversed, [1883] W. N. 103 (C. A.).

Contract of Sale—Warranty of Soundness—Horse “warranted sound for one Month.”

SALE OF GOODS.—*G*, a farmer, sold to *C*, a horse-dealer, two horses, and signed the following note of the sale: “*C*. bought of *G*. a brown horse, 6 years old, warranted sound, for the sum of one hundred and eighty pounds, £180. 0. 0. Also, a bay horse, five years old, for the sum of ninety pounds, warranted sound, £90. 0. 0. (Signed) *G*. Warranted sound for one month. (Signed) *G*.” The bay horse was unsound at the time of the sale, though this was not communicated to the seller until after a month from the sale:—Held, that there was no breach of the warranty, as the words “warranted sound for one month” did not enlarge, but limited, the warranty, and left the seller liable only for unsoundness of which he was informed within a month of the sale.

The first count of the declaration stated that the defendant, by warranting a horse to be sound for a month, sold it to the plaintiff; yet the horse was not sound then, or for a month, according to the warranty. The second count alleged that the defendant, by warranting a horse to be sound and right for one month from the date of delivery of the horse to the plaintiff, sold it to the plaintiff; yet it was not sound or right then, or for one month from the date of such delivery to the plaintiff.

Pleas—To the first count, first, that at the time of the warranty the horse was sound; secondly, a denial of the warranty. There were like pleas to the second count. Upon these pleas issue was joined.

At the trial, before Blackburn, J., at the London Sittings after Michaelmas Term, 1865, it was proved that the plaintiff's father bought two horses from the defendant, who then signed the following note of the sale:

“Trewent, June 6, 1865.

“Mr. Chapman bought of Mr. G. Gwyther a brown horse, 6 years old, warranted sound, for the sum of one hundred and eighty pounds, £180. 0. 0. Also, a bay horse, five years old, for the sum of ninety pounds, warranted sound, £90. 0. 0. George Gwyther. Warranted sound for one month.

“George Gwyther.

“Trewent, Pembroke.”

Two days afterwards the plaintiff wrote to the defendant, inclosing a cheque for 270*l.*, on the back of which was written, “This cheque is received by me for a brown gelding, price one hundred and eighty pounds; also a bay gelding, price ninety pounds, both of which animals I warrant sound and right for one month from the date of delivery.” The defendant, however, paid the cheque into the bank, without affixing his name to these words, or even indorsing the cheque. When requested to indorse the cheque by the manager, he read the words on it, but refused to sign the warranty, saying that he had already given one on the day of sale. On the 9th of July the plaintiff wrote to the defendant, saying that the bay horse was lame. On the defendant refusing to take it back, this action was commenced.

The learned Judge left to the jury the questions, first, whether at the time of the sale disease, or the seeds of disease, existed in the animal; secondly (passing by the writing on the cheque as not altering the warranty),

whether disease, or the seeds of disease, existed on the 5th of July; thirdly, if on the 5th of June the seeds of disease existed, had they so far developed themselves at the end of the month as to cause real disease? The jury found that the horse was actually unsound on the day of the sale, but that this was unknown to the defendant. A verdict was directed for the plaintiff, with leave to the defendant to move.

Hardinge Giffard obtained a rule in Hilary Term, 1886, for the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, on the ground that upon the true construction of the warranty there was no evidence of any breach of the contract.

Henry Matthews and *Moir* shewed cause.—Upon the true construction of the warranty, the plaintiff is entitled to retain the verdict. The words of the warrantor must be taken most strongly against him; and if this is borne in mind, it cannot be doubted but that “warranted sound for one month” means, “I warrant that the horses are sound, and that they will so continue for a month.” The buyer probably wished to protect himself against latent defects in the animals.

[LUSH, J.—What words do you propose to add to the warranty, for it will be necessary to supply some in order to maintain your proposition?]

It is submitted that, as the words stand, they mean that the warranty is to be a continuing one. There are cases where a limited warranty has been maintained; but they are authorities against the defendant, for in all the terms of the contract were explicit, and had no resemblance to the words used in the present case. In *Buchanan v. Parnshaw* (2 Term. Rep. 745) the conditions of the sale were that the purchaser of any horse, warranted sound, who should conceive the same to be unsound, should return him within two days, otherwise he should be deemed sound. In *Mesnard v. Aldridge* (3 Esp. 271) the conditions were that all horses in case of any unsoundness discovered were required to be returned before the evening of the second day after the sale. And in *Bywater v. Richardson* (1 Ad. & E. 508) the horse was sold subject to a rule that a warranty of soundness when given was to remain in force until twelve o'clock at noon on the day next after the day of sale, when it would become complete, and the responsibility of the seller would terminate, unless in the mean time a note to the contrary accompanied by a certificate of a veterinary surgeon should be delivered, setting forth the cause, nature or description of any alleged unsoundness. It is therefore clear that in all these cases express words were thought necessary in order to defeat the warranty; but no such intention is disclosed in the words employed by the defendant.—They also contended that the writing on the cheque ought to have been brought to the notice of the jury.

B. T. Williams (*Giffard* with him), in support of the rule.—The verdict should be entered for the defendant, for the words “warranted sound for one month,” written after the words “warranted sound” previously written, shew an intention to limit the liability of the defendant.

[MELLOR, J.—You say that these words require the plaintiff to notify to the defendant within a month of the sale any sort of unsoundness?]

Yes. In *Liddard v. Kain* (2 Bing. 183) there was a warranty like that which the plaintiff seeks to imply from the words used by the parties here; but the contract was to deliver horses at the end of a fortnight sound and free from blemish. A warranty, as a general rule, never goes beyond the time of sale.

BLACKBURN, J.—In this case we all think that the rule should be made absolute. In the first place, with regard to the question whether the writing signed by the defendant in the 5th of June or the writing on the back of the cheque constituted the contract, we hold that I was right in thinking that the agreement was contained in the first document. The writing on the cheque was, no doubt, evidence of what the original bargain had been; but

the rights of the parties must depend upon the words of the real contract made on the 5th of June.

The real question in the case is, what do the words "a horse warranted sound" with the words "warranted sound for one month" following them mean? If the undertaking was that the horse was sound, and that the soundness would continue for a month, and the warrantor took upon himself the liability for any disease which might smite the animal during this period, that would have been a most imprudent and unlikely contract for any one to enter upon, and we ought not lightly to suppose that it was contemplated. What I think the parties must have intended to express is explained by what was said by Mr. Bearcroft, while arguing the case of *Buchanan v. Parnshaw* (2 Term Rep. 745): "Where a horse is objected to as unsound, it is extremely material that he should be returned within a certain time, to prevent all disputes respecting the time when the horse became unsound, because, if no objection were to be made on that account till a long interval had elapsed, the unsoundness might perhaps be occasioned in that interval. And it is for that reason that it is made a condition of sale at all public auctions that the horse, if objected to as unsound, shall be returned within a short limited time." I cite this to shew that so long ago as 1788 persons did restrict the warranty of soundness by saying that it should only apply within a certain time; and although here the buyer and seller have very inartificially expressed their meaning, we must take it that they meant that the warranty was subject to a term, that it was only to continue in force for a month, and that any complaint must be made within that time. If they had had the assistance of a lawyer, that, I do not doubt, is what they would have instructed him to draw up. Therefore, taking as the general rule of construction that the intention of persons must be gathered from their words, not, however, from the words as used by anybody, but as used by those who are parties to transactions like that which is in question, a rule noticed in the last edition of *Oliphant on Horses*, by Mr. Ryder, p. 111, we must construe the words "warranted sound for one month" as meaning that a month is the only time allowed for any complaint respecting unsoundness in the animal.

MELLOR, J.—I am of the same opinion. I quite agree with the opinion of my Brother Blackburn that the words of this warranty must be construed according to their meaning when used by the parties to a transaction relating to the sale of horses. Adopting this construction, I understand "warranted sound for a month" to mean, "I allow a month for taking objections to the horse, but I intend my warranty to apply during that time only." In the present case the objection came too late, and the rule must therefore be made absolute.

LUSH, J.—I am of the same opinion. We should endeavour, if possible, to find a meaning in the words which will carry out the real intention of the parties. Now it cannot, I think be doubted but that the seller intended, by these words, not to extend, but to limit his liability under an ordinary warranty. With such a warranty the buyer might have claimed damages simply on the ground that the horse was not sound at the time of the sale; and it is often a question of great difficulty whether disease, or the seeds of disease, was or were in the animal at this time. But here the seller thought, "I will not have any liability on account of this horse beyond a definite limit," and he expressed his resolution in a very compendious form. The words "warranted sound for one month" may readily be amended in accordance with the sense so as to express more fully the condition that the warranty is only to continue in force for a month. To interpret them as meaning that the horse is sound now, and will so continue during a month, we must supply words which no rules of law will allow us to introduce. The plaintiff has failed in proving a breach of what we think was the legal contract, and the rule must be made absolute.

Rule made absolute.

[IN THE QUEEN'S BENCH.]

May 4, 1866.

THE QUEEN v. LOFTHOUSE AND WILSON.

35 L. J. Q.B. 145; L. R. 1 Q.B. 433; 7 B. & S. 447; 14 L. T. 359; 14 W. R. 649; 12 Jur. N.S. 619.

Observations approved, *Reg. v. Collins*, [1876] E. R. A.; 45 L. J. Q.B. 413; L. R. 1 Q.B. D. 336; 34 L. T. 447; 24 W. R. 732 (Q.B. D.): affirmed, [1877] E. R. A.; 46 L. J. Q.B. 257; L. R. 2 Q.B. D. 30; 36 L. T. 192 (C. A.).

Quo Warranto—Relator—Board of Health—Voting-Papers—11 & 12 Vict. c. 63. s. 24.

LOCAL GOVERNMENT. QUO WARRANTO.—By the 24th section of 11 & 12 Vict. c. 63. (the Public Health Act, 1848), if the number of persons nominated to be elected as members of a local board exceed the number to be elected, the "chairman shall cause voting-papers in the form contained in Schedule (A.) to this act annexed, to be prepared and filled up," &c. The form in Schedule (A.) contains columns for the "Number of votes," "As owner" and "As ratepayer." An election for the local board for the district of C. being about to take place, the chairman prepared and filled up voting-papers for the persons who were entitled to vote at the election, but omitted to fill in the number of votes to which they were entitled:—Held, by Blackburn, J. and Mellor, J. (Shee, J. dissentiente), that this omission did not make the election void, as the provision in the statute could not be construed as being more than directory.

M, who had been a member of the local board previously, was a candidate for re-election; he canvassed the voters, and himself voted with a voting-paper in which the number of votes had not been filled in. He had himself been elected at an election conducted in a manner similar to the present one, and had not objected to the form of the voting-papers until he was defeated. At the first election he had himself issued papers in the same form:—Held, per totam Curiam, that this Court, in the exercise of its discretion, would not allow him, having acquiesced in the manner of voting, to appear as a relator in an information in the nature of a quo warranto against the successful candidates, and that a rule nisi having been obtained, such rule ought to be discharged with costs.

Semle, per Blackburn, J. and Mellor, J., that the chairman might be liable to a penalty, under section 28, for omitting to fill up the voting-papers in the form provided by the act.

This was a rule calling upon the defendants to shew cause why an information in the nature of a quo warranto should not be exhibited against them, to shew by what authority they claimed to exercise the office of members of the local board of health of the non-corporate district of Cottingham, in the West Riding of Yorkshire, on the ground that the voting-papers delivered to the voters were not filled up with the number of votes which the voters were entitled to, as required by the 24th section of the Public Health Act, 1848.

It appeared from the affidavits that an election of members of the local board being about to take place, a number of persons nominated, and as the number so nominated exceeded the number to be elected, it became necessary that voting-papers should be prepared and filled up by the chairman, to be delivered to the persons entitled to vote, in pursuance of the 24th section of the act.

By that section the voting-papers are to be in the form given in

Schedule (A.) to the act; and in such form there are columns headed, "Number of votes," "As owner," "As ratepayer." The chairman prepared voting-papers, but he omitted to specify the number of votes to which the respective voters were entitled. These papers were used at the election, and the defendants were elected; the relator was also a candidate, but was defeated, and he subsequently obtained the rule above mentioned.

It appeared from the affidavits used on shewing cause that the relator had held office as a member of the said board from its formation until he had retired before the election in question; that he was elected in a similar manner to that now pursued; that he sought re-election and took an active part in canvassing voters, and himself voted with a voting-paper which had not been filled in with the number of votes prior to delivery, without having ever given notice or raised the question of the validity of the voting-papers until after he was defeated. At the first election he had acted as returning officer, and had himself used similar papers.

P. Thompson, for the defendant Lofthouse, shewed cause against the rule.—The relator was not competent to apply to this Court for the present information. He had acquiesced in the propriety of the mode of election, and has taken his chance of success. *The King v. Trevenen* (2 B. & Ald. 339) shews that it is a valid objection to a relator applying for a *quo warranto* that he was present at the time of the objectionable election, even although he was then ignorant of the objection. The relator in the present case is in a still worse position, for he took his chance of being himself elected in the same manner. Next, it is wholly immaterial whether the number of votes is specified or not. By the 27th section the chairman is to attend at the office on the day following the election, and ascertain the validity of the votes, and cast them up; so that if the voter wishes to insure the right number of votes being credited to him, he has only to attend upon the chairman, and take care that that should be done; and he himself must know what number he is entitled to.

[BLACKBURN, J.—It is very difficult to say that it is not the duty of the chairman to insert the number of votes; but perhaps his failure to do so does not make the election void.]

No; the provision is only directory, and not imperative—*The King v. Cross* (16 Justice of the Peace, 215). (He was then stopped.)

Philbrick and *Atkinson* were not heard on behalf of the defendant *Wilson*, as they relied upon the same objections as had already been taken.

Forbes, in support of the rule.—The statute is imperative, and the omission to fill in the number of votes makes the election invalid, just as much as if the chairman had not prepared or delivered any voting-papers at all. It is essential that the voters should know what number of votes they are to be credited with; so that if a smaller number is given than that which they are entitled to, they may attend and insist upon the matter being set right. The chairman is a judicial officer. Again, how can he ascertain the validity of the votes when there is nothing to cast up? These papers were altogether silent as to the number of votes. If the defendants are right, the whole election would be at the mercy of the chairman, who can do just as he likes with the votes. Next, the relator is competent. The affidavit is not sufficiently certain; it only states that he was elected in a similar manner, not even using the word "same." How could perjury be assigned upon such an affidavit? *The King v. Benney* (1 B. & Ad. 684) shews that a relator is not disqualified by the mere fact of having formerly taken part in other elections, where the same irregularity existed as that complained of, but was not noticed. *The King v. Parkyn* (Ibid. 690) was a stronger case than the present, and does not help the defendants.

P. Thompson handed up *The King v. Slythe* (6 B. & C. 240).

BLACKBURN, J.—In this case there are two points that have to be considered. The application is made for a rule *nisi* for a *quo warranto* in the

matter of an election to the office of members of a local board of health; and the objection arises thus—The 24th section of the Public Health Act requires that where there are more persons nominated than are to be elected, the chairman shall cause the voting-papers, in the form of Schedule (A.), to be prepared and filled up, and shall insert the names of all the persons nominated, and then deliver them to the different voters, who, by means of such papers, are to vote. Schedule (A.), which is attached to the act, gives the form in which the blanks contained in it shall be filled. Among those blanks there is one that is to be filled up with the number of votes; and I think there can be no doubt that the meaning of the 24th section is, that the chairman shall, before the papers are sent round, fill up those blanks. He has the means, by looking at the rate-book, of ascertaining what is the number of votes that can be given, and it is intended he shall insert them so as to inform the voter what number of votes the chairman means he should give. In the present case the chairman neglected to do this, and sent round the papers filled up in every respect except the blank for the votes, and left that blank; and there is no doubt that by so neglecting, under the 28th section, he made himself liable to a penalty not exceeding 50*l.* If the omission was *bona fide*, the penalty would not be levied to the extent of 50*l.*; but if wilful, and with intent to mislead, he would probably find the penalty enforced to that amount, in case of a proceeding against him.

But the question that is now raised is, whether this neglect vitiates the voting-papers and renders them a nullity, so as to make void the whole election. In other words, whether the direction to fill them up is a condition precedent, or merely a direction to the chairman, the neglect of which exposes him to the penalty but does not vitiate the election; and I think, on looking at the section, this omission does not vitiate the election. It is required to be done in order that the chairman may give the voter notice what number of votes he at that time supposes the voter is entitled to, to enable the voter to come afterwards at the time of election, and let the chairman know that he is wrong, and have the matter investigated. The voting-paper gives no information to the opponent as to whether the number of votes proposed to be allowed is too large. The voter who finds his name entered for twelve and believes he has only two will not object, but the one who finds his name entered for two, having twelve, would.

But then comes the 27th section, which says, that after the voting-papers have all been delivered, the chairman is to attend at the office of the local board, and ascertain the validity of the votes from examination of the rate-books, and such other books and documents as he thinks fit, and shall cast up such of the votes as he shall find to be valid and to have been duly given and ascertain the number for each candidate. It seems plain upon that that the number of votes inserted in the voting-paper is not material. If the voting-paper had been overcharged by the number of twelve, and any one then called the chairman's attention to it, or he found out he had made a mistake, it is manifest it would be the chairman's duty to disallow the twelve, and only allow the proper number. In the other case, if the number were too small, and the chairman's attention had been called to it by the voter or any one else, and he found he had put in one when the man was entitled to six, it is plain the chairman's duty would be to allow the proper number, that is, six. This is plain, and why he should not do it if a blank is left and no number put in at all is what I am utterly unable to see, and Mr. Forbes was not able to shew me any reason why it should not be done.

Then comes the question, and I agree, after what Mr. Forbes has said, that it is a good deal a question of common sense, whether the thing is from its nature essential for the election; as, for instance, the chairman inserting in the paper the proper names of candidates, without which the election could not take place—would that render the voting-paper a nullity, because it would not be a voting-paper on which a proper election could take place? I think that common sense shews that to be a condition precedent, but when you find

that the mere filling up the number of votes has no such consequence, but that, because there is a blank, some inconvenience has consequently occurred, and there is no further mischief than if there were a mistake in the number, I cannot think the legislature intended that to be a condition precedent so as by its omission to vitiate the whole election. It is said that if the number is not filled in there would be no means provided by the statute of ascertaining the number of votes the returning officer would allow in respect of each person. The voting-paper itself would not shew that; and I have already shewn that if the voting-paper were erroneous it is the chairman's duty to allow the correct number of votes; the voting-paper would not, therefore, shew that at all.

Then the statute in section 27. provides, that afterwards the chairman shall make out a list in which he shall put the number of votes given to each candidate. It appears in the present case the chairman has done what is right and proper. He has made out a list shewing the number of votes which he has allowed to the voters. Such a thing, as was said the other day in a case in this Court, is right and proper to be done, and ought to be done. But in that case, where the chairman had made out a list, he made out a list in which he put a number, and a lump number of votes to each candidate, 1,000 to one, and 800 to the other, I think all of us said, but I know I said, that though the statute did not require that he should keep a register of the number he allowed for each, it would be right and proper conduct for him so to do. In the present case the chairman has not done that which the statute requires him to do, and the putting the number of votes in the voting-paper would only supply that defect. Therefore, as I said before, for those reasons I think this is a matter that ought to be done by the chairman, and that the failure to do so does subject him to a penalty, but does not vitiate the election.

If it stood on that alone, as I believe my Brother Shee has a doubt, it might be a matter that might be put upon the record; but there is another ground that cannot be put upon the record, and that is, that in the exercise of our discretion we should not allow the election to be disturbed at the application of a relator under the circumstances in which Mr. Mawe is. It must be done at the instance of some person, and from very early times it has been said the allowing such an information is in the discretion of the Court, and one of the great elements is that we shall see that the person who comes to ask us to put the law in motion, and by whom substantially it would be carried on, though in the name of the Master of the Crown Office, is a fit person to make use of the prerogative process of the Crown. Very early it was said, and the rule has been constantly acted upon, that we should see that the relator is entitled to complain, and when he complains in criminal informations for libel and other matters the rule is constantly acted upon, and in an information in the nature of *quo warranto* it is also acted upon.

Now, in the present case, what are the facts? It is sworn in the affidavits that, at the first election, when Mr. Mawe himself was the returning officer, he, no doubt thinking it right, did issue voting-papers in this form; and to demur specially to the affidavit, because it is sworn that he conducted the election in issuing voting-papers in a similar manner, seems to me merely cavilling with the words; the intention was to swear that he issued voting-papers such as these. He did that when the first election took place, and he was the returning officer. It appears that at the second election he was returned himself, and that election was conducted in the same way, and certainly he must be taken to know what was the form. In the third election it was done in the same way. He received the voting-paper in blank delivered to himself, and the affidavits sufficiently lead to the conclusion that when he voted on that paper he knew the other papers had been issued in the manner he himself originated. Then he proceeds, nevertheless, to take his chance upon the election, keeping this objection in reserve; or perhaps not having thought of it then, but it being suggested to him by his legal adviser afterwards, he

takes his chance of being returned, and then complains of the election on a ground that he was well aware of before. I think that that is a matter we ought not to allow. It is very similar indeed to the common case in which an arbitrator has proceeded when there has been something wrong, but one party has gone on taking the chance of the award being in his favour, and, when it turns out against him, trying to upset the award. It is the same thing in principle and in common sense; but here it seems to me that Mr. Mawe, having himself originated and caused the mode of election, and taken his chance to be returned under it, cannot now be heard to say that the Court should grant the prerogative process of the Crown to be used in his favour to upset the election.

Under those circumstances, on the last ground, which is one that could not be raised upon the record, being in the discretion of the Court, I think the rule should be discharged, and being discharged on such ground it should be discharged with costs.

MELLOR, J.—I am of the same opinion, and without going at large into the last point, the relator in the present case comes within the rule which, I apprehend, is the true rule cited in *Corner's Crown Practice*, p. 184. And it appears to me the affidavits bring him within that rule. I agree with my Brother Blackburn upon that, and as the other point is also of importance, and I agree with my Brother Blackburn in the views he has expressed, I wish to state shortly the reasons which induce me to come to the conclusion I do. I think the vice of Mr. Forbes' argument consisted in this, that he does not distinguish sufficiently between the functions of the returning officer which are ministerial and those which are judicial. It is apparent from the form of the act that there are some that are ministerial and some that are judicial. And what is required is this, that before the election by section 23, the chairman is to prepare and sign the particulars of the number and qualification of the persons to be elected; and then (s. 24.) if the number of persons nominated shall be the same or less than the number of persons to be elected, such persons, if duly qualified, shall be deemed to be elected, and shall be certified as such by the chairman under his hand. But if the numbers so nominated exceed the number to be elected, what is the chairman to do? Why he is to do this, to cause voting-papers to be prepared in the form contained in Schedule (A.); and there is no doubt that in the form in Schedule (A.) the number of votes appears as intended to be stated. I may take it for granted in the present case the returning officer has not stated the number of votes, but has left that a blank. In other respects the voting-paper is duly filled up, but in that respect he has omitted to fill it up at all. He should insert therein the names of all the persons nominated in the order in which the nomination-papers were received, but it is not necessary to insert more than once the name of any person nominated. That is what the returning officer is directed to do, and undoubtedly, if he does not do it, then he has failed to comply with one of the directions of the act, and under the 28th section he may be liable to a penalty for neglecting or refusing to comply with one of the provisions of the act. It appears to me that that section shews that some of the provisions of the act, though they are penal upon the chairman if he wilfully refuses or neglects to obey them, still are not intended to influence the validity of the election. The voter is to write his initials in the voting-paper against the name or names of the persons, not exceeding the number of persons to be elected, for whom he intends to vote. That shews that it is necessary that the names of the persons nominated should be inserted, otherwise the voter could not exercise his functions at all. Then comes the provision in section 26, and these words are negative, shewing that the papers cannot be received except where certain conditions are complied with: "That no voting-paper shall be received or admitted unless the same has been delivered at the address or residence as aforesaid of the voter." Therefore, if they have not been delivered they cannot be received, thereby

showing that the delivery at the residence of the voter is necessary. Then if it is omitted there is a provision that the person not having received the voting-paper, may require the voting-paper to be delivered to him, and may fill it up in the presence of the chairman. Then the returning officer, by the 27th section, should immediately after the day of the election and on as many days as is necessary, attend at the local board and ascertain the validity of the votes by the examination of the rate-books, and such other documents as are necessary, by examining such persons as he thinks fit, and should cast up such of the votes as he finds to be valid. Now, I stop for a moment to remark on one of the observations of Mr. Forbes on this subject. He must read it as if the words were "and shall cast up such of the votes as are named in such voting-papers," because, according to his argument, if that is not so it must fall to the ground; but see the effect of that. Suppose the paper contains a smaller number of votes than the voter is entitled to, then it would be inapplicable, because he could not do it from the votes named in the voting-paper. It would only give him a negative power; he would be obliged to strike off the votes named in the voting-paper, but he could not surcharge the paper by adding votes to it, "as he shall find to be valid, and to have been duly given, collected or received, and ascertain the number of such votes for each candidate." The other provision I have already referred to. Then the 28th section is this: "That if the said chairman or other person charged with taking, collecting or returning the votes at any such election as aforesaid, shall neglect or refuse to comply with any of the provisions of this act, he shall be liable to a penalty." Therefore, it appears to me that with reference to many matters required to be done, they are such as do not necessarily, and ought not, and I do not see how they can, if the chairman does his duty under the 27th section, affect the validity of the election. There is no doubt it affords facilities, and therefore it is a proper regulation to make, and a proper requirement to impose upon the returning officer, that he shall in a particular form send out his voting-papers. It is and may be a very strong step to say that, because he has neglected to comply with something that is not material as it appears to me to the actual judicial functions he is to perform, and which he is to do from the rate-books, and those means provided by the section, that because that requirement is not complied with the whole election is to be void. Therefore it appears to me, as I agree with my Brother Blackburn on this, and also agree with him in the conclusion at which we should arrive, that we ought not under these circumstances to do other than discharge this rule, with costs.

SHEE, J.—Although I have interfered very little in the course of the argument of the learned counsel, I am afraid it has been sufficiently apparent that I differ from my learned Brothers on the main point in this case, and as I always do so with great distrust of myself I think it is right and respectful that I should state the ground of the difference. Now it seems to me, indeed it is admitted as I understand on the part of the learned counsel who shews cause against this rule, and by my Brothers, that the chairman in this case has not observed the requirements of the act, that he has not conducted this election in the way in which the act of parliament directs him to conduct it; and it appears to me that he has failed in particulars that are important, that in point of fact he has not done that thing which the act requires as essential to the validity of this election.

Now let us see what the provisions of the act are. The act contemplates that persons shall vote according to the rateable value of their property, some having more votes than others in proportion to the rateable value of their property. That is distinctly provided by the 20th section. If the property in respect of which the person is entitled to vote be rated upon a rateable value of less than 50*l.* he shall have one vote, and so on. So in the last, if to the amount of 250*l.* he should have six votes, and any person who is owner and *bona fide* occupier of the same property shall be entitled to vote both in respect of "such ownership and of such occupation," words that are very

important when we come to consider the provision of the 24th section, and the form of the voting-paper which the chairman is directed to send out. Then we come to that section, and it provides that "if the number of persons nominated shall be the same or less than the number of persons to be elected, such persons, if duly qualified, shall be deemed to be elected, and shall be certified accordingly by the said chairman under his hand; but if the number so nominated exceed the number to be elected, the said chairman shall cause voting-papers in the form contained in the Schedule (A.) to this act annexed, to be prepared and filled up, and shall insert therein the names of all the persons nominated in the order in which the nomination papers were received; but it shall not be necessary to insert more than once the name of any person nominated. Now, I take it that no one can doubt, that if this election had been conducted by the chairman without sending any voting-papers at all, though it was perfectly plain that nobody had been allowed to have more votes than he was entitled to have, that the election could not be right.

Now let us just endeavour to see what the true meaning of the section is. He is to cause voting-papers in the form contained in the Schedule (A.) to this act annexed. Now, what is the form contained in Schedule (A.) to this act annexed? It surely cannot mean the general form that is set out in the schedule. It is the form in Schedule (A.) to this act annexed which is to be prepared and filled up. Surely that must mean a form prepared and filled up by him as in Schedule (A.) to this act annexed. Now, let us see what that form is. It is a form that is to state the number of the voting-paper, the name and address of the voter, and the number of votes, whether as owner or ratepayer or both. The voter is to put his initials against the names of the persons for whom he intends to vote, and it is to contain the names and residences of the persons nominated, the quality or calling of the persons nominated, the names of the nominators and the addresses of the nominators. Surely the meaning of the act of parliament is that all those requisites should be inserted in the form.

Now, it is remarkable that in the section of the act which gives this form, there is no direction as to any of these particulars, except as to the names of all the persons nominated, and as to that all the direction is, that those names are to be inserted in the order in which the nomination-paper was received; so that, as it seems to me, this provision of the 24th section, if it does not mean that the chairman must fill up all the blanks of this voting-paper, for the voter afterwards to put his initials to, in point of fact prescribes no form at all. My opinion upon it is, that the chairman has not sent a voting-paper, but that he has sent a form imperfectly filled up; and let us see if the other provisions of the act of parliament does not support that view of the construction of it. There must have been some object in requiring this form to be followed, and we find, in the 24th section, "And the said chairman shall, three days before the day of election, cause one of such voting-papers to be delivered by the person appointed for that purpose to the address in the parts for which the election is to be held, of each owner and proxy and at the residence of each ratepayer entitled to vote therein." What is the object of that? Why, that the person who is entitled to some votes may know three days before the election whether the right number of votes has been given to him by the chairman, so that he may be content with the arrangement that the chairman has made as to the number of votes that he is to give, or that he may give himself the trouble, before the day of election, of disputing the opinion of the chairman as to the number of votes which the voter is to give, which opinion he finds recorded in the voting-paper that has been sent to him. Then it proceeds, and by the 26th section it is provided, "that the said chairman shall cause the voting-papers to be collected on the day of election by the person appointed or employed for the purpose, in such manner as he shall direct; but no voting-paper shall be received or admitted unless the same have been delivered at the address or residence as aforesaid of the voter within the parts for which the election is had, nor unless the same

be collected by the person appointed or employed for the purpose, except as next hereinafter provided;" so that by this section the legislature again attaches importance to the fact of the voting-paper so filled up being sent in to the person who is entitled to vote, and in case of any omission, intends to make provision for that omission: "Provided always, that if any person qualified to vote shall not have received a voting-paper as aforesaid, he shall on application before that day"—that is, the day of election—"to the said chairman be entitled to receive a voting-paper from him, and to fill up the same in his presence, and then and there to deliver the same to him." Surely that section clearly shews that before the election, even so late as the day of the election, if there has been any omission to fill up the voting-paper, the voter may insist on its being done, and do it himself, if necessary, in presence of the chairman. Then there is, after that, section 27, which provides "That the chairman shall on the day immediately following the election, and on as many days immediately succeeding as may be necessary, attend at the office of the local board of health, and ascertain the validity of the votes by an examination of the rate-books and such other books and documents as he may think necessary, and by examining such persons as he may see fit." What is the object of that? Why, that in case of any dispute arising as to the number of votes which he has ascribed, or which he has given or allotted to any particular voter, that may be inquired into and finally ascertained. "And he shall cast up such of the votes as he shall find to be valid." Those words "cast up" surely do not mean that he shall then and there settle how many votes each individual is to have; but it refers to that having been already, not finally, but provisionally settled, and subject to inquiry ascertained, "and he shall cast up such of the votes as he shall find to have been valid, and to have been duly given, collected or received, and ascertain the number of such votes for each candidate;" and accordingly it provides that he shall cause a list to be printed of the number of votes that each candidate has received; but that list does not shew how many votes were allowed to each particular voter, and does not afford the smallest opportunity of ascertaining whether the chairman, who is made to obey the requirements of the 24th section, has taken pains to ascertain that each elector, each owner or occupier, shall have been allowed as many votes as he was entitled to and no more. It appears to me, therefore, on the first point—though, as I said before, I differ, as I always do from my learned Brothers, who have had more experience in these matters than I have, with very great distrust of myself in my judgment—that these were not voting-papers at all within the provisions of the act, and no satisfactory answer has been given to the argument of the learned counsel who moved this rule.

Now, as to the other point, with the assistance of my learned Brothers, who have called my attention to certain cases in one of the books of practice, I have arrived at the conclusion that their decision is perfectly right, and that we ought not to assist this relator in the course which he has thought proper to adopt. It appears that, with knowledge of the irregularity of the course pursued by the chairman on this occasion, he voted on a voting-paper which he knew or believed not to be a voting-paper within the provisions of the act, and it appears to me that this case comes exactly within the description of a relator, whose application is not to be attended to, which is given by Lord Kenyon in the case of *The King v. Clarke* (1 East, 46). "The Court," Lord Kenyon says, "have, indeed, on several occasions said, and said wisely, that they will not listen to a common relator coming, though within the time limited, as a mere stranger, to disturb a corporation with which he has no concern; nor even a corporator, who has acquiesced, or perhaps concurred, in the very act which he afterwards comes to complain of when it suits his purpose, and, so far, I think, we have determined rightly." That seems to me to be the exact position of Mr. Mawe; he has done the same thing more than once, which he has endeavoured to take advantage of in this case—he has profited by it before this election; and it appears to me

that, agreeing in this respect with my learned Brothers, he is a person who is not entitled to the assistance of the prerogative power of this Court, and that in this matter, which is entirely for our discretion, we cannot accede to the application. I agree, therefore, that this rule ought to be discharged with costs.

Rule discharged with costs

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Queen's Bench.)

May 9, 1866.

LLOYD v. HARRISON.

35 L. J. Q.B. 153; L. R. 1 Q.B. 502; 7 B & S 529; 14 W. R. 737; 14 L. T. 799; 12 Jur. N.S. 701: affirming 34 L. J. Q.B. 97; 6 B. & S. 36; 13 W. R. 602; 12 L. T. 271; 11 Jur. N.S. 364 (Q.B.).

Referred to, *Staffs Joint Stock Banking Co. v. Emmott*, [1867] E. R. A.; 36 L. J. Ex. 105; L. R. 2 Ex. 208; 16 L. T. 175; 15 W. R. 1135 (Ex.). Discussed and applied, *Ames v. Colnaghi*, [1868] E. R. A.; 37 L. J. C.P. 159; L. R. 3 C.P. 359; 18 L. T. 327; 16 W. R. 758 (C.P.). Principle applied, *Rossi v. Bailey*, [1868] E. R. A.; 37 L. J. Q.B. 204; L. R. 3 Q.B. 621; 19 L. T. 130 (Q.B.); *Hargreaves v. Armitage*, [1868] E. R. A.; L. R. 4 Q.B. 143; 38 L. J. Q.B. 46; 17 W. R. 140 (Q.B.). Not applied, *Ames v. Waterlow*, [1869] E. R. A.; 39 L. J. C.P. 41; L. R. 5 C.P. 53; 21 L. T. 393; 18 W. R. 67 (C.P.). Distinguished but principle applied, *Allen v. Carter*, [1870] E. R. A.; L. R. 5 C.P. 414; 22 L. T. 586 (C.P.).

Sheriff, Liability of—Escape—Bankruptcy Act, 1861—Invalid Deed of Arrangement—Registration—Certificate of Registrar.

SHERIFF.—*The plaintiff having recovered judgment against B., sued out a ca. sa., and delivered it to the sheriff. B. had previously entered into a deed (to which the plaintiff had not assented), which purported to be a deed of assignment for the benefit of his creditors, but which was, in fact, an invalid deed under the Bankruptcy Act, 1861. It was, nevertheless, duly registered; and the Chief Registrar gave a certificate of registration to B. The certificate contained a note that it was available as a protection in bankruptcy. The sheriff arrested B.; but upon the production of this certificate allowed him to go at large, and returned that B. was entitled to protection from arrest, and that he was not found in his bailiwick. An action having been brought against the sheriff for a false return, and an escape,—Held, affirming the judgment of the Court of Queen's Bench, that the certificate entitled B. to his discharge, and that there must be judgment for the defendant.*

This was an appeal by the plaintiff against the decision of the Court of Queen's Bench, in favour of the defendant, upon the argument of a demurrer to the third and fourth pleas.

The pleadings are fully set out in the report of the proceedings in the Court below (34 Law J. Rep. (N.S.) Q.B. 97).

Bayliss, for the plaintiff.—The question to be argued upon this appeal is, whether the Registrar's certificate of the registration of a bad deed of arrangement is a protection, so as to justify the sheriff in discharging a prisoner whom he has arrested under a *ca. sa.* The decision of the Court below was wrong. For the purposes of this argument it is to be assumed that the deed was

invalid, and it is clear that the certificate must be so as well—*Ilderton v. Jewell*.¹ And this law was approved of in *Leigh v. Pendlebury* (33 Law J. Rep. (N.S.) C.P. 172). The debtor had the remedy in his own hands; if he was entitled to his discharge he should have applied to the Court—*Dewhurst v. Kershaw* (1 H. & C. 726; s. c. 32 Law J. Rep. (N.S.) Exch. 146). The Court of Common Pleas have acted upon the opinion that the remedy is by *habeas corpus*, and the Lords Justices, in *In re Poland* (Law Journal Notes of Cases, 134), were of the same opinion. The granting of a certificate is not a judicial act, but a ministerial one simply. No judicial mind is brought to bear upon it, or is required, and it can be no protection to the sheriff unless it be supported by a good deed. It cannot stand by itself. The question arises upon the construction of the 192nd, 193rd, and 198th sections of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134); and it is submitted that all the Registrar is required to do under the 192nd and 193rd sections is ministerial. Then the 198th section provides, that "a certificate of the filing and registration of such deed, under the hand of the Chief Registrar and the seal of the Court, shall be available to the debtor for all purposes as a protection in Bankruptcy." The word "such" is to be noticed; it means such a deed as would be valid. In the Court below, Lord Chief Justice Cockburn held that the word "such" could not be got rid of—see 34 Law J. Rep. (N.S.) Q.B. 111.

[BRAMWELL, B.—I do not quite see the cogency of the argument based upon the word "such." There might be a certificate, though there was no deed at all.]

What do the words "shall be available" mean? It is submitted that they mean shall be available for such limited protection as is for the benefit of the Court and the creditors, a protection of the debtor as a witness to attend the Court *de die in diem*, and give evidence as to his estate. Such a protection as is referred to in sections 112. and 113. of the 12 & 13 Vict. c. 106, and for the interference with which a penalty of 5*l.* a day is imposed by section 113. There is a difference in the language used in section 113. of the 12 & 13 Vict. c. 106, and of section 198. of the 24 & 25 Vict. c. 134; and it must be remembered that the position of the debtor under the two sections is different. Under the first his property has become vested in the assignees; but under the second it is not so, and there is good reason for holding that the officer is not excused if he act upon the production of a certificate of a deed which is bad, and which, therefore, confers no security upon the creditors. If the sheriff arrests a bankrupt while going to or from the court no action will lie against the sheriff, the remedy being an application to the Court for his discharge—*Magnay v. Burt* (5 Q.B. Rep. 381).

[ERLE, C.J.—In the progress of legislation upon this subject, the prominent idea is the protection of the debtor. It would be a great hardship upon the sheriff, if you are right. POLLOCK, C.B.—Do you say that it is impossible to read the statute so as to support the judgment of the Court below?]

Perhaps it would be difficult to go so far as that.

[POLLOCK, C.B.—Then I think that it would be proper to read it so, in order to get rid of the absurdity of holding that the sheriff would be liable because it turned out that there was a flaw in the deed, which he could not know of.]

It is submitted that it is a mistake to argue upon the hardship to the sheriff. His office is a lucrative one, and he undertakes it knowing that the law subjects him to some apparent hardship. The hardship is rather upon the creditor, who, if the debtor is to be entitled to his discharge, although the deed be bad, loses all hold of him and his property. The deed may be altogether fictitious. Besides, a sheriff is not in the same position as other persons with regard to hardship—see *Copland v. Powell* (1 Bing. 369; s. c. 2 Law J. Rep. C.P. 369) and *Gladwell v. Blake* (1 Cr. M. & R. 636).

(1) 14 Com. B. Rep. N.S. 665; s. c. 32 Law J. Rep. (N.S.) C.P. 256; affirmed in error, 16 Com. B. Rep. N.S. 142; s. c. 33 Law J. Rep. (N.S.) C.P. 148.

[BRAMWELL, B.—The fact of his being already subject to one hardship is hardly a reason for our holding that he is to be subject to another.]

He also referred to *Ex parte Stewart* (33 Law J. Rep. (N.S.) Bankr. 4), *In re Windsor* (1 New Rep. 230), and to the other cases cited in his argument in the Court below.

Mellish (G. Bruce with him).—The certificate was of a valid deed, but gave a misdescription of it, and it turned out to be invalid according to the law as now decided. Then, what was the duty of the officer when the certificate was produced? The plaintiff says that he was bound to keep his prisoner; but if so, what is the use of giving a certificate at all? And the latter part of section 198. would be inoperative and needless. It says that the certificate shall be available for all purposes. The legislature intended to diminish imprisonment for debt as much as possible, and that when the debtor had obtained the certificate, he should be protected at once, and that the officer should act upon it at once. Possibly, if the certificate had shewn that the deed was bad, there would have been no protection; but here it shewed that the deed was good. The officer cannot be bound to go and find out whether the deed is good or not. The other side must admit that as soon as a genuine protection is produced, the officer must act upon it at once. Next, it is a mistake to say that the duty of the Registrar is ministerial; it is, to some extent, judicial. He is not to grant his certificate without examining the deed, to see what it is, and must exercise his judgment upon it. But the argument may be put in the very words of Mr. Justice Crompton in delivering judgment in the Court below. The learned Judge said: "My judgment proceeds on the ground that the legislature appears to me to have pointed out the document in question as the one on which the sheriff is to act, at all events until he has notice of the invalidity of the deed; and I think him excused by the legislature directing him not to persist in executing the process if such document be produced, just as he is where the plaintiff himself has directed him not to execute the process. I cannot construe the act of the legislature as imposing so monstrous a hardship upon the sheriff, as to direct him under severe penalties to act upon the production of the document, and yet to leave him liable in so acting as for a breach of duty, if it should turn out that circumstances of which he can have no knowledge have made invalid the deed on which the certificate is founded. The legislature throws upon the Registrar, as the officer of the Court, the responsibility of seeing that the requisite proportion of creditors have signed, and he has the affidavit before him of that fact, and he has also the deed before him from which he is to make in his book of registry a short statement of the nature and effect of the deed. The sheriff, being required to act merely on the production and having a copy of the certificate of the registration, has no means of testing its validity, either in point of fact or law. The legislature would be putting him in a worse case than in the ordinary case of difficulty of a sheriff who can inquire, and whose duty it was in many cases at common law to inquire, into the validity of documents. Here the legislature in effect takes from him all opportunity of inquiring, and directs what is his duty on production and receipt of a copy of the certificate. It seems to me that the legislature have said that the document in question is to be evidence that 'such' valid deed has been duly executed, upon which the sheriff is required to act; and that in effect he is prevented by the legislature from inquiring further, and is compelled to act at once upon such evidence; at all events, unless he has some knowledge or notification of the badness of the deed. I think, therefore, that we ought to hold that the sheriff in the case at bar was justified in discharging the debtor who produced the certificate of the Registrar in due form, that such a deed had been executed, although the deed afterwards turned out to be invalid."

Next, the natural construction of the statute is that the Court of Bankruptcy has the whole matter before it, and has the power to determine whether

the creditor should get execution or not. It affords an easy way of getting execution subject to an appeal to the Lord Chancellor. When the deed turned out to be invalid the plaintiff could have gone to the Court of Bankruptcy. In *In re Tresidder* (35 Law J. Rep. (N.S.) Bankr. 1) Lord Cranworth, L.C. said, that where a deed was invalidated he was inclined to think that a creditor had power to apply to a commissioner under section 198. to issue execution, and that it was not unreasonable that he should be able to set the law in motion without incurring the great peril of doing it at his own risk.

Bayliss replied.

ERLE, C.J.—We are of opinion that the judgment of the majority of the Court below should be confirmed. This matter has been discussed in the Court below with very ample research and very powerful argument on both sides. Nothing can be more powerful than the case as put by Lord Chief Justice Cockburn, and also as put by the other three Judges, Mr. Justice Shee, Mr. Justice Mellor, and Mr. Justice Crompton. We are of opinion that the certificate of such a deed is that which is to operate as a valid certificate. We are of opinion that the sheriff is not bound to go and ascertain whether a valid deed exists, and then to act. It is a matter beyond his powers to ascertain that; and we think the words of the statute are, that the certificate of such a deed shall be the matter which the sheriff has to look to. The certificate would be without any operation at all if it did not have the effect which has been contended for. The sheriff is to see whether there is a certificate of such a deed. The certificate states the validity of the deed. The deed itself may be an invalid deed; but it is the certificate which was produced. As a protection in bankruptcy we are clearly of opinion that it did not give the debtor mere privilege, but give him a right to be discharged. It is available as a protection in bankruptcy, and entitles the party to be discharged. Whatever he might be liable to, we need not stop to inquire; but it gave the right of being discharged, and the sheriff would be wrong if he did not discharge him. The consequence is, that the judgment of the majority of the Court below is affirmed. Merely because Mr. Justice Crompton is no more, we adhere to and adopt his words, although there is an equally powerful statement on the part of the other Judges. But we rather adopt the words of Mr. Justice Crompton in the passage read by Mr. Mellish. Our judgment is based upon that passage. We prefer taking it from Mr. Justice Crompton's judgment for the reason I have stated.

POLLOCK, C.B., BRAMWELL, B., BYLES, J., KEATING, J. and PIGOTT, B. concurred.

Judgment affirmed.

[IN THE EXCHEQUER CHAMBER.]

(*Error from the Court of Queen's Bench.*)

Feb. 1, May 10, 1866.

KEMP v. HALLIDAY.

35 L. J. Q.B. 156; L. R. 1 Q.B. 520; 6 B. & S. 723; 14 L. T. 762; 14 W. R. 697; 12 Jur. N.S. 582: affirming, 34 L. J. Q.B. 233; 6 B. & S. 723; 13 W. R. 1035; 11 Jur. N.S. 852 (Q.B.).

Referred to, *Harrison v. Bank of Australia*, [1872] E. R. A.; 41 L. J. Ex. 36; L. R. 7 Ex. 35; 25 L. T. 944; 20 W. R. 385 (Ex.); *Dinoon v. Home and Colonial Assurance Co.*, [1872] E. R. A.; 41 L. J. C.P. 162; L. R. 7 C.P. 341; 26 L. T. 628; 20 W. R. 970 (C.P.): referred to, *Rankin v. Potter*,

[1873] E. R. A.; 42 L. J. C.P. 169; L. R. 6 H.L. 83; 29 L. T. 142; 22 W. R. 1 (H.L.). Dictum adopted, *Anderson v. Ocean Steamship Co.*, [1885] E. R. A.; 54 L. J. Q.B. 192; L. R. 10 App. Cas. 107; 52 L. T. 441; 33 W. R. 433 (H.L.). Principle applied, *The Raisby*, [1885] E. R. A.; 54 L. J. (Adm.) 65; L. R. 10 P.D. 114; 53 L. T. 56; 33 W. R. 938 (P. D.). Principle explained, *Marine Insurance Co. v. China Trans-Pacific Steamship Co.*, [1887] E. R. A.; 56 L. J. Q.B. 100; L. R. 11 App. Cas. 573; 55 L. T. 491; 35 W. R. 169 (H.L.).

Ship and Shipping—Marine Insurance—Ship sunk in Deep Water—General Average.

MARINE INSURANCE.—Where a ship with her cargo on board is sunk in deep water, so that ship and cargo are in common danger of destruction, and there is nothing to rebut the inference that the most convenient mode of saving either ship or cargo, or both, is by raising the ship together with the cargo, the shipowner, in considering whether there is a constructive total loss of the ship, on the ground that the cost of raising it will exceed its value when saved, is bound to take into account the fact that the outlay will be diminished by his claim for general average on the cargo and freight, which will be secured to him by a lien on the cargo, if recovered.

Error from the decision of the Queen's Bench (34 Law J. Rep. (N.S.) Q.B. 233).

The facts are contained in the special case which is set out at length in the report of the decision of the Queen's Bench. It will be sufficient to say that the *Chebucto*, the vessel insured, sustained a general average loss at sea and put back into Falmouth harbour, where she was partially repaired. While lying moored to the pier she was sunk by a hurricane, at a place where at low water there was a depth of twenty-two feet and at high water a depth of forty feet. A few days afterwards, and after the plaintiff had sent notice of abandonment to the insurers, the ship's agents, without his authority, raised the ship with her cargo on board. The value of the cargo which sank in the ship and which was raised in her was, when raised, 1,750*l.* The amount of the whole freight by the charter-party was 475*l.*, and upon the portion of goods sunk 237*l.* 10*s.*; the whole net freight was 75*l.* The jury, in answer to questions put to them, found that there was a constructive total loss of the vessel when the notice of abandonment was given, and at the time when the vessel lay moored after being raised. In putting these questions to the jury, no account was taken of any liability on the part of the cargo or freight to contribute in a general average towards the expenses of raising the vessel or towards the general average loss at sea, and it was taken as a fact that if such liability for either loss ought to have been taken into calculation, and the estimate of the cost of raising and repairing ought to have been reduced by the amount of the general average to be so contributed, then that there was not a constructive total loss. The Court of Appeal were to draw inferences of fact in the same way as a jury would be entitled to do.

The questions for the opinion of the Court were, first whether the plaintiff, under the above circumstances, was entitled to recover on the policy for an absolute total loss, as distinguished from a constructive total loss; and if the Court answered this question in the negative, then, secondly, whether it was material in determining the question of constructive total loss, to take into account the liability, if any such existed, of the cargo and freight to make a general average contribution towards the expenses of raising the ship, or towards the general average loss at sea. The third question is omitted, as it was not touched upon by the judgment of the Court in error. After argument in the Queen's Bench, Blackburn, J., dissenting from Shee, J., gave judgment for the defendant. Shee, J., thereupon withdrew his judgment, and the plaintiff appealed.

At the commencement of the argument

Cohen, for the defendant, intimated that he did not intend to press any question relating to the general average loss at sea.

Watkin Williams, for the plaintiff.—The decision of the Court below was wrong. In the first place the assured are not entitled to general average from the owners of the cargo, for general average can only be claimed where expenses are voluntarily incurred for the purpose of avoiding a danger threatening the whole of the ship and cargo—*Benecke's Principles of Indemnity in Marine Insurance*, edit. 1824, p. 165. Here the vessel was raised without the consent of the owners; the cargo was not in danger, and any benefit which it received was the result of accident, not of intention. Two leading cases on this subject are *Job v. Langton* (6 El. & B. 779; s. c. 26 Law J. Rep. (n.s.) Q.B. 97) and *Moran v. Jones* (7 Ibid. 523; s. c. 26 Law J. Rep. (n.s.) Q.B. 187). In the first of these cases a ship had stranded, and the cargo having been removed, expense was incurred in getting her off. It was held, that general average could not be charged on the cargo. In the second case, where the landing of the goods was part of the continuous operation of removing the vessel, the claim for general average was upheld. Secondly, it is submitted there was a constructive total loss of the vessel. In the judgment of Mr. Justice Blackburn, in the Court below, his Lordship, after stating that the rule as to steps to be taken by the assured for the recovery of the subject-matter of the insurance, is to find what a prudent uninsured owner would do, comes to the conclusion that the fact that cargo would be saved and would contribute to the expense, is an important element in deciding whether it would be reasonable to raise a vessel; citing the cases of *Irving v. Manning* (1 H.L. Cas. 287, 306), *Moss v. Smith* (9 Com. B. Rep. at p. 103; s. c. 19 Law J. Rep. (n.s.) C.P. at p. 228) and *Rosetto v. Gurney* (11 Com. B. Rep. at p. 186; s. c. 20 Law J. Rep. (n.s.) C.P. at p. 261). But it is submitted that the rule so stated is not a sound one. If the shipowner could sell the hull where it happens to lie on advantageous terms, he would not care whether the ship were worth the cost of repairs or not. The true test is, is the hull worth the expenditure necessary to bring it back to the condition of a ship? The special circumstances in which the owner is placed ought wholly to be disregarded; the question is, has there been a total loss of the ship? not, how much is the owner out of pocket by the disaster? The master, within reach of the shippers, had no right to impose a charge upon the cargo. The rule that where a ship is restored to the assured there is no total loss, only applies to cases of capture and recapture. And the better opinion is, that recapture does not avail the underwriters unless the ship is restored in only a slightly damaged state. He cited *Hamilton v. Mendes* (2 Burr. 1198), *Bainbridge v. Nelson* (10 East, 329), *Smith v. Robertson* (2 Dow, 474), *Benecke on the Principles of Indemnity in Marine Insurance*, p. 215, and *Phillips on Insurance*, section 1545.

Cohen, for the defendant.—There was no constructive total loss of the *Chebucto* when she first sank; and if there had been, the loss did not remain total at the time of action brought. It is hardly asserted that there was an absolute total loss. It cannot be said in the words of *Arnould on Marine Insurance*, 3rd edit. 885, that there was ever an effective privation of the *spes recuperandi*. There is no distinction on this part of the subject between a loss by capture, or by any other disaster. It is laid down in *Phillips on Insurance*, s. 1527, that submersion does not by itself in all cases authorize the abandonment of a ship; and that the real question is whether the vessel can be raised and repaired at a reasonable expenditure of time and money. In section 1594 it is said that if the ship is raised, repaired and restored to the assured, and the expense of salvage and repairs paid by him, the loss ceases to be total. Here the assured could have taken possession of the ship without being liable to a salvage suit, as the claim for salvage was forfeited according to section 450. of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104).

The distinction between the law of England and America as to a constructive total loss is pointed out by Mr. Justice Blackburn, in the Court below. There can be no doubt but that the cargo was liable to general average. It was quite as much in danger as in the ordinary case where expenses are incurred in unshipping and warehousing it. It is unnecessary to inquire whether the cargo could have been lifted up in a cheaper way. During the last 100 years, wherever ship and cargo have simultaneously been saved, the Court of Admiralty has always equally apportioned the salvage. He cited *Knight v. Faith* (15 Q.B. Rep. 649; s. c. 19 Law J. Rep. (N.S.) Q.B. 509), *King v. Walker* (2 H. & C. 384; s. c. 33 Law J. Rep. (N.S.) Exch. 325), *Farnworth v. Hyde* (18 Com. B. Rep. N.S. 835; s. c. 34 Law J. Rep. (N.S.) C.P. 207), *Hunt v. the Royal Exchange Assurance Company* (5 M. & S. 47), *Castellain v. Thompson* (13 Com. B. Rep. N.S. 105; s. c. 32 Law J. Rep. (N.S.) C.P. 79), *Atkinson v. Woodall* (31 Law J. Rep. (N.S.) M.C. 174), *Lozano v. Janson* (2 El. & B. 160; s. c. 28 Law J. Rep. (N.S.) Q.B. 337), *Arnould on Insurance*, 3rd edit. 824, 920, 921, *Maclachlan on Shipping*, 375, *Bailey on Average*, 138-150, *Parsons on Maritime Law*, 403, and *Pritchard's Admiralty Digest*, 796.

Watkin Williams, in reply.—The case of *Hamilton v. Mendes* (2 Burr. 1198) has, no doubt, decided that the assured cannot recover for a total loss where his property has been restored to him at the time of action brought. But this case and later ones were cases of capture, where the assured had resumed possession of the vessels insured. Here, however, the assured never attempted to take possession of the ship after it had been raised. The jury besides have found that as a reasonable man he was not bound to retake possession. The ship had no claim to a general average contribution from the cargo, because it was not raised for the purpose of prosecuting the voyage.

[MONTAGUE SMITH, J.—Was not the shipowner bound, if practicable, to raise the ship and prosecute the voyage?]

There is nothing to shew that this was, under the circumstances, the best course.

Cur. adv. vult.

The judgment of the Court (Erle, C.J., Pollock, C.B., Martin, B., Willes, J., Channell, B., Keating, J., Pigott, B. and Montague Smith, J.) was, on the 10th of May, delivered by—

ERLE, C.J.—In this case we affirm the judgment for the defendant, and give the same answer to the two questions in the special case as was given by the Court below, being of opinion, first, that there was no absolute total loss, and, secondly, that it was material in determining the question of constructive total loss to take into account the liability, if any such existed, of the cargo and freight to make general average contribution towards the expenses of the ship. The real dispute was confined to the second question; and although the case has been argued with remarkable learning, both here and in the Court below, yet our decision turns upon inference of fact from the statement in the special case more than upon any point of law. We do not lay down a rule that all claims for contributions to the ship from any other interest ought to be taken into account in determining whether the ship was worth raising. But we hold that the plaintiff, in considering whether the submersion of his ship containing cargo, as stated in the case, was a constructive total loss, was bound to take into his estimate the fact that cargo would be saved by the operation which raised the ship, and would contribute to the expense thereof, and that the circumstances which would go to increase or diminish the outlay required for raising and repairing the ship, and the circumstances which would go to increase or diminish the benefit to be derived from that outlay, are elements in calculating whether the cost of raising would exceed the value when saved.

We infer from the statement in the case that there was a common peril

of destruction imminent over ship and cargo as they lay submerged; that the most convenient mode of saving either ship or cargo, or both, was by raising the ship together with the cargo; that the expense required for such raising would be an extraordinary expense for the common benefit of both; that the cargo would be liable to a general average contribution towards that expense, and that the shipowner would have a lien on the cargo to secure the payment of that general average. If these facts are properly inferred from the statement in the special case, it follows that the plaintiff in calculating the cost of raising was bound to take into his estimate the contribution which would become due to him from the cargo secured to him by a lien thereon, and if so, the special case provides that the defendant should succeed.

If the case had not been so stated, and we had to apply the common rule, we should consider that a prudent owner uninsured would calculate on the amount of the general average contribution inseparably connected with the raising of the ship and safely secured with as much reliance as if he could calculate on the value of the ship itself when repaired, it being clear that all the items, both of cost and value, upon which the owner is to make his calculation when electing between repairing or abandoning, are subject to contingency and matter of conjecture only.

In this decision we have adopted the principle upon which Mr. Justice Blackburn relied below, and we refer to his judgment for a more ample statement of that principle in the application of it to this case.

Baron Martin and Mr. Justice Willes desire me to say that, in their opinion, the judgment ought to be for a new trial, on the ground that the facts are not sufficiently stated so as to enable the Court to pronounce judgment.

Judgment affirmed.

[IN THE EXCHEQUER CHAMBER.]

(*Error from the Court of Queen's Bench.*)

Feb. 3, May 10, 1866.

MOODY v. CORBETT AND OTHERS.

35 L. J. Q.B. 161; L. R. 1 Q.B. 510; 14 W. R. 787: partly affirming and partly reversing, 34 L. J. Q.B. 166; 5 B. & S. 859 (Q.B.).

Distinguished, *Blackmore v. London and South Western Railway*, [1869] E. R. A.; 38 L. J. Ch. 19 (V.C.): varied, [1870] E. R. A.; 39 L. J. Ch. 713; L. R. 4 H.L. 610; 23 L. T. 504 (H.L.). Referred to, *May v. Great Western Railway*, [1872] E. R. A.; 41 L. J. Q.B. 104; L. R. 7 Q.B. 864; 26 L. T. 17; 20 W. R. 328 (Q.B.): affirmed, [1873] E. R. A.; 42 L. J. Q.B. 6; L. R. 8 Q.B. 26; 27 L. T. 620; 21 W. R. 295 (Ex. Ch.): affirmed, [1874] E. R. A.; 43 L. J. Q.B. 233; L. R. 7 H. L. 283; 31 L. T. 137; 23 W. R. 141 (H.L.); *Hooper v. Bourne*, [1878] E. R. A.; 47 L. J. Q.B. 487; 3 Q.B. D. 258; 37 L. T. 594; 26 W. R. 295 (C. A.): affirmed, [1880] E. R. A.; 49 L. J. Q.B. 370; 5 App. Cas. 1; 42 L. T. 97; 28 W. R. 498 (C. A.).

Railway—Land adjoining Surplus Land acquired by Railway Company—Lands Clauses Consolidation Act (8 Vict. c. 18. s. 127).

COMPULSORY PURCHASE.—By section 217. of 7 & 8 Vict. c. xcii. (a section in almost the same words as the *Lands Clauses Act*, section 127.) it is provided that if the company do not sell within the period of ten years the superfluous lands not required by them for the purposes of their act, then such lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto in proportion

to the extent of their lands respectively adjoining the same. The company became amalgamated with others; and the new company, after the period of ten years had expired, obtained an extension act, which provided that the respective periods by the several acts relating to the company limited for the sale of their superfluous lands should be extended for five years from the passing of the act, and those several acts should be read and construed as if that period had been fixed by each of those acts for that purpose":—Held, first, that the obligation to re-sell the surplus and applied to reversions or other partial interests in land acquired by the company as well as to property in which they had acquired the fee simple; secondly, that the words of the section extending the time for the re-sale could not be construed so as to defeat the vested rights which had arisen from the lapse of the time allowed for the re-sale.

The Court of Queen's Bench having decided that the surplus land forfeited by the company must be apportioned among the adjoining owners according to a line drawn from the point where their boundaries met to the nearest point of the land actually used by the company,—Held, by the Exchequer Chamber, that this mode of apportionment was wrong, and that the land ought to be divided among the owners of the adjoining properties in proportion to the frontage of each, that is, the length of the line of contact of each property, if the line were made straight from the point of intersection of the boundaries on one side, to the point of intersection of the boundaries on the other.

Error from the Queen's Bench.

The special case, with a plan of the premises, will be found in the report of the decision of the Queen's Bench (34 Law J. Rep. (N.S.) Q.B. 166).

The action was an ejectment, brought by the plaintiff as surviving trustee of land adjoining to that sought to be recovered. The defendants, the London, Brighton and South Coast Railway Company, defended for the whole, as did the other defendants, who occupied the lands.

By 7 & 8 Vict. c. xcii. the Croydon and Epsom Railway Company was incorporated for the purpose of making a railway from the London and Croydon Railway at Croydon to Epsom. By section 216. the surplus land not required for the purposes of the company was to be sold and conveyed within ten years after the passing of the act. By section 217. (a section in almost the same words as section 127. of the Lands Clauses Act, 8 Vict. c. 18) it was enacted that if the company did not sell such superfluous lands within the period aforesaid, then such lands remaining unsold at the expiration of such period should thereupon vest in and become the property of the owners of the lands adjoining thereto, *in proportion to the extent of their lands respectively adjoining the same.*

By 9 & 10 Vict. c. cclxxxiii., reciting that by virtue of 7 & 8 Vict. c. xcvi. the London and Croydon Railway Company had purchased the Croydon and Epsom line, the London and Epsom companies were dissolved, and the powers, privileges, rights, lands, &c. granted to them were vested in the London, Brighton and South Coast Railway Company.

Evidence was given at the trial that the land in question was within the limits of deviation of the Croydon and Epsom Company, and, with a slight exception, scheduled in their special act. Proof was also given that a portion of this land was sold to the company and occupied by their tenants at the time of the passing of the act, and that they had by some means acquired the reversion in the other portion without disturbing the tenant.

By section 28. of 26 & 27 Vict. c. cxcii., an extension act obtained by the London and Brighton Company, "the respective periods by the several acts relating to the company limited for the sale of their superfluous lands are hereby respectively extended for five years from the passing of this act, and those several acts shall be read and construed as if that period had been fixed by each of those acts for that purpose."

It appeared that the boundary of the plaintiff's land adjoined the surplus land in question in a line running north of the railroad and almost parallel to it, while the eastern boundary of this surplus land was property belonging to a Mr. Turner, which adjoined it in a curved line.

The judgment of the Court below, delivered by Blackburn, J., was to the effect, first, that a reversion or other partial interest in land acquired by the company under their compulsory powers was as much within the section limiting the time for re-sale as a fee simple in possession; secondly, that the section extending the time for such re-sale could not be construed so as to be retrospective, and to defeat vested rights acquired by the laches of the company, and that the principle to be adopted in ascertaining the proportion in which the land in question would vest in the plaintiff and Mr. Turner, was to draw a line from the point where the boundaries of the two adjoining owners met to the nearest point of the works of the company.

From this decision the defendants appealed.

Bovill (*Denman* and *Hannen* with him), for the appellants.—The judgment of the Court below was wrong. The plaintiff did not distinctly shew the boundary of the land which he sought to recover, as he was bound to do. In *Doe d. Hellyer v. King* (6 Exch. Rep. 791; s. c. 20 Law J. Rep. (n.s.) Exch. 301), an ejectment by tenants in common, where the exact number of the tenants in common could not be given at the trial, it was held that the case must be sent back for a new trial, as the *onus probandi* was on the plaintiff; secondly, the act obtained by the company for the extension of the time for re-sale affords a defence to the action. In *Cobbett v. Sir George Grey* (4 Exch. Rep. 729; s. c. 19 Law J. Rep. (n.s.) Exch. 187) it was held, that a plea in bar, justifying under a statute which affords a defence arising subsequently to the commencement of the action, is good after verdict. *The Proprietors of the Edinburgh and Dalkeith Railway Company v. Wauchope* (8 Cl. & F. 710) decides that any one, interested in the subject-matter of a private act of parliament, will have his rights affected by its provisions, though it may have been introduced and passed without notice duly given to him. The words of the section clearly apply to a re-sale under the powers of the special act.—He then proceeded to argue against the mode of apportionment adopted in the Court below.

Baylis (*Mellish* and *Murphy* with him), for the respondents, relied upon the arguments used in the Court below.

Cur. adv. vult.

ERLE, C.J. now (May 10) delivered the judgment of the Court.¹—In this case we affirm that part of the judgment of the Court below which decides that the defendants have no defence under the statute 26 & 27 Vict. c. cxcii. s. 28, extending the time for the sale of the superfluous lands for five years, for the reasons there assigned. We also affirm that part of the judgment which decides that section 216. of the 7 & 8 Vict. c. xcii. extends to lands of which the reversion had been purchased subject to a term, also for reasons therein assigned.

With respect to the part of the judgment relating to the practical application of the 216th section to the land, we have found difficulty in construing the enactment, that the superfluous lands shall vest in and become the property of the owners of the lands adjoining, in proportion to the extent of the lands adjoining thereto. We cannot lay down a rule that a straight line should be drawn from the point where the boundaries of two adjoining owners meet to the nearest point of the land actually used by the company for their works, and that the portions of superfluous land on each side of that line should vest in the respective owners on whose lands they abutted. In the case of superfluous land, surrounded by lands of adjoining owners, each owner would be entitled to a portion, though the line defining some portions

(1) Erle, C.J., Pollock, C.B., Martin, B., Willes, J., Keating, J., Pigott, B. and Montague Smith, J.

might be drawn in a direction from, instead of to, the works of the railway company. But, notwithstanding any difficulty, we are bound to construe and apply the statute, and we do so as follows: Where there are several adjoining properties in contact with the superfluous land in question, we think it should be divided among the owners of such adjoining properties in proportion to the frontage of each; and by frontage we mean what would be the length of the line of contact of each property if such line were made straight from the point of intersection of the boundaries on one side, to the point of intersection of the two boundaries on the other side.

To exemplify an application of this principle, we assume a piece of superfluous land, bounded by the railway on the south, and that the line of contact as above described of the owner adjoining it on the north is twenty feet long, and that the line of contact as above described of each of the owners on the east and west is ten feet long; the owner on the north would take a half, and each of the other owners a quarter. Each owner would take a triangular piece, having the assumed straight line of contact for its base. If this principle is applied to the present case, it may be that Mr. Turner, on the east, has, in substance, as much as he is entitled to; at all events, we have not the *data* to correct this apportionment if it is wrong. But on the west it is found in the case that the land coloured brown on the plan does not belong to the plaintiff or to the defendant, therefore neither party in the cause has any claim either to this land or in respect thereof, though if we had to draw the western boundary of the plaintiff's portion of the part coloured red, he is not entitled to more than would be to the east of a straight line from the south-west angle of his boundary line, to the nearest point of the railway works. According to the principle of the judgment below, this would take off a portion allotted to him in that judgment; but we consider that the statute gives a title to each of the adjoining owners at the time when it comes into operation, and that all land has an owner, and that therefore the land coloured brown has an owner, and that such owner has a title to a portion on the west on the above principle, and that the plaintiff has no title to such last-mentioned portion; and therefore, as the plaintiff in ejectment must recover on the strength of his own title, the decision in the Court below, on this special case, for the plaintiff ought to be restricted in the manner here laid down in respect of a further portion of the land coloured red, lying on the western side of the superfluous land in question, which is represented on the plan as coloured red.

Judgment below affirmed in part and reversed in part.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Queen's Bench.)

May 9, 10, 1866.

EGLINTON, appellant, v. BRAMWELL, official assignee, &c. respondent.*

35 L. J. Q.B. 163; L. R. 1 Q.B. 494; 7 B. & S. 587; 10 L. T. 295; 12 W. R. 551: affirming, 33 L. J. Q.B. 130; L. R. 1 Q.B. 494 (Q.B.).

Not applied, *ex parte Southam*, [1874] E. R. A.; 43 L. J. Bk. 39; 30 L. T. 132; 22 W. R. 456 (C. J. B.).

Bankrupt—Petition in Forma Pauperis—Adjudications, Relation of—Goods in Possession, Order or Disposition of Bankrupt at Time of Arrest.

BANKRUPTCY.—Section 103. of the 24 & 25 Vict. c. 134, which enacts, that

* *Coram*, Erle, C.J., Pollock, C.B., Bramwell, B. and Keating, J.

"every adjudication against any prisoner for debt so brought up as aforesaid shall, unless the Court shall otherwise direct, have relation back to the date of his commitment or detention, as the case may be, shall be as valid and effectual for all purposes as if it had been made under any other of the provisions of this act," has reference to petitioners petitioning in *forma pauperis*, and brought up and adjudicated bankrupts under sections 98. and 99.

A debtor having been arrested under a *ca. sa.* and lodged in prison, petitioned in *forma pauperis*, under section 98, and was adjudicated a bankrupt under section 99. Goods which were in the apparent order and disposition of the bankrupt at the time of his arrest, by the consent of the true owner, were seized by the true owner after the first day of the imprisonment, and before the bankrupt filed his petition. At the time of the seizure the true owner had notice of the arrest and imprisonment. The bankrupt's assignee brought an action against the true owner for the conversion of the goods, and an order was made for the sale of them, under section 125. of the 12 & 13 Vict. c. 106:—Held (affirming the judgment of the Court below), that section 103. of 25 & 26 Vict. c. 6. applied to the case of this debtor, who was "brought up" within the meaning of that section, and operated so that the goods passed to the bankrupt's assignee; since the effect of the section was to render the adjudication as complete as if it had been made on the first day of the imprisonment.

Held, also, that sections 98.—103. formed a distinct chapter in the Bankruptcy Act, 1861, and were to be read with reference to 1 & 2 Vict. c. 110. s. 57 (repealed), and that to sections 98.—103. section 133. of the Bankrupt Law Consolidation Act, 1849, had no application; so that whether the seizure of the goods by the true owner was or was not a *bona fide* transaction, without notice of a prior act of bankruptcy, within section 133. of the act of 1849, that section did not apply to the present case.

Quære—Whether a prisoner, against whom an adjudication is made by the Registrar, under section 101. of 24 & 25 Vict. c. 134, is a "prisoner for debt so brought up as aforesaid," within the meaning of section 103.

The following CASE was stated pursuant to section 39. of the Common Law Procedure Act, 1854, by way of appeal by the defendant, the appellant, from a rule of the Court of Queen's Bench, discharging a rule to shew cause, which was granted on the 5th of November, 1863, and which is hereafter set forth.

The action was brought by Bramwell (the respondent), as official assignee, &c., of C. G. Service, a bankrupt, against the defendant (the appellant).

The first count of the declaration was for the conversion, by the defendant, before Service became bankrupt, of certain goods (household furniture) belonging to Service. The second count was for the conversion, by the defendant, after Service became bankrupt, of the same goods belonging to the plaintiff as such official assignee.

The defendant pleaded, to both counts, not guilty, and, severally to each count, not possessed. Joinder of issue.

The cause came on to be tried, before Mellor, J., at the Durham Summer Assizes, 1863, when the following facts were proved:

The plaintiff is the official assignee of the estate and effects of one C. G. Service, a bankrupt, who before and up to the time of his arrest hereinafter mentioned carried on the business of a shipbroker at Sunderland, and the defendant at the time of the said arrest was the holder of a bill of sale, previously given to him by Service, upon the goods and chattels, claimed by the plaintiff in this action, as a security for divers sums of money, amounting with interest to 50l., advanced by the defendant to Service.

The bill of sale, bearing date the 22nd of October, 1862, was duly registered, and empowered the defendant to seize and sell the said goods

and chattels upon default being made by Service in payment of the principal and interest, after demand made upon him by notice in writing. The bill of sale may be referred to as a part of this case.¹

At the time when the bill of sale was given the defendant also drew a bill of exchange, dated the same day (the 22nd of October, 1862), for 50*l.*, at four months, on account of the same debt, which Service accepted and the defendant at once indorsed over for value, and it was outstanding in the hands of other persons for value at the time the defendant seized the goods as hereinafter mentioned. This bill would become due on the 25th of February, 1863. Service remained in possession of the furniture, it being that of the house in which he and his wife lived, down to the time when he was arrested and committed to prison as hereinafter mentioned.

On the 12th of February, 1863, Service was arrested on a *ca. sa.*, at the suit of a creditor, for 33*l.* 10*s.* He immediately informed the defendant of the fact of his arrest, and was advised by him to go to gaol, and petition the Court *in forma pauperis*, which he afterwards did. Service was lodged in Durham Gaol on the same day, of which the defendant had notice. On the 16th of February, about noon, the defendant, knowing Service was in gaol, left a notice in writing with Mrs. Service at their house, demanding payment of the money secured by the bill of sale; and the same evening he took possession of the furniture by putting a person in the house, and, afterwards, by a friendly arrangement with Mrs. Service, he locked the house up.

On the 18th of February Service filed his petition *in forma pauperis* (together with the proper affidavits), for an adjudication of bankruptcy against himself in the County Court of Durham, under section 98. of the Bankruptcy Act of 1861; and on the 23rd of February he was brought up to the county court under the 99th section, and adjudicated a bankrupt, protection being granted, and an order made for his discharge from custody. He was discharged accordingly, and on his return home on the same day, Service first received actual notice of the defendant's demand for payment.

No creditors' assignee was appointed after the adjudication, and the plaintiff being the registrar of the Court became and remained official assignee, and, as such, demanded the furniture of the defendant; the defendant, however, retained possession, and on the 13th of March sold it. On the 8th of June this action was commenced, and on the 15th of June an order for the sale of the furniture was made by the county court Judge, under the 125th section of the 12 & 13 Vict. c. 106.

On the trial, at Durham, it was contended, on the part of the plaintiff, that Service having petitioned the Court *in forma pauperis*, and having, after being brought up before the county court Judge for adjudication upon such petition, been duly adjudicated a bankrupt by the said Judge, under the 99th section of the act, the said adjudication related back to the 12th of February, the date of his commitment to prison, by virtue of the 103rd section, and that the goods and chattels having been in the order and disposition of Service on that day, with the consent of the defendant, as the true owner thereof, the property therein passed by relation on that day to the plaintiff, as official assignee of the bankrupt's estate and effects.

For the defendant it was contended that the adjudication of bankruptcy against pauper petitioners did not, by virtue of the 103rd section, relate back to the date of their commitment to prison; that the operation of the 103rd section was confined to cases of recusant or contumacious prisoners within the 102nd section; and that, as there was no evidence that the bankrupt had brought himself within the 102nd section, or been adjudicated a bankrupt under it, the 103rd section had no application to his case. It was also further contended, on the part of the defendant, that, even on the assumption that the 103rd section did apply to the cases of bankrupts who had done no more

(1) An abstract of the bill is given in the report of the case below, 33 Law J. Rep. (N.S.) Q.B. 130.

than petition the Court *in forma pauperis*, and been thereupon adjudicated bankrupt, still the seizure of the said goods and chattels having been made by the defendant on the 16th of February, without notice of any prior act of bankruptcy committed by Service at the time of such seizure, and having therefore preceded the date of the petition on the 18th, and the date of the fiat on the 23rd of the same month, was a protected transaction, within the 133rd section of the Bankruptcy Consolidation Act, 1849. The learned Judge reserved these and other points, and gave the defendant leave to move the Court of Queen's Bench to enter a nonsuit or a verdict for the defendant, and a verdict was in the mean time entered for the plaintiff, subject to the said point so reserved.

On the 5th of November, 1863, the defendant, in pursuance of the leave so reserved, obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, or a verdict entered for the defendant on the ground that, on the evidence, the defendant was entitled to succeed, and on the 22nd of February, 1864, the Court of Queen's Bench discharged the rule to shew cause; and from this decision the defendant appeals.

The question for the Court of appeal is, whether the said rule of the 5th of November ought to have been discharged or ought to have been made absolute upon the said points hereinbefore stated, and so reserved as aforesaid, or upon either of them. The Court of appeal to make such rule upon this appeal as it shall think fit, and to proceed thereon, pursuant to the provisions of the Common Law Procedure Act, 1854.²

Edward James (Levers with him), for the defendant.—The Court below was wrong in ordering that the rule should be discharged. It was argued in that court, on behalf of the plaintiff, that the words in section 103. of the Bankruptcy Act, 1861, "commitment or detention," refer to the 98th and 99th sections, and that they ought to be construed as meaning arrest on final

(2) The appellant's points were as follows: That assuming the bankruptcy to have dated from the arrest, the doctrine of reputed ownership does not apply to this case, the bankrupt having been at the alleged date of the bankruptcy the true owner of the goods, his ownership not being then terminated by a demand in writing. That assuming the date of the arrest to have been the date of bankruptcy, the seizure of the goods was a protected transaction within the 133rd section of the Bankruptcy Consolidation Act, 1849, having been made without notice of any prior act of bankruptcy. That assuming the effect of the 133rd section to be limited to cases where acts of bankruptcy have been committed, the legislature intended, in the 103rd section of the Bankruptcy Act, 1861, to make the suffering a commitment or detention an act of bankruptcy, and that on this assumption also the seizure was a protected transaction within the 133rd section of the Bankruptcy Act, 1849, a prior notice of such act of bankruptcy having been an impossibility under the circumstances. The defendant, however, contends, that to construe the words "commitment or detention" to mean a commitment to prison or a detention in prison for debt, would, in cases where there had been a detention under a detainer subsequently to the original commitment, create two distinct dates of bankruptcy, an anomaly never intended by the legislature. That the object of the legislature in the 103rd section of the Bankruptcy Act, 1861, was to prevent the rights of the assignees from being prejudiced by the contumacy mentioned and provided for in the 102nd section, and that the true meaning of the words "commitment and detention" is this: the Court may, under the 102nd section, where a contumacious prisoner is reported by the Registrar, commit such prisoner to the common gaol of the county, and the Court may at the same time adjudge such prisoner bankrupt; but this power is discretionary, and may not be exercised all at once. The Court may omit on the first occasion to commit him, and simultaneously adjudge him bankrupt. In such cases the prisoner would be detained where he was, *i. e.* in the debtors' prison, and any subsequent adjudication would relate to the date of such detention; or again, the Court may commit him at once and postpone the adjudication of bankruptcy. In that case the subsequent adjudication would relate to the date of such commitment; but in either case, and however the Court may exercise its discretion, the date of the bankruptcy would be the same, however differently described, and the title of the assignees would be protected to the same extent in either case from the consequence of contumacy on the part of the prisoner.

The respondent's points were, that the adjudication of bankruptcy relates back to the date of the commitment to prison under section 103. of the Bankruptcy Act, 1861, and that the goods were in the order and disposition of the bankrupt at that date. And further, that the 133rd section of the Bankruptcy Act, 1849, has no application to this case, and does not protect the seizure.

Sections 98.—103. of 24 & 25 Vict. c. 134. are set out in 33 Law J. Rep. (N.S.) Q.B. 131.

process or detention; but it is submitted the 103rd section only applies to the case of prisoners brought up for contumacy before the county court Judge, as provided for by the 102nd section. The Court below admitted that the 102nd section did not provide in express terms that contumacious prisoners should be "brought up" before the county court Judge; but they thought that as the county court Judge was empowered to send them to the common gaol with hard labour, the legislature intended that they should be "brought up" for the purpose of being heard in their own defence. There is no difficulty therefore created, as regards the defendant's construction, by the words "brought up." On the other hand, on the plaintiff's construction, there is this palpable inconsistency—that the section is made to apply exclusively to pauper petitioners "brought up," under the 99th section, before the county court Judge, and not to pauper petitioners discharged and adjudicated bankrupt by the Registrar; for the 99th section says, "if not previously discharged by the Registrar," so that the bankruptcy of pauper petitioners "brought up" before the county court Judge would be held to relate back to the date of their arrest, and the bankruptcies of pauper petitioners discharged by the Registrar relating back to the fourteenth day of their imprisonment, as provided for by the 101st section, taken in connexion with the 71st section. The key to the true construction of the 103rd section is suggested by the analogous provisions of the 71st section. By that section the bankruptcy of a trader lying in prison dates from the fourteenth day of imprisonment, and of a non-trader from the expiration of two months; whereas in the case of prisoners who do not conform, and who effect their escape from prison, the bankruptcy dates from the time of their arrest. So here, in the case of prisoners who conform, their bankruptcy dates from the fourteenth day or the expiration of three months (otherwise why should the power of the Registrar be limited by the 101st section to prisoners who had committed acts of bankruptcy by lying in prison?); but in the case of prisoners who prove contumacious, the bankruptcy is made, by the 103rd section, to relate back to their arrest by way of penalty for their contumacious conduct. The mere collocation of the 103rd section, coming, as it does, immediately after the 102nd section (and for which the Court below admitted that they could not suggest any satisfactory reason upon the plaintiff's construction of the words) shews clearly that the 102nd, and not the 99th section, was before the mind of the legislature when enacting this section. But even if this adjudication does relate back to the commencement of the imprisonment, the defendant is protected by the 133rd section of the 12 & 13 Vict. c. 106, which is unrepealed—*Graham v. Furber* (14 Com. B. Rep. 134; s. c. 23 Law J. Rep. (N.S.) C.P. 51), *Conway v. Nall* (1 Ibid. 643; s. c. 14 Law J. Rep. (N.S.) C.P. 165) and *Edwards v. Gabriel* (31 Law J. Rep. (N.S.) Exch. 113).

Mellish (*Quain* with him) was requested to confine himself to the second point, viz., the effect of the 133rd section of the act of 1849 upon bankruptcies under these sections—Section 133. of the Bankruptcy Act, 1849, has no application to the present case. The scope of sections 98.—103. of the act of 1861, which form a code distinct from the rest of the Bankruptcy law, may be perceived from comparing the enactments under the 1 & 2 Vict. c. 110. ss. 57-59, relating to insolvent debtors. The legislature there appeared to think that there was no injustice in saying to all persons, "If you choose to deal with a person who is a prisoner in actual custody, you must do so at your peril."³ This being the law, on drawing the code of 1861, these clauses may have suggested to the framers that there were some cases to which the laws affecting insolvent prisoners might properly be applied. This is the explanation of section 103. of the Bankruptcy Act of 1861. It was urged on the other side that that section was designed as a punishment of the prisoner; but that is quite a mistake. It is to be taken

(3) By section 57. goods in the prisoner's apparent ownership at the time of his arrest or other commencement of his imprisonment were vested in the assignee, and there was no protection whatever for *bona fide* transactions without notice.

(from the intimation of the Court) as established that that section includes the case of *prisoners* petitioning under section 98. Is it not most consistent with that to hold that the intention of the act was to draw the dividing line between the rights of the official assignee and the rights of a private creditor at the first day of imprisonment?—(He was then stopped.)

Leuvers, in reply.—It is admitted that if sections 98.—103. of the act of 1861 form a distinct code, the 133rd section of the act of 1849 has no application; but they must be construed with reference to the act of 1849. It was only by virtue of the 125th (the reputed ownership) section of the act of 1849 that the assignee had even a colourable title to the goods. That section always was qualified by the 133rd section of the same act, and the result of holding the 98th to the 103rd sections of the act of 1861 to be a distinct code would be to give the 125th section of the act of 1849 a different operation in the case of those bankruptcies from what it had in ordinary bankruptcies. Again, if these sections formed a separate code, why is it that the 101st section limited the jurisdiction of the Registrar to the cases of prisoners who have committed acts of bankruptcy by lying fourteen days or two months in prison, as provided by the 71st section? If bankruptcies under these sections were to relate to the date of the arrest, no reason can be suggested why the jurisdiction of the Registrar should be limited to persons who had lain fourteen days or two months in prison, as provided by the 101st section? Why should the Registrar, on the plaintiff's construction, not have been empowered to deal with prisoners who had lain one day in prison? Besides, the concluding words of the 103rd section are adverse to the plaintiff's contention that these sections are to be construed solely by themselves. The concluding words of the section are, "shall be as valid and effectual for all purposes as if it had been made under any other of the provisions of this act." The extent of the operation of these bankruptcies must therefore be deduced from the other provisions of the act; and yet the plaintiff asked the Court to close its eyes to all other parts of this or any other act. In truth, the plaintiff claims for these bankruptcies a more extensive operation than ordinary bankruptcies have, in contravention of the clear meaning of the legislature, because the legislature, in enacting that these bankruptcies should be "as valid and effectual" as other bankruptcies, by implication enacted that they should not have any higher or more extensive validity, on the principle, *unius expressio est exclusio alterius*. There is internal evidence, therefore, in these sections that they are not to be construed solely by themselves; but that they must be construed with reference and subject to the rest of the Bankrupt Law. Assuming that the Court is satisfied on this point, the seizure of the goods was clearly a protected transaction, under the 133rd section of the act of 1849. This is clear under the principles of *Edwards v. Gabriel* (31 Law J. Rep. (n.s.) Exch. 113) and *Conway v. Nall* (1 Ibid. 643; s. c. 14 Law J. Rep. (n.s.) C.P. 165). Notice of the arrest could not be "notice of a prior act of bankruptcy," within the meaning of that section, so as to deprive the defendant of the protection given by that section.

ERLE, C.J.—We are unanimous in thinking that we ought to affirm the judgment of the Court below on both points. We think that section 103. of the Bankruptcy Act, 1861, applies to a prisoner brought up as the bankrupt was in this case. Section 98, and the following sections of that act, relate to adjudications of bankruptcy against paupers, prisoners for debt; and we think that section 103. goes back so as to relate to all petitioners, so far as it is possible for it to apply, that come under this chapter of the statute, and we read these sections as forming a separate and distinct chapter in the statute. Section 103. applies to every "prisoner for debt so brought up as aforesaid." It is not necessary to decide whether these words apply to prisoners brought up before the county court Judge only, and not to those against whom an adjudication is made under section 101. by the Registrar, because this pauper is clearly "brought up" within these words.

As to the second point, the transaction in question was after the bankrupt

was committed to prison, and before the adjudication. The defendant, the owner of the goods, took possession of them between the first day of the imprisonment and the day of adjudication of bankruptcy. Whether or not there is anything in the point of law that was raised, whether or not the taking possession of the goods by the defendant, with notice of the arrest, was a *bona fide* transaction, without notice of a prior act of bankruptcy, which would be protected under section 133. of the Bankruptcy Act of 1849—however that may be—the moment Mr. Mellish infused the idea that the distinction⁴ between the code relating to prisoners under the Insolvents' Act and the code relating to prisoners under the Traders' Act, might throw light on this statute, and that the statute is to be read with reference to both classes, I thought the legislature might well have intended that as to *all* pauper prisoners, whether insolvents or bankrupts, coming under the 98th and following sections, section 103. should apply, and that the effect of that section should be that the operation of the adjudication of bankruptcy should be as complete as if the bankrupt had been so adjudicated on the first day of his imprisonment. This construction gives the same effect to the clause in the Insolvents' Act (1 & 2 Vict. c. 110. s. 57), which enacts, that all property in the possession, order or disposition of the prisoner at the time of his arrest or other commencement of his imprisonment, with the consent of the true owner, shall pass to his assignee, and to the 103rd section of the Bankruptcy Act, 1861. Now the words of that section are, "Every adjudication against any prisoner for debt so brought up as aforesaid, shall, unless the Court shall otherwise direct, have relation back to the date of his commitment or detention, as the case may be, and shall be as valid and effectual for all purposes as if it had been made under any other of the provisions of this act." I think that, giving effect to these words, in reference to the legislation before existing, the adjudication has full operation from the first day of the imprisonment, and gives to the creditors the right to the goods then in the order or disposition of the bankrupt.

Judgment for the respondent.

[IN THE QUEEN'S BENCH.]

May 5, 1866.

BALMFORTH v. PLEDGE.

35 L. J. Q.B. 169; 7 B. & S. 425; L. R. 1 Q.B. 427; 14 L. T. 361;
12 Jur. N.S. 644.

Practice—New Trial—Cause ordered to be tried in County Court—19 & 20 Vict. c. 108. s. 26.

COUNTY COURT.—*A motion for a new trial in an action of contract, tried under Judge's order in a county court, must be made in the superior court in which the writ was issued.*

This was an action for the price of certain goods, tried, under a Judge's order, according to 19 & 20 Vict. c. 108,¹ in the County Court of Bradford, on the 20th of April, 1866, when a verdict was given for the plaintiff.

Kennedy having obtained a rule *nisi* to shew cause why the verdict should not be set aside and a new trial had on the grounds, first, that the action was

(4) This distinction is clearly explained in the written judgment of Blackburn, J., 33 Law J. Rep. (N.S.) Q.B. 133-4.

(1) The following sections of the County Court Acts were referred to during the argument :
By 9 & 10 Vict. c. 95. s. 89. every order and judgment of any Court holden under this act, except as herein provided, shall be final and conclusive between the parties; but the Judge shall have power to nonsuit the plaintiff in every case in which satisfactory proof shall not

brought before credit expired; secondly, that the order for the goods was not complied with by the plaintiff; thirdly, that the quality of the goods ought to have been considered by the Judge,—

Kemplay now shewed cause.—There is a preliminary objection to this rule, namely, that the application ought to have been made to the county court. The words of the section under which this case was tried, 19 & 20 Vict. c. 108. s. 26, which enable orders to be made for causes to be tried in the county court, shew that the superior Courts are divested of all control over such a case as the order is made, and that any decision made in it afterwards can only be reviewed by the machinery of the county court. The section is very different from section 17. of the 3 & 4 Will. 4. c. 42, which only substitutes the sheriff for the Judge at Nisi Prius.

[BLACKBURN, J.—After issue is joined nothing remains to be done but to try the cause.]

In *Angel v. Ihler* (5 Mee. & W. 600; s. c. 9 Law J. Rep. (N.S.) Exch. 8), where it was held that after trial of a writ of inquiry before the sheriff, under 3 & 4 Will. 4. c. 42. s. 17, execution could be stayed by the Court at Westminster, although the sheriff had refused to certify, the decision turned upon the special words of 1 Will. 4. c. 7. s. 19, which was incorporated in the former act.

[LUSH, J.—That section was only necessary to allow a new trial when judgment had been signed.]

In *Breese v. Owens* (6 Exch. Rep. 413; s. c. 20 Law J. Rep. (N.S.) Exch. 288: in error, 6 Exch. Rep. 916; s. c. 20 Law J. Rep. (N.S.) Exch. 359) it was held that a county court established under 9 & 10 Vict. c. 95. is not a Court of record to which a writ of trial can be directed under 3 & 4 Will. 4. c. 42. s. 17. Those words in the section which direct the Registrar to certify the result of the trial to the Master's office, create another difficulty, for the Court ought not to interfere until the arrival of the certificate. In the case of a writ of inquiry a day certain is fixed for the return; here there is no such limit. In *Wheatcroft v. Foster* (El. B. & El. 737; s. c. 27 Law J. Rep. (N.S.) Q.B. 277), where the order directing a cause to be tried in a county court was silent as to costs, it was held that the Master might tax the costs with reference to the County Court scale, Crompton, J. saying, that the case seemed to him very like a proceeding in a county court.

[BLACKBURN, J.—When a cause was tried in the court of the county palatine of Lancaster by virtue of a *mittimus* to the Justices of the Court, it was always the duty of the Court at Westminster to see that the issues were properly tried. There is nothing in this act to shew that the same supervising power is taken away.]

The County Court Acts have provided a special mode of application for a new trial, from which there was no intention to depart in a case like this.

Kennedy against the objection.—The words of the section giving jurisdiction to the county court merely relieve the superior Court from the burden of trying the cause. In all other respects the jurisdiction remains as before.

BLACKBURN, J.—I am of opinion that the objection must be overruled. The question, which is one of considerable importance, is whether application for a

be given to him entitling either the plaintiff or the defendant to the judgment of the Court, and shall also in every case whatever have the power, if he shall think fit, to order a new trial to be had upon such terms as he shall think reasonable, and in the mean time to stay the proceedings.

By 19 & 20 Vict. c. 108. s. 26, Where in any action of contract brought in a superior Court the claim indorsed on the writ does not exceed 50l., or where such claim, though it originally exceeded 50l., is reduced by payment into court, payment, admitted set-off or otherwise, to a sum not exceeding 50l., a Judge of a superior Court, on the application of either party after issue joined, may in his discretion and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name, and thereupon the plaintiff shall lodge with the Registrar of such Court such order and the issue, and the Judge of such Court shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the Registrar to both parties or their attorneys, and after such hearing the Registrar shall certify the result to the Master's office of such superior Court, and judgment in accordance with such certificate, may be signed in such superior Court.

new trial can be made to this Court in a cause tried before a county court Judge, under 19 & 20 Vict. c. 108. s. 26. The case appears to my Brother Mellor to be by no means a clear one, but my other two Brethren and myself have no difficulty. The ground which I adopt is, that the words of the section merely make provision for the trial of the cause, but do not extend to other proceedings. It is like a case tried in the county palatine of Lancaster, where it was one of the incidents of the trial that the superior Courts had a superintending power to set aside the verdict, if any miscarriage had happened. The question arises, what is there here to take away the superintending power of this Court? There is nothing in the statute by express terms to do this. There may be considerable difficulty, particularly where the Judge tries a case without a jury, in ascertaining the terms of his direction; but that difficulty cannot take away the superintending power of this Court. If the legislature had meant to say that this Court should not review such cases, they might have said that the county court Judge must dispose of them altogether. But what they have said is that the cause is to be tried in a county court, and that the Registrar is to certify the result to this Court. When the trial is over the jurisdiction of the County Court is terminated, and this Court resumes its control over the case by means of the Registrar. I therefore think the objection cannot be supported.

MELLOR, J.—I by no means dissent from the judgment of the Court, as I do not feel entire confidence in my construction of the act; all I say is, that the policy of the legislature seems to have been to have these cases tried in a county court, according to the practice in such courts, and not according to the course of common law. As to the words of section 26. of the 19 & 20 Vict. c. 108, which provide that after the hearing of the cause the Registrar shall certify the result to the Master's office of the superior Court, and that judgment may be signed in accordance with such certificate, it has been contended that the verdict only is to be certified; but it seems to me that the effective result of the proceedings may possibly have been intended. I agree, however, that the words can bear two constructions: I am simply uncertain as to which I am to adopt. It is quite true that the express power of granting a new trial in the 9 & 10 Vict. c. 95. s. 89. applies only to plaints commenced in the county court, and that cases like the present one are only sent there after issue has been joined in the superior Court.

SHEE, J.—I am of the same opinion as my Brother Blackburn. Section 89. of the first County Court Act, 9 & 10 Vict. c. 95, applies exclusively to plaints instituted under the provisions of that act, while section 26. of the 19 & 20 Vict. c. 108. applies to cases commenced in the superior Courts and after issue is joined. This section, as it seems to me, merely intended to introduce a cheap and expeditious mode of trying certain cases. If the construction contended for by Mr. Kemplay were correct, and the provisions of the earlier act are to be altogether applicable to cases tried under section 26, those which relate to writs of *certiorari* would be useless, as the section orders the Registrar to forward the result of every case to this Court. With reference to these last three lines of the section directing the Registrar to certify the result of the trial, one would surely have expected if the whole of the act, 9 & 10 Vict. c. 95, was to apply to them, that the words "unless a new trial shall have been ordered by the Judge" would have been added.

[LUSH, J.—I am of the same opinion, as I think that the jurisdiction of this Court is not taken away by the fact that it was sent for trial before a county court Judge. If it had been intended to deprive this Court of any jurisdiction, we should expect to find words indicating such an intention. But as I read the section, it merely vests in the county court Judge a jurisdiction to try the cause. When the case is tried, the Judge is *functus officio*, and in the same position as the sheriff after the execution of a writ of trial or a Commissioner of Assize, who tries by virtue of his commission, and not as a Judge. I therefore think that there is no ground for this objection.

Objection overruled.

[IN THE QUEEN'S BENCH.]

May 10, 1866.

REEVES AND ANOTHER v. WATTS.

35 L. J. Q.B. 171; L. R. 1 Q.B. 412; 14 L. T. 478; 14 W. R. 672; 7 B. & S. 523;
12 Jur. N.S. 565.

Referred to, *M'Laren v. Baxter*, [1867] E. R. A.; 36 L. J. C.P. 247; 16 L. T. 521; 15 W. R. 1017 (C.P.). Followed, *Solomon v. Laverick*, 1868, 17 L. T. 545 (Ex.).

The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, was repealed by 32 & 33 Vict. c. 83 s. 20.

Debtor and Creditor—Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192.—Composition Deed—Parties to Deed—Covenant with all the Creditors—Creditor not named—Non-assenting Creditor.

BANKRUPTCY.—*A composition deed under section 192. of the Bankruptcy Act, 1861, was expressed to be made between the debtor of the first part, and "all the creditors" of the debtor of the second part, whereby the debtor covenanted severally with the parties of the second part to pay a composition, in consideration of which the parties of the second part released the debtor from all debts, &c.:—Held, on the authority of Gresty v. Gibson (35 L. J. Ex. 74), that the deed was valid, and bound non-assenting creditors, since, though not named by name as parties, the description was such that they could be ascertained, and they could therefore, sue on the covenant.*

The declaration was on a bill of exchange accepted by the defendant and indorsed to the plaintiffs.

Second plea—That before action the defendant had executed a composition deed under section 192. of the Bankruptcy Act, 1861, which was made between the defendant of the first part, and all his creditors of the second part, and contained a release from all the said creditors' claims, &c., except the covenant for payment of the composition therein mentioned. The plea then averred performance of all things required by section 192, to make the deed binding upon non-executing creditors, and that the plaintiffs were creditors of the defendant within the meaning of the Bankruptcy Act, 1861.

The second replication set out the deed, which was made between "A. Watts," the defendant, "of the first part, and all the creditors of the said A. W. of the second part," and by which, after reciting (*inter alia*) that the deed was intended "to operate equally for the benefit of and to bind all the creditors of the said A. W., whether they assent to them or not," and that A. W. was indebted to the parties thereto, of the second part in divers sums, which he was unable to pay in full; it was witnessed that A. W. covenanted "with the said several persons parties hereto of the second part respectively," that he would pay "unto the said several persons parties hereto of the second part, being all and every the present creditors of him the said A. W.," a composition of 10s. in the pound, by the instalments and at the times therein mentioned. And it was witnessed, further, that in consideration (*inter alia*) of the above covenant "the several creditors parties hereto of the second part respectively," did, and each of them did hereby release, &c., the said A. W. from all the debts, covenants, &c. (except the covenant for the payment of the said composition), which "the said several creditors, parties hereto of the second part respectively," or any of them, might claim of or from the said A. W. on account of the debts, &c. due to them from him. And it was further expressly declared, that "all the creditors of the said A. W." should be equally bound by and entitled to the benefit of these presents, although they might not assent thereto or approve thereof. In witness whereof "the said parties to these presents" have, &c.

The deed appeared to have been executed by only two persons, and the replication averred that they were two of the creditors of the defendant of the second part, and executed the deed; and, further, that the plaintiffs were not parties to, and did not execute the deed.

Demurrer to the replication, and joinder therein.

J. Brown (with him *Eyre Lloyd*), for the defendant, in support of the demurrer.—This deed binds non-assenting creditors. It is exactly similar to the deed in *Gresty v. Gibson* (35 L. J. Ex. 74), which concludes the question. The Court there held the deed good on the authority of *Lay v. Mottram* (19 Com. B. Rep. N.S. 479).

[BLACKBURN, J.—We should be very sorry to upset such a salutary decision as *Gresty v. Gibson* (35 L. J. Ex. 74). If that case is applicable to the present, it is enough to bind us in this Court.]

This case is distinguishable from *The Chesterfield Colliery Company v Hawkins* (34 Law J. Rep. (n.s.) Exch. 121; s. c. 3 Hurl. & C. 667).

C. H. Hopwood, for the plaintiff, in support of the demurrer.—This deed does not bind a non-assenting creditor, for he could not sue on the covenant, and since the two creditors who signed could sue, there is inequality. Unless *Gresty v. Gibson* (35 L. J. Ex. 74) was intended to overrule *Ex parte Cockburn* (33 Law J. Rep. (n.s.) Bankr. 17) (which there is authority for saying it was not), the Court of Exchequer have been led into error; for they gave judgment in *Gresty v. Gibson* (35 L. J. Ex. 74) on the supposition that there was no distinction between that case and *Lay v. Mottram* (19 Com. B. Rep. N.S. 479). It is contended there is a distinction. In the latter case *Lay*, the non-assenting creditor, was by implication named in the schedule, but neither in the present case nor in *Gresty v. Gibson* (35 L. J. Ex. 74) was the non-assenting creditor named in the schedule, for there was none. Therefore in *Lay v. Mottram* (19 Com. B. Rep. N.S. 479) the Court had not the present point before them, and it is no authority against my proposition that on a deed *inter partes* a person must either be named *nominatim* or must seal, in order to be able to sue. This is established by *Ex parte Cockburn* (33 Law J. Rep. (n.s.) Bankr. 17). In *Lay v. Mottram* (19 Com. B. Rep. N.S. 479) there were means of ascertaining all the creditors.

[BLACKBURN, J.—But in fact they may perhaps not have been ascertained. From the judgment of Mr. Justice Willes, in *Lay v. Mottram* (19 Com. B. Rep. N.S. 479), it appears that the Court had the present point before them. He says (19 Com. B. Rep. N.S. 487), “Mr. Philbrick says the deed is unreasonable and not binding on dissentient creditors, because no remedy is given them for the composition. But I think the case of *Farrall v. Hilditch* (5 Ibid. 840) furnishes a complete answer to that argument.”]

But it is apparent from the judgment of Byles, J. that the point was not raised before them. On the pleadings here it appears that there are only three creditors. The deed is limited to those who sign and seal. The end runs, “In witness whereof the said parties to these presents have hereunto set their hands and seals;” and the creditors who do not execute are therefore excluded.

[BLACKBURN, J.—These words must not be allowed to control the whole of the deed, so as to defeat the intention to bind non-assenting creditors.]

The covenant is with “the said several persons *parties hereto* of the second part respectively.”

[BLACKBURN, J.—The parties of the second part are *all* the creditors. It all comes round to what the Lord Chief Baron said in *Gresty v. Gibson* (35 L. J. Ex. 74), “The only question is, whether the description of the persons with whom the covenant is made is not too vague.”]

In *Ex parte Rawlings* (32 Law J. Rep. (n.s.) Bankr. 27) and *Ex parte Godden* (32 Law J. Rep. (n.s.) Bankr. 37) the deeds were held invalid.

[BLACKBURN, J.—Neither of those cases have any bearing on the present point.]

In *Ex parte Cockburn* (33 Law J. Rep. (n.s.) Bankr. 17) Lord Westbury

said (see p. 20), "As the deed is between parties, no person who is not a party could sue upon the covenant." That case was implicitly followed in *The Chesterfield Colliery Company v. Hawkins* (34 Law J. Rep. (n.s.) Exch. 128), for Martin, B. quotes the words, and says he feels bound by it.

[BLACKBURN, J.—That point has been treated as an *obiter dictum*.]

Ex parte Cockburn (33 Law J. Rep. (n.s.) Bankr. 17) was again followed in *Martin v. Gribble* (34 Law J. Rep. (n.s.) Exch. 111, per Pollock, C.B.). See also *Ilderton v. Jewell* (33 Law J. Rep. (n.s.) C.P. 148), *Lyne v. Wyatt* (34 Law J. Rep. (n.s.) C.P. 179) and *Benham v. Broadhurst* (34 Law J. Rep. (n.s.) Exch. 61).

[BLACKBURN, J.—If you can produce any authority, except *Ex parte Cockburn* (33 Law J. Rep. (n.s.) Bankr. 17) and *Martin v. Gribble* (34 Law J. Rep. (n.s.) Exch. 111, per Pollock, C.B.) to shew that on a deed between a debtor and all his creditors, a non-assenting creditor could not sue, that would be material. *The Chesterfield Colliery Company v. Hawkins* (34 Law J. Rep. (n.s.) Exch. 121; s. c. 3 Hurl. & C. 667) differs from this case. The technical rule of law there mentioned has no application to this case. The non-assenting creditors there were covenantees, but were not made parties to the deed either individually or in a class.]

In 2 *Preston's Conveyancing*, p. 394, it is said, "With reference to *indentures* between parties, it seems to be a general rule that no one can be considered as a party to a deed, unless he be named as a party in the clause containing the names of the persons who are formally made parties." So, in 8 *Bythewood's Conveyancing*, by Jarman (edit. 1832), it is said, "On the general principle that a stranger to a deed cannot take the benefit of it, covenants in an indenture, entered into with persons who are *not parties* confer no right of action on such persons; and where a deed is expressed to be made between parties, the persons so named alone are parties to the instrument." Would a party be considered to be named *nominatim* if he were a member of a firm which was named?

[BLACKBURN, J.—The Lord Chief Baron, in *Gresty v. Gibson* (35 L. J. Ex. 74), thought that on a covenant with a firm, the several members could sue.]

He cited, as to parties to deeds, *Storey v. Gordon* (3 M. & S. 308), *Metcalf v. Rycroft* (6 Ibid. 75), *Salter v. Kidgley* (Carth. 77), *Scudamore v. Vandertene* (2 Inst. 673), *Berkeley v. Hardy* (5 B. & C. 355), *Lord Southampton v. Brown* (6 Ibid. 718), *Bushell v. Beavan* (1 Bing. N.C. 120).

[BLACKBURN, J.—You have not produced any case which says that a person included in a description cannot sue; though no cases have been produced which assert the affirmative. You propose to add to the technical rules already existing one that a person cannot sue unless named by name.]

[*J. Brown* here referred to *Maughan v. Sharpe* (34 Law J. Rep. (n.s.) C.P. 24), where it was held that a conveyance to the "City Investment and Advance Company" operated as a conveyance to two persons, who were the only members of the company. Williams, J. there said, "I apprehend it is settled that a grant may be good, though the grantee be not named by his christian name or surname. In *Shep. Touch.* 236, after stating the consequence of a mistake in the christian name or surname of the grantee, it is stated, 'And yet if the grant do not intend to describe the grantee by his known name, but by some other matter, there it may be good by a certain description of the person, without either surname or name of baptism'; and it is added, '*id certum est quod certum reddi potest*.' I am of opinion that the meaning of the grant in this deed is to convey the goods to the persons using the style and name of the 'City Investment and Advance Company.' They may or may not be a corporation; but when it has been ascertained that the persons answering to that description are the defendants, the grant operates accordingly to convey the property to them."]

[BLACKBURN, J.—That is very much in point.]

It required the 8 & 9 Vict. c. 106. s. 5. to enable a person to take benefit of

a covenant in an indenture, where the taker was not "named a party" to the indenture.

J. Brown was not called on to reply.

BLACKBURN, J.—In this Court (whatever view might be taken in a Court of error, where the whole question might be reviewed), there can be no doubt that our judgment must be for the defendant, for we are bound by *Gresty v. Gibson* (35 L. J. Ex. 74); and even if we were at liberty to review it, I think the decision was right. We must follow that case, which is expressly in point. The matter was there fully argued; and the Court, having taken time to consider, say that the deed was good; and even if I thought that decision wrong, still we should be bound to follow it here. In *Maughan v. Sharpe* (34 Law J. Rep. (N.S.) C.P. 24) Mr. Justice Williams's remarks are in favour of the position that on a deed *inter partes* one who is not named by name as a party, but is so described that he can be rendered certain, may sue; but whether that is right or not, we are bound by the recent case in the Exchequer, *Gresty v. Gibson* (35 L. J. Ex. 74).

SHEE, J. concurred.

Judgment for the defendant.

[IN THE QUEEN'S BENCH.]

May 9, 10, 23, 1866.

NICHOLSON v. THE GUARDIANS OF THE BRADFELD UNION.

35 L. J. Q.B. 176; 7 B. & S. 774; L. R. 1 Q.B. 620; 14 L. T. 830; 14 W. R. 731.

Referred to, *Hunt v. Wimbledon Local Board*, [1878] E. R. A.; 47 L. J. C.P. 540; L. R. 3 C.P. D. 208; 39 L. T. 35; 26 W. R. 830 (C.P.): affirmed, [1879] E. R. A.; 48 L. J. C.P. 207; L. R. 4 C.P. D. 48; 40 L. T. 115; 27 W. R. 123 (C. A.). Principle applied, *Young v. Mayor and Corporation of Leamington*, [1882] E. R. A.; 51 L. J. Q.B. 292; L. R. 8 Q.B. D. 579; 46 L. T. 555; 30 W. R. 500 (C. A.): affirmed, [1883] E. R. A.; 52 L. J. Q.B. 713; 8 App. Cas. 517; 49 L. T. 1; 31 W. R. 925 (H.L.). Approved, *Lawford v. Billericay Rural Council*, [1903] E. R. A.; 72 L. J. K.B. 554; [1903] 1 K.B. 772; 88 L. T. 317; 51 W. R. 630 (C. A.).

Corporation—Contract not under Seal—Offer to return Goods before Action brought.

CORPORATION. POOR LAW.—*The guardians of the B. union accepted a tender by the plaintiff for the supply of Ruabon and Aberdare coal for the use of the workhouse. The coal was from time to time accepted by the guardians from the plaintiff, of which that which purported to be Aberdare was, and that which purported to be Ruabon was only in part, according to the contract. The guardians, after consuming a part of each sort of coal, discovered an inferiority in the Ruabon coal, and required the plaintiff to take back the unconsumed portion of the Aberdare coal which was according to contract as well as the Ruabon which was not, and offered before action to return it to him:—Held, that the fact that the contract was not under the seal of the guardians was no defence to an action for the price of the Aberdare coal.*

Clarke v. the Guardians of the Cuckfield Union (21 Law J. Rep. (N.S.) Q.B. 349) approved of.

SPECIAL CASE stated for the opinion of this Court.

The facts and arguments are sufficiently stated in the judgment of the Court.

The case was argued on the 9th and 10th of May by—

J. J. Powell and Henry James, for the plaintiff; they referred to the following cases: *Clarke v. the Guardians of the Cuckfield Union* (21 Law J. Rep. (n.s.) Q.B. 349), *Haigh v. the Guardians of the North Brierley Union* (El. B. & El. 873; s. c. 28 Law J. Rep. (n.s.) Q.B. 62), *The London Dock Company v. Sinnott* (8 El. & B. 347; s. c. 26 Law J. Rep. (n.s.) Q.B. 129), *Henderson v. the Royal Mail Steam Navigation Company* (5 Ibid. 409; s. c. 24 Law J. Rep. (n.s.) Q.B. 322), *Sanders v. the St. Neots Union* (8 Q.B. Rep. 810; s. c. 15 Law J. Rep. (n.s.) M.C. 104), *Paine v. the Guardians of the Strand Union* (Ibid. 326; s. c. 15 Law J. Rep. (n.s.) M.C. 89), *Smart v. the Guardians of West Ham Union* (11 Exch. Rep. 687; s. c. 25 Law J. Rep. (n.s.) Exch. 110), *De Grave v. the Mayor, &c. of Monmouth* (4 Car. & P. 111).

Harington (Griffiths with him), for the defendants, cited, *Beverley v. the Lincoln Gas Company* (6 Ad. & E. 829; s. c. 7 Law J. Rep. (n.s.) Q.B. 113), *Lamprell v. the Billericay Union* (3 Exch. Rep. 283; s. c. 18 Law J. Rep. (n.s.) Exch. 282), *The Mayor, &c. of Ludlow v. Charlton* (6 Mee. & W. 815; s. c. 10 Law J. Rep. (n.s.) Exch. 75), *The East London Waterworks Company v. Bailey* (4 Bing. 283; s. c. 5 Law J. Rep. C.P. 175), *Arnold v. the Mayor, &c. of Poole* (4 Man. & G. 860; s. c. 12 Law J. Rep. (n.s.) C.P. 97), *Diggle v. the London and Blackwall Railway Company* (5 Exch. Rep. 442; s. c. 19 Law J. Rep. (n.s.) Exch. 308).

Cur. adv. vult.

The judgment of the Court was delivered, on the 23rd of May, by—

BLACKBURN, J.—This was a case argued at the sittings after last term, before my Brother Lush and myself. The facts were, that the guardians of the Bradfield Union had advertised for tenders for the supply of Ruabon and Aberdare coals, for the use of the workhouse. The plaintiff, amongst others, sent in his tender for 70 tons Ruabon coals at 21s. 9d., and 60 tons of Aberdare coals at 22s. 3d. per ton; and on the 21st of June, 1864, by a resolution of the board of guardians made at a board meeting duly held, his tender was accepted, and on the 22nd of June the clerk of the guardians wrote to inform the plaintiff of this, and requested him to call with his sureties and execute the formal contract. This contract was in the form of a deed purporting to be made between the plaintiff of the one part and the guardians of the poor of the Bradfield Union of the other. The plaintiff attended and executed the deed, but not having brought his sureties with him, the execution by the guardians was postponed till he had procured them. He did afterwards procure his sureties to execute the bond, but, first, on account of some informality, and afterwards in consequence of some dispute, the seal of the guardians was never in fact affixed to the contract. Both parties, however, acted in the interval as if the contract had been formally executed. The plaintiff sent to the workhouse in pursuance of orders properly given to him four parcels of coals, for the price of which he brought this action. Two of these parcels, delivered on the 28th and 30th of June, amounting together to 21 tons, were ordered and supplied as Aberdare coals. The price of these at the contract price amounts to 23l. 7s., and in fact they were such coals as by the contract ought to have been supplied as Aberdare coals. Two other parcels were sent in as Ruabon coals, one lot of 15 tons 9 cwt., on the 1st of July, which really were Ruabon coals, such as by the contract ought to have been supplied as Ruabon coals, and another lot of 7 tons 8 cwt., on the 2nd of July, which were not in fact Ruabon coals at all, and not such as to satisfy the contract. The two parcels delivered as Ruabon coals were shot into the same heap, so that, in consequence of the plaintiff's fault, the coal of the 1st of July, which was according to contract, and that of the 2nd of July, which was not, got mixed together.

On the 2nd of August the plaintiff sent in his account for the whole of these

coals, amounting to 48*l.* 4*s.* 3*d.*, being the amount he would have been entitled to under the contract if the coals had all been according to contract. About 6 tons of the Aberdare coals were used in the workhouse, and about 6 tons of the coal, delivered in July, which consisted partly of Ruabon coal and partly of inferior coal mixed with it, were consumed in the workhouse before the inferiority of the last lot was fully brought to the notice of the board of guardians. On the 17th of August, the clerk of the guardians, by their authority, wrote to the plaintiff, requiring him to take back the whole of the coals, making no distinction between the Aberdare coals supplied in June, which were in fact according to the contract, and the Ruabon coals supplied in July, which were not in fact according to the contract. The plaintiff refused to take back any, and brought his action for the whole sum of 48*l.* 4*s.* 3*d.*

It is clear that the plaintiff cannot be in a better position than if the contract had been executed by the defendants. By the terms of the contract the guardians were to be at liberty, in case the articles delivered were not of the quality and sort contracted for, to return the same at the expense of the contractor, or give notice for the same to be sent for and fetched away; and to obtain a supply elsewhere and charge the contractor with the extra cost of this supply. It is clear, therefore, that the defendants had a right to require the plaintiff to take away so much of the coals remaining as were not according to contract; and we think that as the two parcels sent in in July were mixed together, so that the heap was partly Ruabon and partly not, the whole of these coals must be considered as not according to the contract, though had they been kept separate, one parcel would have been according to contract. The plaintiff cannot therefore, in any view, recover for the price of so much of these latter coals as were not consumed; and the defendants are also entitled to charge him with the extra cost of the supply of coal in their place; and the six tons of this inferior mixture which were actually used cannot be charged for at the full contract price. The plaintiff, therefore, cannot recover for the whole sum he claims.

But the defendants had no right under the contract to require the plaintiff to remove the portion of the Aberdare coals, which in August still remained unconsumed, those coals having been delivered in June, and being in all respects according to the contract. There is indeed a term in the contract that a proper bill of parcels shall be delivered with each lot of goods sent in, or the guardians may reject them; and it appears that the bills of parcels for the Aberdare coal were not sent in till some time after the delivery; but, though this would have entitled the defendants to refuse to receive the goods so sent in, and, probably to send back the whole if inadvertently taken in, provided they did so promptly, it did not authorize them to return a part of the goods so sent in, especially after such a lapse of time. The plaintiff, therefore, if the contract had been sealed with the seal of the corporation, would have been entitled to recover, but not the whole of his demand. At the time of the argument the amount of the deductions were calculated, and it appeared he would be entitled to 26*l.* 10*s.*

There remains, therefore, only the question, whether the fact that the defendants are a corporation and that the contract was not under their seal makes any difference as to the whole or part of this demand. Mr. Harington argued that the price of those coals which still remained unconsumed, and which the corporation were ready and willing and offered before action to return, stood on a different footing from the price of the portion consumed, and that, as to those at least, the plaintiff could not recover; but we think that there is no such distinction. We think that if the defendants are bound to pay for any of the coals as goods sold and delivered, their liability was fixed as soon as the coals, being according to contract, were received, so that there remained nothing to be done but to pay for them; and that this liability could not be got rid of by any subsequent offer to return the coals which the plaintiff was not bound under the contract to accept, and which, if he had at that time accepted, would by no means have put him in the same position as if the goods had never been

kept by the defendants. We think, therefore, that the only question is, whether the absence of a sealed contract does, under such circumstances prevent the plaintiff from recovering.

It is not necessary to express any opinion as to what might have been the case if the plaintiff had been suing on this contract for a refusal to accept the coals, or any other breach of the contract, whilst still executory, or how far the principle of *The London Dock Company v. Sinnott* (8 El. & B. 347; s. c. 26 Law J. Rep. (N.S.) Q.B. 129) would then have applied to such a contract. The goods in the present case have actually been supplied to and accepted by the corporation; they were such as must necessarily be from time to time supplied for the very purposes for which the body was incorporated; and they were supplied under a contract, in fact, made by and with the managing body of the corporation. If the defendants had been an unincorporated body, nothing would have remained but the duty to pay for them. We think that the body corporate cannot, under such circumstances, escape from fulfilling that duty, merely because the contract was not under seal. The case of *Clarke v. the Cuckfield Union* (21 Law J. Rep. (N.S.) Q.B. 349) is in its facts undistinguishable from the present case. We are aware that very high authorities have questioned the soundness of that decision, and, as pointed out in the judgment in that case, there are prior decisions in the Court of Exchequer which it is difficult to reconcile with it. We think, however, that, as far as it extends to such a case as the present at least, the case was rightly decided. There may be cases in which the circumstances are different from those in *Clarke v. the Cuckfield Union* (21 Law J. Rep. (N.S.) Q.B. 349) and the present case, and which would still be governed by the principles laid down in the decisions in the Exchequer. Those we leave to be decided when they arise; but so far as these prior decisions are inconsistent with the decision in *Clarke v. the Cuckfield Union* (21 Law L. Rep. (N.S.) Q.B. 349), we prefer to follow that authority, which we think founded on justice and convenience. We therefore give judgment for the plaintiff for 26l. 10s.

Judgment for the plaintiff.

[IN THE QUEEN'S BENCH.]

June 8, 1866.

TARNER v. WALKER.

35 L. J. Q.B. 179; L. R. 1 Q.B. 641; 6 B. & S. 871; 14 L. T. 660; 14 W. R. 793: affirmed, 35 L. J. Q.B. 179; L. R. 2 Q.B. 301; 8 B. & S. 314; 16 L. T. 234; 15 W. R. 407 (Ex. Ch.).

Reward—Apprehension of Offender—Information leading to.

ADVERTISEMENT.—*The defendant's shop having been broken into and watches and other property having been stolen, he offered a reward to be given "to any person who will give such information as shall lead to the apprehension and conviction of the thief or thieves." Shortly afterwards R. brought one of the watches to the plaintiff, who gave information to the defendant, in consequence of which R. was apprehended with another of the watches in his possession. While in custody, he told the police where the thieves might be found, and they were taken at that place with some of the stolen property upon them, and were subsequently convicted of the burglary. In an action to recover the amount of the reward,—Held, by Mellor, J. and Shee, J. (Blackburn, J. dubitante), that the information given by the plaintiff was not so remote that the question ought not to be left to the jury to say whether he did give such information as led to the apprehension and conviction of the thieves.*

In this case the declaration was framed upon a handbill issued by the defendant, offering a reward in the terms hereinafter set out. It alleged that the plaintiff gave such information as led to the apprehension and conviction of the thieves, and such information as led to the recovery of part of the property, but that the defendant had not paid him the reward.

The declaration also contained counts for work and services rendered, and upon an account stated.

The defendant pleaded, that the plaintiff did not give such information as led to the apprehension and conviction of the thieves.

He also pleaded payment into court of 11*l.* in respect of such information given by the plaintiff as led to the recovery of part of the stolen property.

To the residue of the declaration, he pleaded *never indebted*.

At the trial, which took place before Blackburn, J., at Guildhall, at the Sittings after Michaelmas Term, 1865, it appeared that the shop of the defendant, a watch-maker, on Cornhill, had been broken open upon or about the 4th of February, and that a number of watches and other goods were stolen. The defendant issued a handbill, the material part of which was as follows :

" A reward of 250*l.* will be given to any person who will give such information as shall lead to the apprehension and conviction of the thief or thieves, and a further reward of 750*l.* will be paid for such information as shall lead to the recovery of the property, or in proportion to any part thereof recovered."

The plaintiff worked as a jeweller, and on the 14th of February one Roberts brought a watch to his shop and asked him to alter it. The plaintiff consented to do so, but went to the defendant and told him that the watch was one of those which had been stolen, and that Roberts was coming to his shop again in the afternoon. The police were sent there, and Roberts was taken into custody, having another of the stolen watches upon him. He was kept in prison, and was visited by some female friends. On the 17th of February he gave information to the police that the thieves were to be found at a particular eel-pie shop, which he named, and there they were found, and were ultimately tried and convicted. There was some doubt as to whether Roberts knew of the house where the thieves were at the time of his being apprehended, or whether his friends gave him the information afterwards; but it rather appeared that he knew of it at the time. The police-officers, who apprehended the thieves, swore that the information given by Roberts about the eel-pie shop had nothing to do with the capture, as they had already found the place out.

The learned Judge told the jury to consider whether the plaintiff had given such information as led to the apprehension and conviction of the thieves, pointing out that the real information had been given by Roberts, so that the information given by the plaintiff was very remote, and that according to the evidence of the police, they would have captured the thieves without either the plaintiff's or Roberts's information.

The jury found a verdict for the plaintiff for 250*l.*, and for the defendant upon the plea of payment into Court, thinking that the 11*l.* was the proper proportion in respect of the two watches.

A rule was subsequently obtained for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence.

Parry, Serj. and *Laxton* shewed cause.—The plaintiff is entitled to retain the verdict found for him by the jury, inasmuch as if it had not been for the information given by him to the defendant in the first instance, the police would not have had their attention called by Roberts to the specific house in which the thieves and the stolen property were to be found. How can it be said that he did not give information which might, and in fact did, lead to the apprehension and conviction of the thieves?

[BLACKBURN, J.—Roberts would not have spoken if he had not been in custody, and there is no doubt that the jury considered that the police acted upon the information given by Roberts, although they all denied that that was

so; and the question is, whether I ought not to have told the jury that the information given by the plaintiff was so remote, that he could not be entitled to recover. I feel great difficulty in saying that the act of Roberts was the act of the plaintiff?]

But Roberts would never have been in custody at all if the plaintiff had not told the defendant about him. The case is very like *Smith v. Moore* (1 Com. B. Rep. 438), where the words of the placard were almost identical with those now before the Court. Chief Justice Tindal there said, "The words of the placard offering the reward are large and general enough to comprehend every mode by which information could be conveyed that might have the effect of discovering and convicting the guilty person." Surely the information given by the plaintiff might have the effect of discovering the thieves. (They also referred to the definitions of the word "lead" in *Johnson's Dictionary* and *Richardson's Dictionary*.)

Digby Seymour, in support of the rule.—The mere apprehension of Roberts upon the information given by the plaintiff would not have brought about the apprehension of the thieves. It would rather seem that he would not have been able to tell the police of the place where the thieves might be found, if it had not been for the information given to him by the female friends who visited him while in prison. In order to entitle the plaintiff to the reward, the apprehension of the thieves must have been the natural result of the information given by him. But here it was only the accidental result; for all that the plaintiff can say is this, "I was the cause of Roberts being apprehended, and then by an accident which occurred, he was put in such a position as to be able to tell the police where the thieves could be found."

[MELLOR, J.—The information given by the plaintiff does not end with the apprehension of Roberts, for he was connected with the burglary by his possession of part of the stolen property, and it was natural to suppose that he would be able to give some information about the thieves.]

The words "lead to" in the handbill mean giving information of such a kind that the facts disclosed should lead as a natural result to the apprehension of the thieves. Here it did not lead at all to the apprehension. He also referred to *Williams v. Cavardine* (4 B. & Ad. 621; s. c. 2 Law J. Rep. (N.S.) K.B. 101), and to *Lancaster v. Walsh* (4 Mee. & W. 16; s. c. 7 Law J. Rep. (N.S.) Exch. 209).

BLACKBURN, J.—In these cases of misdirection it is usual that the Judge who presided at the trial should deliver his judgment after the other Judges, but there is this peculiarity in the present case that both of my learned Brothers think that I was right in leaving the case to the jury, as I did, while I myself, though with some doubt, have come to the conclusion that I was wrong. The reward is offered by the handbill or placard in these terms—[His Lordship read it as above set out.]—The facts are that the plaintiff gave information that one of the stolen watches had been offered to him by Roberts, and as the consequence of that information Roberts was apprehended with another of the stolen watches in his possession, and he was a receiver with guilty knowledge. There is no doubt that the plaintiff gave information which led to the recovery of those two watches, but the proper proportion of the 750*l.* having been paid into court, that part of the case is disposed of. But then Roberts being in prison, either from information which he obtained while there, or which he had obtained before, and which comes to much about the same, though he was not able to tell who the thieves were, did tell the police that they might be found at a particular eel-pie shop, and after about a week they were found there, and upon them or in one of their houses some of the stolen property was found. The jury must be taken to have found that the police went to the eel-pie shop upon the information of Roberts, and that Roberts would not have "split" if the plaintiff had not given the information upon which he was taken into custody. Logicians draw a distinction between the *causa causans* and the *causa sine qua non*, but the application is not very easy. I thought that there was great doubt whether the information given by

the plaintiff was not so remote that it could not be said to have led to the apprehension and conviction of the thieves, but I left the question to the jury to say whether it did so lead or not.

Now, the question is, whether I ought not to have told them as a matter of law, that it was too remote, and I rather think, though not without a good deal of hesitation, that I ought to have so laid it down. Long ago, in his work on maxims of the law, Lord Bacon, in reference to the maxim "*In jure, non remota causa sed proxima spectatur*," wrote as follows: "It were infinite for the law to judge the causes of causes and their impulsions one of another; therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." There is no doubt that that is the law, but the difficulty is how to apply it. I rather think here that the information was too remote, though I do not think that it was necessary that the plaintiff should have given such information as would actually convict the thieves. I doubt whether when the police had followed up all the information which the plaintiff had given to the defendant, and had got Roberts into custody, they and he did not have a fresh start. I hardly dissent from the judgment of my Brothers, but I entertain sufficient doubt to justify myself in saying that if the defendant wishes to appeal, he may do so.

MELLOR, J.—I am of opinion that my Brother Blackburn could not have non-suited the plaintiff, because I think that there was evidence for the jury to consider within the terms of the handbill issued by the defendant.—[His Lordship read the part of the handbill above set out, and went through the facts, and then continued]—Therefore, by the information given by the plaintiff, the police had got hold of one of the parties implicated in the burglary, and he gave them some more information, but there is great difficulty in saying why the information given by the plaintiff any the less led to the apprehension and conviction of the thieves. It is said that while Roberts was in custody he obtained information from his friends, but that seems to me not to be made out by the evidence, and it was probably said by him to make out that he was as little guilty as possible, and it was a matter for the jury to consider along with the other circumstances. Then it seems that Roberts, for very likely reasons, gave information to the police, and I think that my Brother Blackburn was right in putting the case to the jury, and telling them that the remoteness was an element for them to consider, and I think that he could not properly have told them that the information was so remote that there was nothing for them to consider. I say this with great diffidence, because the Judge who presides at the trial has greater opportunity for forming an opinion than the rest of the Court; but, as I think that a longer consideration would not throw any more light upon the matter, I give my judgment, though it may be very proper to appeal if the defendant thinks fit to do so.

SHEE, J.—I am of the same opinion. The question is, whether my Brother Blackburn was right in leaving to the jury the question, whether the information given by the plaintiff led substantially to the apprehension and conviction of the thieves, and whether he ought not to have said that the information was too remote to entitle the plaintiff to have the reward which had been offered. I think that my Brother was right in leaving the question to the jury, and that he could not, and ought not to have non-suited the plaintiff. I was at first struck with Mr. Seymour's observation, that Roberts had not the means of giving information as to the place where the thieves were to be found at the time of his apprehension, but it turns out to be doubtful whether he knew it at that time or not; and I do not think it very material, because he was so connected with the burglary by having the stolen watches in his possession, that he might have been himself convicted if he could not have given a good account of himself; he was a man so implicated as to be extremely likely to make a clean breast of it, and give information in order to save himself from punishment. It seems to me that the plaintiff having given information of the man who may have known all about it, and through whose information the thieves were actually apprehended, did give such information, as led to their apprehension.

I do not think that the words "shall lead," mean the same as "shall cause" or "shall suffice for," but as "shall conduct to," and therefore I consider that the plaintiff has brought himself within the true meaning of the handbill, and that my Brother Blackburn was right.

Rule discharged.

[IN THE QUEEN'S BENCH.]

June 11, 1866.

ATKINSON v. FOSBROKE.

35 L. J. Q.B. 182; L. R. 1 Q.B. 628; 12 Jur. N.S. 810; 14 L. T. 553;
14 W. R. 832.

Followed, *O'Connell v. Barry*, 1868, Ir. R. 2 C.L. 648 (Ex.). Not applied, *Edmunds v. Greenwood*, [1869] E. R. A.; 38 L. J. C.P. 115; L. R. 4 C.P. 70; 19 L. T. 423; 17 W. R. 142 (C.P.). Distinguished, *Stein v. Tabor*, 1874, 31 L. T. 444. (C.P.). Discussed, *Hill v. Campbell*, [1875] E. R. A.; 44 L. J. C.P. 97; L. R. 10 C.P. 222; 32 L. T. 59; 23 W. R. 336 (C.P.D.).

Interrogatories—Action for Slander—Common Law Procedure Act, 1854, s. 51.

DISCOVERY. LIBEL AND SLANDER.—*In an action for slander the defendant may be compelled to answer interrogatories as to the words uttered, if it be made out to the satisfaction of the Court that the plaintiff cannot otherwise obtain redress. Therefore, the Court ordered a defendant to answer such interrogatories where it was shewn that the defendant had stated publicly that the plaintiff had committed forgery, and where the plaintiff was unable to discover from any of the persons who heard the statement, what the exact words spoken by the defendant were.*

Rule calling upon the plaintiff to shew cause why an order of Blackburn, J., directing that the defendant should answer certain interrogatories, should not be set aside.

The declaration alleged that the defendant had spoken of the plaintiff the words following, that is to say, "He was obliged to leave Oxford on account of a forgery," and "he committed a forgery while he was at Oxford," by reason whereof the plaintiff was excluded from the Bath and County Club in Bath.

The defendant pleaded not guilty.

It appeared from the affidavits that the father of the plaintiff had proposed him as a temporary member of the club, but that the committee had refused to admit him, and passed a resolution of which the following is a copy: "A statement having been made in public by Mr. Fosbroke, and in the presence of Mr. Pym, a member of the club, affecting the character of Mr. J. W. Atkinson, the committee do not feel themselves justified in admitting him as a temporary member until such accusation is refuted in as public a manner."

Inquiry was made of the secretary of the club, a Mr. Clephane, and of the chairman, and the former said that Mr. Pym had told the committee that the defendant had stated in the shop of Herring & Son, tobacconists, that the plaintiff had committed forgery on his father, but subsequently they both said that the accusation was simply one of forgery.

Application was made to Pym, but he stated that he had merely reported to the committee a conversation which he had heard in a public shop. He also said that the words in the declaration were not the precise words uttered by the defendant, but that he should not tell what those words were unless the defendant consented to his doing so. A letter was then written by the plaintiff's

attornies to the defendant, asking for an apology, upon which he wrote as follows:

"In reply to your letter of the 17th inst., I have to request that you furnish me with a statement of the charge made against me by Mr. Atkinson."

To this the plaintiff's attornies replied as follows:

"The statement referred to in our letter of the 17th inst. was made in the shop of Messrs. Herring, Milsom Street, and was that Mr. Atkinson had committed forgery on his father, the Rev. R. A. Atkinson."

To which the defendant replied:

"I must distinctly deny ever having made such a statement as that imputed to me by you in your letter of yesterday's date."

Subsequently the plaintiff's attornies wrote again as follows:

"Our letter to you of the 19th instant was the result of information received from Mr. Clephane, who now states that he was somewhat in error, and should not have named Mr. Atkinson's father as the person whose name was forged. But we have ample evidence that you stated that Mr. Atkinson had committed forgery, and for that statement we require the retraction and apology on the terms of our letter to you of the 17th inst., and we must have it in the course of to-morrow, or an action will be commenced."

No reply was received to this letter.

The chairman of the club refused to give any further information, and Messrs. Herring declined to give any at all unless compelled to do so. The order above referred to was then obtained.

The following were the proposed interrogatories: first, did you in the month of February last, or on the first nine days of last March, on the premises of Messrs. Herring, tobacconists, Milsom Street, Bath, in the presence of Mr. F. A. Pym, use any words imputing forgery to the plaintiff, to the effect that he had to leave Oxford on account of a forgery, or that the plaintiff had put another man's name on a bill of exchange, or had issued or used a bill of exchange with the name of a person written on it but not by that person, or had used a bill of exchange having the signature of a person on it who had repudiated it as his signature, or to any effect similar to any of the above, or that he had been obliged to leave Oxford about any such transaction as above? If yea, what, as near as you can remember, were the words which you so used? Secondly, what words, as near as you can remember, affecting the character of the plaintiff, did you use in this year before the 10th of March in the presence of the said Mr. Pym, or on the premises of the said Mr. Herring?

Coleridge and *T. W. Saunders* shewed cause.—The rule ought to be discharged; this is not what is called a fishing application, but is fairly for the purpose of making out the case of the party asking for it. It is a matter for the Court to decide according to its discretion, taking into consideration the necessity of the case, and the convenience and inconvenience of the course suggested. The defendant is not bound to criminate himself, but the possibility of his doing so is no reason why the question should not be put to him—see *Bartlett v. Lewis* (31 Law J. Rep. (N.S.) C.P. 230). And it is clear that the plaintiff cannot vindicate his character unless he is allowed to interrogate the defendant who has uttered the slander. That being so, the case falls within the ruling of *Erle, C.J.*, in *Stern v. Sevastopulo* (32 Law J. Rep. (N.S.) C.P. 268), where that learned Judge said, "I do not say that interrogatories should never be allowed in an action for slander, but I think that they should not be ever allowed in such an action, unless the Court be satisfied from the peculiar circumstances of the case that the party could not get redress, unless they were allowed."

[*BLACKBURN, J.*—That is the case upon which I acted, and I thought that in the exercise of my discretion, I ought to make the order. Probably the statement by Pym, to the committee of the club, was a privileged communication, but not that of the defendant, who was repeating in a shop the gossip which he had heard.]

Holl, in support of the rule.—The Court ought not to allow the interroga-

stories, unless a very strong necessity is shewn. It is admitted that it is a matter for the discretion of the Court, but interrogatories have generally been refused in actions for libel and slander—see *Baker v. Lane* (34 Law J. Rep. (N.S.) Exch. 57) and *Topping v. Ward* (30 Law J. Rep. (N.S.) Exch. 222; s. c. 6 Hurl. & N. 749). Here there is no necessity for issuing them, as the plaintiff has been furnished by the secretary and the chairman of the club with all the information which Pym had given to them, and with the resolution passed by the committee.

[BLACKBURN, J.—That is not sufficient; he wants to know what it was that the defendant said. COCKBURN, C.J.—The defendant does not deny that he has uttered the words.]

The plaintiff may go on with the action, and call Pym as a witness.

COCKBURN, C.J.—I am of opinion that we ought to discharge this rule, which has been obtained to rescind the order of my Brother Blackburn. I think that that order was rightly made. I quite agree that in exercising that jurisdiction which has been conferred upon us by the Common Law Procedure Act, we ought to take care that the interrogatories should be issued only where the party applying for them really has a case, and applies to the other side in vain for information. Thus we ought not to grant them in a mere fishing application; but in the present case we may safely do so, and for this reason: It is clear, on the evidence before us, that the defendant has uttered some slanderous words affecting the character of the plaintiff. The plaintiff was put up as a member of the club, and was rejected; and, upon inquiry, was informed that this had been done upon a suggestion that he had been guilty of forgery, and Pym was referred to as the person who had made the statement. Of course the plaintiff is anxious to know by whom the slander was uttered, and the circumstances under which it was uttered; but all that he is able to discover is, that Pym made the statement, and that he had it from the defendant. Pym will not state what he heard, except in general terms, and the committee are only able to state what Pym told them; and although the plaintiff has a good cause of action in respect of the slander upon him, he has no means of ascertaining the precise form in which it has been uttered, unless from the defendant himself, by means of these interrogatories. I think that, under these circumstances, he is entitled to receive such assistance as the Court can give him; and, that, therefore, the present rule ought to be discharged.

BLACKBURN, J.—I am of the same opinion. In making this order I did not wish to interfere with *Stern v. Sevastopulo* (32 Law J. Rep. (N.S.) C.P. 268), with which I entirely agree. It is a matter in the discretion of the Court or the Judge; though, no doubt, in cases of slander it is not, in general, the practice to make the order.

MELLOR, J. and SHEE, J. concurred.

Rule discharged.

[IN THE QUEEN'S BENCH.]

June 1, 13, 1866.

SWINFORD v. KEBLE.

35 L. J. Q.B. 185; 7 B. & S. 573; L. R. 1 Q.B. 549; 14 L. T. 770;
14 W. R. 858; 12 Jur. N.S. 783.

Local Board of Health—“Trustees”—Transfer of Powers to Borough Corporation—5 & 6 Will. 4. c. 76. s. 142. and 20 & 21 Vict. c. 50. s. 2; 20 & 21 Vict. c. 98. s. 26.

LOCAL GOVERNMENT.—By 20 & 21 Vict. c. 50. s. 2, repealing section 75 of

5 & 6 Will. 4. c. 76, the trustees under any act for paving, lighting, supplying with water or gas, cleansing, watching, &c. any borough, whether the powers of the trustees extend beyond the limits of the borough or not, may by indenture transfer their powers to the borough corporation, which is henceforward to be the trustee for carrying the act into effect. By section 142. of the latter act, "trustees" are defined to mean trustees, commissioners or directors, or the persons charged with the execution of a public trust or duty, by whatever name they are designated:—Held, that local boards of health, established by virtue of the Public Health Act, are not "trustees" within the meaning of the last section, and cannot transfer their powers to the borough corporation.

Held, also, that the 20 & 21 Vict. c. 98. s. 26. does not render valid a transfer by a local board of health to the corporation of a borough where the district of the local board includes and is more extensive than the district of the borough.

Special CASE stated for the opinion of the Court, under the Common Law Procedure Act, 1852.

The facts are so clearly stated in the judgment of the Court that the following summary of them will enable the argument to be understood. The action was brought to test the validity of rates made by the corporation of Margate in parts beyond the limits of the borough. The parish of St. John the Baptist, Margate, has an area of about 2,500 acres, of which about 1,000 acres are within and form the town of Margate. The residue consists for the most part of arable land beyond the limits of the town.

By a provisional order of the General Board of Health, dated the 4th of July, 1851, and confirmed by 14 & 15 Vict. c. cxviii., after reciting that local acts relating to the purposes of the Public Health Act were in force within Margate, the Public Health Act was applied to the whole parish. The order provided that none of the rating powers of the act should be put in force within any part of the parish not included in the schedule to the order, but that the rating area should be from time to time extended by order of the local board. The scheduled boundaries did not extend beyond the town of Margate.

On the 29th of July, 1857, a charter of incorporation was granted to the borough of Margate within the limits scheduled in the order of the General Board of Health. On the 2nd of February, 1858, an indenture was made between the local board and the corporation of Margate, by which all the rights, powers and liabilities of the local board were transferred to the corporation. On the 31st of May, 1864, an order was made by the corporation for extending the rating area of the borough to the whole of the parish of St. John the Baptist, being the district constituted by the provisional order of the local board of health. The plaintiff, who was the owner and occupier of property beyond the limits of the borough, had refused to pay his proportion of a general district rate for the purposes of the Public Health Act on all property within the district. The question for the opinion of the Court was, whether the corporation had power to levy such rate upon the plaintiff. If the Court should be of opinion in the affirmative, then judgment of *nolle prosequi* was to be entered for the defendant, with costs of suit. If the Court should be of opinion in the negative, then judgment should be entered for the plaintiff for 40s., with costs of suit.

Bovill (Tomlinson with him), for the plaintiff.—The rate is bad. The deed of transfer to which the board of health and the corporation were parties is invalid. The defendants will rely upon the 20 & 21 Vict. c. 50. s. 2,¹

(1) By the 20 & 21 Vict. c. 50. s. 2, the trustees under any act for paving, lighting, supplying with water or gas, or cleansing, regulating or improving, or for providing or maintaining a cemetery or market in and for any borough (whether mentioned in the schedule to the 5 & 6 Will. 4. c. 76, or subsequently incorporated under that act or otherwise), or any part of such borough, and whether the powers of such trustees do or do not extend beyond the limits of such borough, may by indenture duly made, transfer to the body corporate of such borough their powers, property and liabilities, and the body corporate of such borough shall on such transfer being made be the trustee by the council of such borough for carrying any such act

repealing 5 & 6 Will. 4. c. 76. s. 75, and upon the interpretation clause of the last act, in which a very large definition is given to the word "trustees." But the 20 & 21 Vict. c. 50. was not intended to apply to local boards of health. These boards exercise not only the powers referred to in section 2, but others of a more extensive and varied character under the general act. This will be made more clear by the fact, that provision is expressly made by the Local Government Act for the exercise of the powers of a local board by the town council in certain cases only. At the time of the passing of the 5 & 6 Will. 4. c. 76. s. 75, local boards of health like the one in question were not in existence. By section 33. of the Public Health Act, 1848, in any charter of incorporation by which the district of a local board becomes a corporate borough, a day shall be specified in which the transfer of powers, &c. is to take effect. By section 26. of the 21 & 22 Vict. c. 98, this portion of the section is repealed, and it is provided that all transfers of powers, &c. which have been, or shall hereafter be, made by a local board of health to the mayor, aldermen and burgesses of a corporate borough by their council, the district of such board and such borough being identical, shall be valid and effectual though no day for such transfer shall have been named in the charter incorporating such borough. But the district of the borough of Margate and the local board of health are not identical. The borough comprises only the area of the board before it had exercised its powers of extension.

Manisty (*Watkin Williams* with him), for the defendant.—The rate is good. It is not contended that this is a transfer under the Public Health Act. But the transfer is valid according to the 20 & 21 Vict. c. 50. s. 2. The members of the board act by and under acts of parliament, and are persons charged with the execution of public duties. There is no reason why the powers given by the Public Health Act should not be exercised by a corporation. The duties of the trustees specified in section 2. of the 20 & 21 Vict. c. 50. are analogous to those of a local board of health.

Bovill, in reply.

Cur. adv. vult.

BLACKBURN, J. (June 13) now delivered the judgment of the Court.²—We have come to the conclusion that the common council of the borough of Margate had not power to make the rate in question, and, consequently, judgment must be entered, according to the agreement of the parties, in favour of the plaintiff for 40s. and costs. The question depends on the construction of the 20 & 21 Vict. c. 50, which is to be construed along with the 5 and 6 Will. 4. c. 76. By this enactment the trustees acting under any act for paving, lighting, supplying with water or gas, or cleansing, watching, regulating or improving, or for providing or maintaining a cemetery or market in and for any borough (whether mentioned in the schedule to the 5 & 6 Will. 4. c. 76, or subsequently incorporated under that act, or otherwise), or any part of such borough, and whether the powers of such trustees do or do not extend beyond the limits of such borough, may, by indenture duly made, transfer to the body corporate of such borough their powers, property and liabilities, and the body corporate of such borough shall, on such transfer being made, be the trustee by the council of such borough for carrying any such act into operation, and all the property of the trustees shall vest in the body corporate of the borough, and all the liabilities shall be borne by the body

into operation, and all the property of the trustees shall vest in the body corporate of the borough, and all the liabilities shall be borne by the body corporate from the time of the transfer.

By section 8. this act and the unrepealed portion of 5 & 6 Will. 4. c. 76. are to be construed and read together as one act.

By the 5 & 6 Will. 4. c. 76. s. 142. "trustees" are defined to mean trustees, commissioners, or directors, or the persons charged with the execution of a public trust or duty, by whatever name they are designated.

(2) Blackburn, J., Mellor, J. and Shee, J.

corporate from the time of the transfer. The interpretation clause, section 142, of the 5 & 6 Will. 4. c. 76. defines trustees to mean "trustees, commissioners or directors, or the persons charged with the execution of a public trust or duty by whatever name they are designated." The facts are, that by a provisional order, confirmed by act of parliament, a local board of health was constituted for the parish of St. John the Baptist, Margate, Kent, comprising the town of Margate, and also a rural district; but by the terms of the order their rating powers were, in the first instance, confined to an area conterminous with the town, though power was given them from time to time to extend the rating area so as to bring into it the rest of the district; and the members of the local board were to be elected by the ratepayers within the rating area for the time being. Then the town of Margate was incorporated. At this time, therefore, the local board of health was elected by the inhabitants of a rating area co-extensive with the new borough, though the district over which they might extend their powers was more extensive. They professed, by indenture, to transfer their powers to the corporation of the borough, which, subsequently, sought to extend its powers to part of the rural district; and the question whether the municipal corporation can thus extend their powers over the rural parts of the district depends on the question, whether the transfer to them of the powers of the local board of health was valid; and that again depends on this, whether a local board of health for a district comprising a borough are within the meaning of the 20 & 21 Vict. c. 50. s. 2. trustees for executing an act for paving, &c. within the meaning of the enactment; and we think that they are not. There is no doubt that the duties of the local board of health, imposed by the General Public Health Acts, comprised many of those duties enumerated in the enactment in question, and the general course of legislation has been by a provisional order, confirmed by act of parliament, to transfer to the local board of health the powers of all trustees for executing local acts of that description within their district: so that local boards of health are charged with the execution of a public trust or duty, and are acting under the Public Health Acts, confirming the provisional order under which they are created; and those acts may, in one sense, be said to be acts for the purposes mentioned in the 2nd section of the 20 & 21 Vict. c. 50. But we think that they are not such as were intended by the legislature. The whole scheme of the Public Health Act, 11 & 12 Vict. c. 63, is to transfer all powers of this kind to a local board where there is one. By section 12, if the district either is or becomes co-extensive with a borough, the council of that borough are the local board, but the local board of health and the municipal corporation are kept distinct, so that the borough fund is not liable to the creditors of the local board. If the district consists partly of a borough, the local board are to consist partly of members of the council; and, by section 33, if the district become entirely comprised within a borough, and a day is named in the charter of incorporation for that purpose, the powers of the persons then forming the local board are to be transferred to the council of the borough. There is no similar provision applicable to the case of part of the district being brought within a borough. Now, we cannot think that the legislature intended by the 20 & 21 Vict. c. 50. s. 2. to give to a local board, part of whose district lies within a borough, power to reverse the whole of this legislation, and to charge the municipal corporation with the duty of carrying the Public Health Act into execution, so as on the one hand to charge the borough fund with all the liabilities of the local board of health, and, on the other, to deprive the ratepayers of the rural part of the district of all share in the election of those who are to govern them. We think, therefore, we must, in order to effectuate the intention of the legislature, construe the section as applying only to bodies charged with the duty of executing local and personal acts of the kind mentioned in the enactment, which was, no doubt, what was meant.

Our attention was called to the 21 & 22 Vict. c. 98. s. 26, which is, no doubt strangely framed, as it declares that a transfer made by any local board of health to the mayor, aldermen and burgesses of any corporate borough, by their

council, shall be valid and effectual, the district of such board and such corporate borough being identical, "though no day shall have been named for such transfer in the charter incorporating such borough." Now, in case, within the 33rd section of the Public Health Act, 1848, no transfer is made by the local board, and if the transfer was supposed to be made under the Municipal Corporation Acts, the absence of the naming of a day in the charter of incorporation is quite immaterial. But though it is very difficult to say what was meant, it is clear that this enactment cannot extend to the present case, in which the districts are not identical. We regret to be obliged to decide as we do, as we are sensible that the consequence must be that the affairs of the district must be thrown into a state of confusion, which may probably render it indispensable to apply for a local act to set things right; but this we cannot help.

Judgment for the plaintiff.

[IN THE QUEEN'S BENCH.]

June 9, 13, 1866.

LLOYD v. JACKSON AND OTHERS.

35 L. J. Q.B. 188; L. R. 1 Q.B. 571; 7 B. & S. 683; 14 W. R. 960: affirmed, [1867] E. R. A.; 36 L. J. Q.B. 169; L. R. 2 Q.B. 269; 7 B. & S. 698; 15 W. R. 408 (Ex. Ch.).

Distinguished, *Shannon v. Good*, 1884, 15 L. R. Ir. 284 (V.C.).

Will, Construction of—Devise without Words of Limitation—Inference from Direction as to Education of Children.

WILL.—*The following devise, made before the Wills Act, "As touching such worldly estate wherewith it hath pleased God to bless me in this life, I give and bequeath to my well-beloved wife M. A., whom I likewise constitute, make, and ordain my sole executrix of my last will and testament, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed, together with all my houses and household goods, deeds, and movable effects; all my children to be educated and settled in business according to my wife's discretion," was held to carry the fee to the executrix, as the words relating to the education of the children, whether they created a binding trust to be enforced in equity, or merely expressed a wish which was not obligatory, were enough to shew the intention of the testator that the executrix should have the inheritance.*

Ejectment by the plaintiff as heir-at-law of the testator, Ebenezer Lloyd, to recover possession of certain land, houses, and premises in the parish of Fishguard, in Pembroke.

At the trial, before Blackburn, J., at the Assizes for the county of Pembroke, on the 28th of February, 1866, it appeared that the will of Ebenezer Lloyd, dated the 9th of June, 1809, was as follows:—

"In the name of God, amen. I, Ebenezer Lloyd, of the parish of Fishguard, in the county of Pembroke, being of perfect mind and memory, thanks be given unto God therefore, calling into mind the mortality of my body, knowing that it is appointed to all men once to die, do make and ordain this my last will and testament; that is to say, principally and first of all, I give and recommend my soul into the hands of Almighty God that gave it, and my body I recommend to the earth to be buried in decent Christian burial, nothing doubting but at the General Resurrection I shall receive the same again by the almighty power of God, and as touching such worldly estate wherewith it hath pleased God to bless me in this life, I give and bequeath to my well-beloved wife Mary Ann

Lloyd, whom I likewise constitute, make, and ordain my sole executrix of my last will and testament, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed, together with all my houses and household goods, deeds, and movable effects; all my children to be educated and settled in business according to my wife's discretion."

The will concluded with a revocation of former testaments. Mary Ann Lloyd, the widow of the testator, upon his death, took possession of the property in question, which she occupied till her death, in 1865, devising it by her will to uses for the benefit of the plaintiff and the defendants. A verdict for the plaintiff was directed by the learned Judge, with leave for the defendants to move.

Joshua Williams, accordingly, in Easter Term, 1866, moved for and obtained a rule to enter the verdict for the defendants, on the ground that the widow took under the will an estate in fee simple, and not one for life.

Mellish, Hardinge Giffard and *J. W. Bowen* shewed cause.—The widow took an estate for life only. The rule is clear, that before the Wills Act a devise without words of inheritance did not pass the fee. The introductory words, "as touching such worldly estate," cannot be relied on as shewing an intention that the testator intended to convey the fee, unless the word "estate" is imported into the devise. By themselves, the words merely mean "with reference to my estate." In *Denn v. Gaskin* (2 Cowp. 657), where the will commenced with these words, Lord Mansfield said that, as there were no words to connect the devise with the introduction so as to pass the whole interest, the words could only mean "with respect to my worldly estate." That case is in point, and differs only from this by the fact that here there is but one devisee. But no decision can be referred to which shews that this circumstance is material. In *Grayson v. Atkinson* (Wils. 333) it is merely said that if the words "all my temporal estate" are used, they shew an intention to charge the inheritance. The words "by her freely to be possessed and enjoyed" might, in the absence of authority, be thought material. But in *Goodright v. Barrow* (11 East, 220) it was held that these words by themselves are insufficient to raise a presumption that the testator meant to convey the fee. But the main question will, no doubt, be, whether the words "all my children to be educated and settled in business according to my wife's discretion" are enough to impose a charge on the wife, so as to raise an inference that it was meant to give her the fee. It is quite clear that they do not. It may be doubted whether they mean more than that the widow is to be guardian. A leading case on this subject is *Foley v. Parry* (5 Sim. 138), where the words were "it is my particular wish that my dear wife will superintend and take care of the education of W, so as to fit him for any respectable profession or employment." It was held, that these words amounted to a gift to W. of the expense of his education. But it is decided that, in order that such a direction should raise a presumption that an estate in fee is conveyed, the direction must be one which without the inheritance cannot well be carried out. In *Moor v. Denn* (2 Bos. & P. 247) the rule is explained by Chief Baron Macdonald, and it is shewn that where there is no charge no presumption can be derived from words of request. Here there is only a personal direction to the wife.

[BLACKBURN, J.—Settling a child at once may require a large sum.]

The principle upon which the Courts have acted in holding that the existence of a charge was evidence of a devise in fee is that otherwise *damnosa hæreditas* might fall to the devisee. But according to *Foley v. Parry* (5 Sim. 138) there is a gift to the children of the expenses of maintenance, and the executrix is not bound to see to the execution of any trust. They cited *Doe d. Small v. Allen* (8 Tem. Rep. 497), *Doe d. Ashby v. Baines* (2 Cr. M. & R. 23; s. c. 4 Law J. Rep. (N.S.) Exch. 141), *Bromitt v. Moore* (9 Hare, 374; s. c. 22 Law J. Rep. (N.S.) Chanc. 129), *Thorp v. Owen* (2 Ibid. 607; s. c. 11 Law J. Rep. (N.S.) Chanc. 129), *Doe d. Knott v. Lawton* (4 New Cases, 455), *Doe d. Knocker v. Ravell* (2 Cr. & J. 617), *Burton v. Powers* (3 Kay & J. 170; s. c. 26 Law J. Rep. (N.S.) Chanc. 330), and *Jarman on Wills*, vol. 2, 3rd edit. 247.

Joshua Williams (June 9), *H. G. Allen and C. Coleridge*, in support of the rule.—The executrix took under the will an estate in fee. Even before the Statute of Wills the intention of the testator was the chief criterion in construing a will—*Biederman v. Seymour* (3 Beav. 368), *Jarman on Wills*, 7th edit. vol. 1, p. 277. The words “as touching such worldly estate” cannot be rejected. They shew that the testator intends to part with everything that he has. In *Ibbetson v. Beckwith* (Ca. t. Talbot, 157) it is said that where the testator sets out in his will to give and dispose of his worldly estate, this is a strong proof that he intends to dispose of the inheritance.

[BLACKBURN, J.—There the word “estate” was brought down into the body of the devise.]

In *Smith v. Coffin* (2 H. Black. 444) it is said by Serjeant Williams, *arguendo*, that the introductory clause when connected with the rest of the will, affords a good ground on which to reason in favour of the devisee. *Love-acres v. Blight* (1 Cowp. 352) is also strongly to the same effect. With regard to the direction as to the education of the children, it is contended that these words amount to a charge on the executrix. The Courts of Chancery have had much difficulty in deciding as to the existence of such charges. *Costabadie v. Costabadie* (6 Hare, 410) shews that the mere fact that the devisee has a discretion, does not prevent the trust from being enforced. There is no guardian appointed and no trustees, so that the charge falls upon the wife as executrix. They cited *Doe d. Willey v. Holmes* (8 Term Rep. 1), *Doe v. Richards* (3 Ibid. 356), and *Cole v. Rawlinson* (1 Salk. 236).

BLACKBURN, J.—In this case we heard part of the argument on a former day, and it is unnecessary that we should take further time to consider our judgment. The question arises upon the construction of a will; and if the widow of the testator took under this will an estate in fee, the defendants are right and the rule must be made absolute. I have come to the conclusion that upon a true construction of the will the widow did take an estate in fee, and the rule must consequently be made absolute. The general rule by which a case like this is decided, is to look at the will and endeavour to collect from it the intention of the testator. This word “intention” must not, of course, be understood in its ordinary sense, but must mean an intention expressed in proper words, according to the ordinary rules of law. Now, at a very early period, before the Wills Act, it was established that a plain gift or devise of lands, farms or tenements, or words to that effect, would only operate to convey to the devisee an estate for life, and would not disinherit the heir unless, from the express words or provisions of the will, it should appear to have been the intention of the testator that an estate of inheritance should pass. But it has often been held, that if the word “estate,” or some equivalent term, be used in the devise, as if the testator had said, “I devise all my estate in Blackacre to A. B.,” that there would be sufficient to explain the intention of the testator, and that a devise of the estate would carry the inheritance. But I do not think that the mere introduction of these words at the beginning of the will, “touching all my worldly estate,” shewing that the deviser did not intend to die intestate, will alone make a subsequent devise carry the fee. The distinction is rather a nice one, but where it is shewn that the introductory words may be brought down into and united with the devise, so that the testator may be supposed to have said, “I do not intend to die intestate, but to dispose of all my estate, and I give and devise it accordingly,” the Courts have adopted that construction, so that the estate is included in the devise, and the inheritance is conveyed. But the two cases, *Denn v. Gaskin* (2 Cowp. 657) and *Doe d. Small v. Allen* (8 Term Rep. 497) distinctly shews that where the word “estate” is not brought down and incorporated in the devise, the inheritance cannot be enlarged. These cases Mr. Williams endeavoured to distinguish from the present one, on the ground that here there is but one devise to one devisee. But in *Denn v. Gaskin* (2 Cowp. 657) an equal interest in the whole of the lands was devised to the same persons; and in *Doe d. Small v. Allen* (8 Term Rep. 497), it appeared that

there were other lands as to which the testator intended to die intestate. I think, therefore, that these two cases are not to be distinguished, and that as far as they apply, they go to shew that the fee was not conveyed by the words of the present will. Proceeding further, we find the testator gives all his lands, messuages and tenements to the executrix, by her "freely to be possessed and enjoyed." Now, there can be no doubt that in *Loveacres v. Blight* (1 Cowp. 352) Lord Mansfield gave some weight to these words, "freely to be possessed and enjoyed." But there were other circumstances, to which his Lordship attached weight, to lead to the inference that an estate of inheritance was given; and in the subsequent case of *Goodright v. Barrow* (11 East, 220), where the same words occurred, and *Loveacres v. Blight* (1 Cowp. 352) was brought to the notice of the Court, it was distinctly held that by themselves these words were not sufficient. This case is the later one of the two; and I think that we ought to follow it, and hold that in the present instance these words alone are not sufficient. But we now come to that part of the will which, I think, is sufficient to give to the widow an estate of inheritance. After devising all his lands to his wife, to be by her freely enjoyed, with all his houses, household goods, and so on, the testator uses these words, "My children to be educated and settled in business according to my wife's discretion." Now, it has been decided by the Court of Chancery that where there is a devise of lands, without words of limitation, and the devisee would incur any burthen by accepting the estate, the devisee must be presumed to have meant to convey the inheritance; for otherwise the devisee might be a loser. If the devisee were very old, and his life worth only a few years' purchase, the amount of the burthen might be equal to the value of his life, and there would be strong ground for concluding that the testator intended that the devisee should have an interest in the estate for a term larger than his life. On the other hand, if the devisee were young, and his life worth many years' purchase, and the only charge was a small annuity to a servant, there would not be the same ground for such a conclusion. If we are to ascertain whether the inheritance was conveyed, according to the magnitude of the estate, and the burthen placed upon it, there must always be some uncertainty. It has therefore been laid down, that the magnitude of the estate is not to be taken into account; and in Mr. Jarman's work *On Wills*, vol. 2, p. 220, it is said, "It has long been settled that where a devisee whose estate is undefined is directed to pay the testator's debts or legacies, or a specific sum in gross, he takes an estate in fee, on the ground that if he took an estate for life only he might be damnified by the determination of his interest before reimbursement of his expenditure; and the fact that actual loss is considered highly improbable, by the disparity of the amount of the sum charged relatively to the value of the land, does not prevent the enlargement of the estate." The question then arises in the present case, do the words relating to the education of the children cast a burthen on the widow if she accepts the devise, and will she be under an obligation to educate the children, and settle them in business according to her discretion? It may well be that this is a burthen which the Court of Chancery would compel her to undertake; not controlling her discretion, but looking upon it as a fiduciary discretion, so that she should not give away the property, but must *bona fide* apply it in satisfaction of the charge imposed on her. If that were so, the burthen of educating the children, putting them to some business, paying the premiums and other expenses, would be a considerable one. Now, the cases in the Court of Chancery leave me in considerable doubt as to whether this direction would in the present case be treated as an obligation and enforced. Whether it does amount to such an obligation, or is a mere expression of a wish on the part of the testator, without depriving the devisee of the power of obeying or disregarding it, must depend upon an examination of cases in Chancery; and I should give my decision with much diffidence and doubt as to whether it would be approved of by a Court of equity. It seems to me, however, most unlikely that the testator could have meant that his wife should have the estate clogged with a burthen; but if such a burthen were to fall upon it, he would be more likely to wish that the devisee should have the fee,

so as not to be a loser. Now, it seems to me that precisely the same reasoning would apply to this case if, without imposing any obligation, the testator had strongly expressed his desire that a particular charge should be incurred. If the testator makes a devise of land, without binding the devisee by any conditions, but requesting that certain payments may be made, the inference would be that he intended to give the inheritance in the land, so that the object of his bounty might comply with the moral obligation. In this view of the case, I think that it is unnecessary for us to decide whether this will creates a binding trust to be enforced in equity, or merely expresses a wish which is not obligatory. In either case, according to the principle of decided cases, there would be evidence of an intention that the executrix should have the inheritance. The rule will be made absolute to enter the verdict for the defendants.

MELLOR, J.—I am of the same opinion. I think that we see in the words of the will a clear intention on the part of the testator that his wife should take an estate in fee. Mr. Mellish, indeed, so far succeeded in his argument as to shew that it would be extremely unsafe, notwithstanding some expressions in the decided cases, to hold that the words "as touching such worldly estate" are sufficiently brought down into the devise so as to carry the fee. I think also, that he succeeded in shewing that the other words, "to be freely possessed and enjoyed," are not sufficient. But it is not enough to shew that one portion of the will, taken by itself, is insufficient, and that another portion is also insufficient. The arguments must be based upon the words of the whole will taken together, and I think that Mr. Williams is quite right in saying that though the words to which I have alluded may not by themselves suffice, yet that they assist us in coming to a conclusion as to the meaning of the last clause upon which he relied. I quite agree with my Brother Blackburn in feeling considerable doubt as to whether this will creates an equitable obligation which a Court of equity would enforce. At the same time, if we were called upon to decide the question, it seems to me that the authorities cited against the obligation may either be distinguished, or admit us to decide (looking at the words which precede and follow the devise) that it was the intention of the testator that his children should be educated and settled in business, and that the mode of carrying out his intention should be left to the discretion of his wife, though with no power on her part to decline the trust. For if it were left at her option to educate the children or not, the word "discretion" need not have been used in the will. And I also agree with my Brother Blackburn, that the principle by which words imposing a charge on the estate are used as evidence of the intention of the testator, applies also to a mere recommendation to the wife that she should exercise that discretion with regard to her children, which a husband might reasonably expect. In either case the quantity of the estate of the devisee would be material, since it would be absurd to express a hope that the devisee would incur expenses unless the estate bore some proportion to the object contemplated; and the testator must be supposed to have intended that his wife should take what would reasonably enable her to carry out the objects which he had in view. I think, therefore, that the defendants are clearly entitled to judgment.

SHEE, J.—I am of the same opinion. The clear result of the cases cited in the course of the argument is, that words shewing an intention to convey the whole quantity of the testator's interest in a particular estate may be sufficient to carry the fee, though no words of inheritance be used. The words of this will, independently of any construction, legal or equitable, which has been previously put upon such words, shew an intention on the part of the testator to give the whole of his estate, real and personal, to his wife, to be by her freely possessed and enjoyed. If the will had contained nothing more I should have had some difficulty in coming to the conclusion that the wife took more than a life estate, for the words, "as touching such worldly estate wherewith it hath pleased God to bless me," are not incorporated with the devising part of the will. But the intention of the testator is made apparent by his direction, and it seems to me of little moment whether this direction is the mere

expression of a wish, or creates a trust, that his wife should enjoy the real estate in a way consistent with his and her moral duty to their children, not merely to their nurture in childhood, which, in a vast majority of cases, would in no way derogate from the full and free enjoyment of the estate by the widow, but subject to an outlay on their account for their education and settlement in business, which would probably be payable out of her income from the estate during her life. There can be little doubt, therefore, that he meant to give to his wife such an estate as would, at the cost to herself of some diminution of her estate, secure the object of educating and settling her children in life. It has been argued that the words "at her discretion" import that the executrix should have the discretion of disposing of the estate in any way that she might think proper. But it seems to me that, coupling these words with the rest of the will, the right construction to be put upon them is that suggested by my Brother Mellor, and that they apply rather to the mode of educating and settling the children than to an absolute discretion on the part of the wife to dispose of the estate as she might think proper, without reference to the interests of the children. The rule must be made absolute.

Rule absolute.

[IN THE QUEEN'S BENCH.]

June 13, 1866.

HIBBS. v. ROSS.

35 L. J. Q.B. 193; L. R. 1 Q.B. 534; 7 B. & S. 655; 15 L. T. 67;
14 W. R. 914; 12 Jur. N.S. 812.

Applied, *The Troubadour*, 1866, L. R. 1 A. & E. 302; 16 L. T. 156 (Adm.); *Wear River Commissioners v. Adamson*, [1878] E. R. A.; 47 L. J. Q.B. 193; L. R. 2 App. Cas. 743; 37 L. T. 543; 26 W. R. 217 (H.L.). Distinguished, *Powell v. M'Glynn*, [1902] 2 Ir. 154 (K.B. D.).

Evidence—Negligence—Shipkeeper—Action against Registered Owner.

SHIPPING.—*A ship, of which the defendant was the registered owner, was lying in a dock under the care of a shipkeeper. One of the hatchways was left by the negligence of that person, and the plaintiff, who was lawfully passing across the ship, fell down the hatchway and was injured. He brought an action against the defendant. At the trial, it was proved and found by the jury that the injury was occasioned by the negligence of the shipkeeper, but the only evidence to fix the defendant was the proof of the register, in which he was described as "owner":—Held, by Blackburn, J., and Lush, J. (Mellor, J. dissentiente), that this was evidence to be left to the jury, and would have justified them in finding that in fact the defendant had employed the shipkeeper.*

The declaration alleged that the defendant was possessed of a vessel called the *Jarnia*, lying in the Surrey Dock, and that the plaintiff, being the master of another ship lying alongside, was entitled to pass over and across the deck of the *Jarnia* to get to his own ship, and that the defendant improperly removed the hatches from one of the hatchways, and allowed them to remain off after dark, whereby the plaintiff, having occasion to cross over, fell down the hatchway and was injured.

The defendant pleaded, among other pleas, not guilty.

At the trial, which took place before Mellor, J., at the London Sittings after Trinity Term, 1865, it appeared that the ship had been lying in the Surrey Dock for some considerable time under the care of a shipkeeper. The plaintiff had occasion to pass across the ship, in order to get to his own vessel,

which lay on the other side of her. In doing so, he fell down an unsecured hatchway and sustained some injury. The register was produced, and it appeared therefrom that the defendant was the registered owner, but there was no other evidence to fix him with liability. The learned Judge thought that this evidence was not sufficient, but he left to the jury the questions as to the fact of negligence and of contributory negligence, and a verdict was found for the plaintiff. Leave was given to the defendant to move for a rule to shew cause why a nonsuit should not be entered.

Subsequently a rule was obtained by *Brett*, against which

Bush Cooper (*Kenealy* with him) shewed cause (Jan. 13).—The presumption of law, in the absence of direct evidence, is that a keeper in charge of a chattel which cannot be carried about the person, is the servant of the owner of the chattel, just as the driver of a hackney carriage is considered to be the owner's servant. Under the old Hackney Carriage Act, the owner's name must be on the vehicle. In the present case, there being no evidence as to who appointed the shipkeeper, the owner must be held liable for the negligence, unless the presumption that the owner is the master of the shipkeeper is rebutted. In an action against the owner for breach of contract, it might be necessary to give further evidence of agency; but in actions of tort, of which this is one, all the avenues of information are closed against a plaintiff, and such actions could not be sustained if direct evidence were required.

[BLACKBURN, J.—For all that appears, the keeper might be the servant of the broker to sell the ship.]

It was clearly part of his duty to keep the ship free from danger to persons coming on board; but in fact he kept the hatchway open during the night, although it was always covered by day. By the Piers and Dock Act, lights are prohibited at night. *Cox v. Reed* (Ry. & M. 199) is stronger than the present case; for there it was laid down that a registered owner is *prima facie* liable for the repairs of his ship, until that presumption is rebutted: see also *Fletcher v. Reid* (Ibid. 202). *Frost v. Oliver* (2 El. & B. 301; s. c. 22 Law J. Rep. (N.S.) Q.B. 353) is also in the plaintiff's favour.—He also referred to *Mitcheson v. Oliver* (5 Ibid. 419; s. c. 25 Law J. Rep. (N.S.) Q.B. 39).

Brett (May 7), in support of the rule.—This is a most important question, and comes to this: is the mere production of the register sufficient to fix the defendant as the employer of the shipkeeper? It is much the same question as whether the owner of a ship is liable in respect of necessities ordered by a person on board, though in such a case it would be enough to shew that the person ordering the goods was the agent of the owner, while here it is necessary to shew that the shipkeeper was the servant of the defendant. It often happens that the registered owner is not the beneficial owner, or the owner who nominated the master. There is this additional peculiarity in the present case, that the ship has been laid up in dock for some considerable time, so that it may well be that the shipkeeper was employed by the dock company or by the broker, and that the defendant had nothing to do with him at all.

[BLACKBURN, J.—But the registered owner is *prima facie* the beneficial owner, and inasmuch as the truth of the matter is almost exclusively in the knowledge of the defendant, is he not bound to rebut the presumption that he employed the shipkeeper? LUSH, J.—May it not be carried so far as that the registered owner should be presumed to be in possession of that which is his own?]

No; it is submitted that those presumptions do not fairly arise from the mere fact of the defendant being the registered owner.

[MELLOR, J.—The plaintiff ought to shew that the shipkeeper was the servant of the defendant, before he can properly call upon him at all.]

Yes; and the case may be likened to a case where a man is seen digging a hole in a field, and injury is occasioned by such hole to another person. Could an action be maintained against the owner of the field on the mere proof that he was the owner? The legal owner may be a mere trustee. In *Hackwood v. Lyall* (17 Com. B. Rep. 124; s. c. 25 Law J. Rep. (N.S.) C.P. 44 n.), which was

an action for repairs done to a vessel of which the defendant was the registered owner of forty-eight sixty-fourths, Mr. Justice Cresswell said, "The question is, whether the captain has power to make contracts to charge any person whose name appears on the register as owner. At one time the register was considered to be conclusive evidence of ownership, in an action for repairs or for necessities supplied to a ship. Now, it is not considered even *prima facie* evidence." And Jervis, C.J., said, "The Register Acts, are mere matter of fiscal regulation."

[BLACKBURN, J.—The observation of Mr. Justice Cresswell is a mere dictum thrown out *arguendo*.]

He also referred to and discussed *Frost v. Oliver* (2 El. & B. 301; s. c. 22 Law J. Rep. (N.S.) Q.B. 353) and *Mitcheson v. Oliver* (5 Ibid. 419; s.c. 25 Law J. Rep. (N.S.) Q.B. 39).

Cur. adv. vult.

On the 13th of June the following judgments were delivered.—

MELLOR, J.—In this case the defendant is sought to be made responsible for an accident which happened to the plaintiff in lawfully crossing a ship called the *Jarnia*, lying in the Surrey Dock, to get from another ship, called the *Moulshi*, lying alongside, to the quay. It must be taken for granted, upon the finding of the jury, that the accident was occasioned by the negligence of the shipkeeper of the *Jarnia*, which ship was then, and had been for some time, laid up in the dock for the winter. The only evidence to fix the defendant with liability, was the proof of the register, in which he was described as owner. There being no other evidence, I was of opinion that the registry of ownership, without more, was insufficient for that purpose; but I left questions as to the fact of negligence and of contributory negligence to the jury, who found their verdict for the plaintiff, and assessed the damages at 450*l.*; and I therefore reserved leave for the defendant to move to enter a nonsuit, in case the Court should be of opinion that there was not sufficient evidence for me to leave to the jury to entitle them to find for the plaintiff. A rule to set aside that verdict and to enter a nonsuit, pursuant to the leave reserved, was obtained by Mr. Brett, and the question now arises, whether the mere proof that the defendant was the registered owner of the ship, is *prima facie* sufficient to fix him with liability for the negligence of the shipkeeper. I retain the opinion which I formed at the trial, viz., that such evidence alone was not enough to submit to the jury, to support the allegation in the declaration, that "the defendant negligently removed the hatches, whereby the accident complained of happened."

In order to make the defendant liable, it was incumbent on the plaintiff, upon whom the burden of proof rested, to shew affirmatively that the shipkeeper was the defendant's servant. This depends upon the ordinary principles of law, applicable to the case of master and servant, and is not embarrassed by considerations arising out of the peculiar relation which the captain of a ship in general bears to the owner, and upon which the liability of the owner of a ship for repairs done to it, or for necessities supplied to it, by the captain's orders, may depend. Even in that case it would appear to be incumbent upon the plaintiff, who seeks to render an owner liable, to shew affirmatively that the master who gave the orders was the master appointed by or sanctioned by the owner, so as to make him in the particular case "his master"—*Mitcheson v. Oliver* (5 Ibid. 419; s. c. 25 Law J. Rep. (N.S.) Q.B. 39). As was said by Mr. Justice Erle, in *Frost v. Oliver* (2 El. & B. 301; s. c. 22 Law J. Rep. (N.S.) Q.B. 353), "The doctrine that the legal ownership of the ship is proof that the master has authority to contract for such owner has been repeatedly negatived." That is a material circumstance, as a step to proof, is undoubted, and, coupled with evidence that the repairs were done for the benefit of the ship, or the stores were supplied for its use, may in general be a sufficient *prima facie* case to call for evidence by way of explanation or answer; but I apprehend that the present case differs materially from that. Here the registry is the only evidence,

and I cannot perceive that the single fact of ownership raises a presumption that the man in charge of the ship was the servant of the owner or appointed by him. And unless there is a presumption of fact, arising out of the mere ownership of the ship, to that effect, the rule to enter a nonsuit ought to be made absolute. The ship was not in the course of navigation, and there was absolutely nothing to shew that the owner ever came near the ship, or knew that it was in the dock. Whether the ship was in the possession of the owner, or of a mortgagee, or of the dock authorities, or of a broker, or of any other person, did not appear. In the case of *Mitcheson v. Oliver* Mr. Baron Parke, in delivering the judgment of the Court of Exchequer Chamber (5 El. & B. 445-6),—says, in remarking upon a passage of Lord Campbell's summing-up, in which he had put it to the jury "whether upon the evidence on both sides they were of opinion that the defendant had authorized the goods and work to be supplied and done on his credit," &c. "No doubt if the jury disbelieved the parts of the case that made for the defendant, and drew the *prima facie* inference from the ownership and other facts, there was evidence on which they might find that Thompson was in fact master for the defendant." It appears to be clear, I think, that Mr. Baron Parke did not consider that the mere fact of ownership, without "*the other facts*," would have afforded even *prima facie* evidence that Thompson was the defendant's master. The action was for ordinary repairs done to the ship and for goods supplied to it, upon the orders of the registered master, and there were other circumstances tending to raise an inference as to the liability of the defendant; but it never appears to have been contended by the counsel, or suggested by any of the Judges, that the registry alone would have been sufficient proof that the captain was the captain of the owner so as to bind him.

However this may be, in the case of repairs done to a ship, or stores supplied to it, for the apparent benefit of the owner, the same reason does not apply to the present case. I think that it would be unduly shifting the burden of proof to call for an answer to the mere fact of ownership; and I cannot see why any presumption should be made which would dispense with the necessity of further proof. Possession may be presumptive evidence of title; but the converse does not necessarily hold, viz., that title is presumptive evidence of possession. It is obvious that in the case of things which are constantly the subject of demise, charter, mortgage or the like, the presumption that the actual possession is in the owner cannot but be weak, and is not to be classed with those strong presumptions which shift the burden of proof from a plaintiff to a defendant.

There exists an exception to the general rule that a party who alleges a matter must prove it in cases in which the subject-matter of the allegation lies *peculiarly within the knowledge of one of the parties*. In this case there is no peculiar knowledge on the part of the defendant within the meaning of that maxim. In one sense, in almost every case, the defendant has peculiar knowledge affecting his relation to the act complained of, but that is not the knowledge referred to. Here the shipkeeper could have proved by whom he was appointed, and so have laid a good foundation for the plaintiff's case, if appointed by the defendant. Why should the burden of proof shift in such a state of things in order to compel a defendant to disprove that which it was incumbent upon the plaintiff to prove? I am not aware of any case in which such evidence has been held sufficient, and I think that all experience at *Nisi Prius* is against it. For these reasons, I am of opinion that this rule should be made absolute; but as a majority of the Court is of a different opinion, the rule will of course be discharged.

BLACKBURN, J.—In this case, tried before my Brother Mellor, it appeared that the plaintiff was lawfully passing over a ship then lying in dock under the charge of a shipkeeper, in order to reach his own vessel, which lay on the other side. In so doing he fell through an unsecured hatchway, and sustained considerable injury. There was evidence proper to be left to the jury, that this accident was occasioned by the negligence of those having the charge of

the ship, over which it was known that the plaintiff might pass, in not keeping it reasonably safe; and the evidence was such as to make it a question for the jury whether the plaintiff had or had not himself contributed to the accident by the want of reasonable care on his part; but the only evidence to connect the defendant with those having charge of the ship was the production of the ship's register, by which it appeared that the defendant was the registered owner of the ship in question. It was objected that there was no evidence to fix the defendant, and my Brother Mellor was of that opinion; but in order to avoid the expense of a new trial, he reserved leave to enter a nonsuit, and left to the jury the question whether there was negligence in the shipkeeper occasioning the accident, and whether the plaintiff could by due care have avoided the consequences of that negligence. Both of these questions the jury found in favour of the plaintiff. No question was left to the jury as to whether they thought that, in fact, the defendant was the employer of the shipkeeper, nor was my Brother Mellor asked to leave that question to the jury.

A rule *nisi* was obtained to enter a nonsuit, on the ground that there was no evidence to fix the defendant, which was argued before my Brothers Mellor and Lush, and myself. I have come to the conclusion that the registry was evidence which would have justified the jury in finding that, in fact, the defendant employed the shipkeeper if that question had been left to them, and, consequently, that the rule to enter a nonsuit should be discharged; but, under the circumstances, I think the defendant ought to be permitted, if he desires it, to have a new trial, costs to abide the event, in order to have the question of fact more distinctly raised and determined.

I do not think that any liability attaches to the defendant merely as owner of the ship. The question I think is, whether he employed the shipkeeper as his servant. In all cases in which the owners of a ship are sought to be made liable,—either in contracts for necessaries supplied on the order of the captain, or as in cases of collision for the negligence of the crew, or as in the present case for the negligence of the shipkeeper,—I think that the question really is, whether the persons sought to be charged were the employers of the captain who made the contract, or the masters of the persons who were guilty of the negligence, and that the liability does not depend on the title to the ship. In cases of contract a further question sometimes arises, as to whether the ship-owner may not have clothed the master with apparent authority, so as to be precluded from disputing his authority; but in cases of tort the question can only be, whether he in fact employed those actually guilty of negligence. But whilst agreeing that the ownership of the ship does not render the owners liable, either in contract or in tort, for the acts of the master and crew or other persons in charge of the vessel, unless the owners are the employers of those persons, I think that the ownership is a very important piece of evidence, tending to shew that the persons who are proved to be owners of the ship are, in fact, employers of those who have custody of the ship. Ships are most commonly in the possession of their owners, and those who have the actual custody of the ship are most commonly in the employment of the owners; and, consequently, proof of ownership is evidence tending to prove that the persons proved to be the owners of the ship are employers of those having the actual custody of the ship; and the register being evidence of the title to the ship is, I think, evidence that the registered owners are in possession, and employ those having the actual custody. It is by no means conclusive. The ship may be demised (though that is very rarely the case) and the persons navigating her may be employed by the lessee, or by a person who has purchased her, but has not yet paid the price, and consequently not had the ship conveyed to him, as was the case in *Frost v. Oliver* (2 El. & B. 301; s. c. 22 Law J. Rep. (N.S.) Q.B. 353), or, as in the most common case, they may be employed by one who is, in fact, a mortgagor in possession, though the mortgagee is registered as absolute owner; and when the ship is like the one now in question, not being navigated, but laid up in dock, there is the additional possibility that the shipkeeper may be the servant of the dock company, or the ship's broker, or any one else with

whom the owners may have made an arrangement to keep his ship for him as a bailee of the ship. But those are all exceptional cases; and the facts lie so entirely in the knowledge of the defendant, and may so easily be proved by him, that I think a jury would be fully warranted in acting on the *prima facie* inference that the persons having the actual custody of the ship are employed by the owners, unless some evidence to the contrary is given.

The case in this respect, in principle, somewhat resembles those in which it has been held that the evidence of possession of demised premises is sufficient proof that the person in possession is assignee of the lease, in the absence of any evidence of facts tending to shew that he is in possession as sub-lessee or otherwise, *Doe v. Williams* (6 B. & C. 41), or the cases that establish that, though dealing with the goods of the deceased, is quite consistent with the person who does so being agent for a lawful executor, or claiming the goods as his own; yet, in the absence of anything to explain it, the fact is sufficient to charge the defendant as executor; "for the most obvious conclusion which strangers can form from his conduct is, that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof"—2 *Black. Com.* 507. If, instead of considering the case on principle merely, we look to the cases decided as to ships, I find none in which it has been held that the title of a ship is not some evidence that the owners were the employers of the person who acts as captain, and several which, as it seems to me, are authorities for saying that it is sufficient *prima facie* evidence that they are his employers. At one time it was a common idea that even if it was proved that the owners did not employ the captain, yet that the ownership of the ship conclusively made them liable to those who supplied necessaries on the order of the captain. That, it is now established, was a mistake; the persons liable are those who really were the captain's principals, when he made the contract, or who had precluded themselves from denying that they were so; but in all the cases on the subject there was evidence that the persons who were on the register as owners were not, in fact, the employers of the captain. In *Abbott on Shipping* (5th edit. p. 18, by Shee), Lord Tenterden states his own view of the law thus: "The title to a ship may furnish evidence that repairs are made or stores furnished under the authority and upon the credit of the legal owner, as in fact they generally are; but it does no more; and therefore if it appear that they were made or furnished under the authority and upon the credit of another, the legal owner will not be answerable." In *Jennings v. Griffiths* (Ry. & M. 42) Lord Tenterden left the case to the jury, using expressions which (though not quite bearing out the statement in the marginal note) seem to me, when taken in conjunction with this passage, to shew that, in Lord Tenterden's opinion, the title to the ship was evidence that the owners employed the captain, and so gave him authority to order necessaries for them, though this evidence might be rebutted. This must be because he is in the control of their ship, and they can explain how that is, if he is not their captain. The same principle applies where the person in control is not the captain, but one acting as ship's husband. That was the case in *Fletcher v. Reid* (Ibid. 202) and *Cox v. Reid* (Ry. & M. 199). In *Fletcher v. Reid* (Ibid. 202) the plaintiffs rested their case on an admission that necessary repairs, to the extent of 540*l.*, were done by the plaintiffs to the ship *Asia*, and the bill rendered to one Bulmer, and that the defendants, during the time when the repairs were done, were registered owners. Lord Gifford, after objection, decided that this was sufficient to call on the defendants for an answer; the defendants failed in proving what it subsequently appeared was the fact, that they were only mortgagees, Bulmer being in fact not their agent, but a mortgagor, and the plaintiff obtained a verdict. In *Cox v. Reid* (Ry. & M. 199), a similar action against the same defendants, they were provided with evidence that the transfer to them was only intended to be as mortgagees, though the then Registry Acts made it operate in law as an absolute transfer. Chief Justice Best told the jury that the owner of a ship is *prima facie* liable for repairs, but it was for them to say whether that presumption was not met

by the facts of the case. And the defendants obtained a verdict. These were but *Nisi Prius* decisions, but no attempt was made to disturb either verdict.

The whole law on this subject was discussed in the two cases of *Frost v. Oliver* (2 El. & B. 301; s. c. 22 Law J. Rep. (n.s.) Q.B. 353) and *Mitcheson v. Oliver* (5 Ibid. 419; s. c. 25 Law J. Rep. (n.s.) Q.B. 39), and as these are the latest cases on the subject, and the latter was the decision of a Court of error, it is important to see what really was decided in them. In *Frost v. Oliver* (2 El. & B. 301; s. c. 22 Law J. Rep. (n.s.) Q.B. 353) the question arose on a rule to set aside the verdict obtained by the plaintiff for misdirection in leaving the case to the jury at all, on the ground that there was no evidence on which the verdict could be supported, the Court having refused a rule as against the weight of evidence. The evidence as the Court then took it to be, is reported by Lord Campbell in the beginning of his judgment. The evidence on the trial of *Mitcheson v. Oliver* (5 Ibid. 419; s. c. 25 Law J. Rep. (n.s.) Q.B. 39) came before the Court of Exchequer Chamber on a bill of exceptions, and is set out in the beginning of the report of *Mitcheson v. Oliver* (5 Ibid. 419; s. c. 25 Law J. Rep. (n.s.) Q.B. 39), and was not quite so favourable to the plaintiff as that stated in *Frost v. Oliver* (2 El. & B. 301; s. c. 22 Law J. Rep. (n.s.) Q.B. 353); though in substance not different. Lord Campbell based his judgment mainly on the ground that the facts were such that Oliver was precluded from denying that Thompson was his captain, even if the jury believed that in fact Thompson was not his captain; the decision of the Court of error was, that in this he was wrong. Mr. Justice Wightman, after stating that "the legal title to a ship will furnish *prima facie* evidence that repairs are made under the authority and for the benefit of the legal owner, but if it appears that they were made under the authority and for the benefit of another, the legal owner will not be answerable," proceeds to state, as the basis of his judgment, that there was in this case evidence of a holding out by the defendant of himself as the beneficial owner, and "to have held Thompson out to the world as his captain." The Court of error decided that in *Mitcheson v. Oliver* (5 Ibid. 419; s. c. 25 Law J. Rep. (n.s.) Q.B. 39) there was no evidence of any such holding forth as his captain, but they did not impugn the earlier part of his judgment. Mr. Justice Crompton did not base his judgment on this erroneous ground. He states the question to be, whether there was "evidence of any authority on the part of the master to pledge the credit of the defendant by giving the general orders for the supply of the rigging in question." He says, "It does not follow from the ownership or interest in the ship not determining the question of liability, that it is not a material circumstance in ascertaining the question of credit and contract," and he proceeds, in a very able and instructive judgment, to shew that they did make a *prima facie* case, though liable to be rebutted, and then asks, "How is the *prima facie* case to be rebutted? Surely by proof of all the circumstances by which the contract is proved to have been made with, and the credit given to another, and not to the legal owner; and all the facts on the one side and the other, as to such contract and credit, must be for the jury." He pretty plainly intimates that in his opinion the verdict was against the weight of evidence, but that there was evidence for the jury that in fact Thompson was acting by the plaintiff's authority. This judgment was certainly not overruled in the court of error, and is, in my opinion, correct in point of law. Mr. Justice Erle, who differed from the majority of the Court, does not question that there was *prima facie* evidence of authority, but states, as the basis of his judgment, "I take it to be a general principle that if direct evidence of the matter to be proved (here of the making of the contract, and of the giving of authority for that purpose) is adduced and believed, the circumstantial evidence from which the matter to be proved might be inferred, in the matter of direct evidence, then becomes immaterial and irrelevant." This the Court of error decided to be correct; and I think the only difference between Chief Justice Erle and Mr. Justice Crompton was, that the latter thought the rule could not be made absolute in its then shape, because the question whether the rebutting evidence was *believed* could not be

withdrawn from the jury; though, if the rule had been granted on the ground that the verdict was against the weight of evidence, he should have thought that there ought to be a new trial, because they did not believe it. In *Mitcheson v. Oliver* (5 Ibid. 419; s. c. 25 Law J. Rep. (N.S.) Q.B. 39) the Court of error had to decide on the exceptions taken to the summing-up of Lord Campbell as appearing on the bill of exceptions. One of those was, that there was no evidence to go to the jury; as to this, Mr. Baron Parke, in delivering the judgment of the Court, says: "Lord Campbell desires the jury to consider whether, upon the evidence upon both sides, they were of opinion that the defendant had authorized the goods and work to be supplied and done on his credit, and the goods and work had been supplied and done on his credit. Taking that as a detached part of the summing-up, unaffected by what went before, that is unexceptionable; for, no doubt, if the jury disbelieved the facts of the case that made for the defendant, and drew the *prima facie* inference from the ownership and other facts, there was evidence on which they might find that Thompson was, in fact, master for the defendant; and that being so, we cannot agree with the exceptions that there was no evidence to go to the jury."

I do not think that I am entitled to rely upon this as a decision of the Court of error, that the ownership alone would be evidence from which, whilst unexplained, the jury might draw a *prima facie* inference that the persons actually in the possession of the ship were employed by the owners; for the Court of error may have proceeded on the other facts set out in the bill of exceptions, though, on examining the statement of the evidence in the bill of exceptions, I find very little more than that Oliver was owner, and was, as such, in possession both before the orders were given and after the work was completed; but I think that I am entitled to rely upon the authority of Mr. Justice Crompton, and the cases he refers to, as not impeached or shaken by the decision in the Court of error. I therefore think that the registry was evidence from which, when unexplained, the jury might properly draw the inference that the owner employed the persons actually in charge of the ship; but that it was only evidence quite capable of being explained or rebutted; and therefore the defendant may, if he so elects within a fortnight, have a new trial. Costs to abide the event. Otherwise I think the rule should be discharged.

My Brother Lush desires me to say that he agrees in this judgment. The rule will, therefore, in conformity with the opinion of the majority, be discharged, unless the defendant elects within a fortnight to take a new trial, costs to abide the event, in which case the rule will be moulded accordingly.

*Rule absolute for a new trial.*¹

[IN THE QUEEN'S BENCH.]

Feb. 3, 1865.

FEATHER v. THE QUEEN.*

35 L. J. Q.B. 200; 6 B. & S. 257; 12 L. T. 114.

Applied, *Thomas v. Regina*, [1875] E. R. A.; 44 L. J. Q.B. 9, 17; L. R. 10 Q.B. 31; 31 L. T. 439; 23 W. R. 176 (Q.B.). Approved, but limited, *Dixon v. London Small Arms Co.*, [1877] E. R. A.; 46 L. J. Q.B. 617; 1 App. Cas. 632; 35 L. T. 559; 25 W. R. 142 (H.L.). Referred to, *Roden v. London Small Arms Co.*, [1877] E. R. A.; 46 L. J. Q.B. 217; 35 L. T. 505; 25 W. R.

(1) The defendant elected to take a new trial.

* Decided in the Sittings after Hilary Term.

269 (Q.B. D.). Approved, *Windsor and Annapolis Railway v. R.*, [1886] E. R. A.; 55 L. J. P.C. 41; L. R. 11 App. Cas. 607; 55 L. T. 271 (P.C.). Referred to, *Income Tax Commissioners v. Pemsell*, [1892] E. R. A.; 61 L. J. Q.B. 265; [1891] A. C. 531; 65 L. T. 621 (H.L.).

Petition of Right—Invention—Letters Patent—Infringement—Rights of the Crown.

CROWN. PATENT.—By letters patent, dated the 26th of November, 1862, the Crown granted to the suppliant special licence, power, sole privilege and authority to use, exercise and vend a certain invention for improvements in the construction of ships, and to “enjoy the whole profit, benefit, commodity and advantage from time to time coming, growing, accruing, and arising by reason of the said invention for and during the term of,” &c. The letters purported to be granted upon the petition of the suppliant, and “of our especial grace, certain knowledge and mere motion”; and they contained a command “to all and every person and persons, bodies politic and corporate, and all other our subjects whatsoever,” that they should not use the invention without the consent, licence and agreement of the suppliant, his executors, &c. on such pains and penalties as could be justly inflicted, and the liability to damages. There was also a clause that the letters should be void if the suppliant, his executors, &c. should “not supply or cause to be supplied for our service all such articles of the said invention, as he or they should be required to supply by the officers or Commissioners of the department of our service for the use of which the same shall be required,” &c. It was further provided, that the letters were to be construed in the most favourable and beneficial sense for the best advantage of the suppliant, his executors, &c.

The Crown having made use of the invention during the currency of the letters patent, a petition of right was preferred by the inventor.

Held, first, that the Crown was not excluded from the use of the invention,

Secondly, if the effect of the letters was to exclude the Crown, yet that a petition of right could not be maintained in respect of the infringement of the patent right.

The petitioner, by his petition of right, alleged that he was the inventor of a certain new manufacture, namely, of “improvements in the manufacture of ships, and in rendering ships and boats impervious to shot”; that letters patent for the said invention were granted to him; that a specification, disclaimer and alteration of title had been duly filed; and that the Crown had infringed the patent right, that is to say, in the construction and use of a ship for the service of the Crown, called the *Enterprise*, to the damage of the suppliant, &c.

The Crown set out the patent, the specification, the disclaimer and the memorandum of alteration, and demurred to the petition of right.

The letters patent were as follows.—“Victoria, by the grace of God, &c. To all to whom these presents shall come, greeting. Whereas Robert Barnard Feather, of Liverpool, merchant, hath by his petition humbly represented unto us that he is in possession of an invention for improvements in the construction of ships [and in rendering ships and boats impervious to shot], which the petitioner believes will be of great public utility; that he is the first and true inventor thereof; and that the same is not in use by any other person or persons, to the best of his knowledge and belief. The petitioner, therefore, most humbly prayed that we would be graciously pleased to grant unto him, his executors, administrators and assigns, our royal letters patent for the sole use, benefit and advantage of his said invention, within our United Kingdom of Great Britain and Ireland, the Channel Islands and the Isle of Man, for the term of fourteen years, pursuant to the statute in that case made and provided; and we, being willing to give encouragement to all arts and inventions which may be for the public good, are graciously pleased to condescend to the petitioner's request.

Knowing, therefore, that we of our special grace, certain knowledge and mere motion, have given and granted, and by these presents for us, our heirs and successors, do give and grant unto the said Robert Barnard Feather, his executors, administrators and assigns, our special licence, full power, sole privilege and authority that he, the said Robert Barnard Feather, his executors, administrators and assigns, and every of them, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he, the said Robert Barnard Feather, his executors, administrators and assigns, shall at any time agree with, and no others, from time to time and at all times hereinafter, during the term of years herein expressed, shall and lawfully may make, use, exercise and vend his said invention within our United Kingdom of Great Britain and Ireland, the Channel Islands and the Isle of Man, in such manner as to him, the said Robert Barnard Feather, his executors, administrators and assigns, or any of them, shall in his or their discretion seem meet, and that he, the said Robert Barnard Feather, his executors, administrators or assigns, shall and lawfully may have and enjoy the whole profit, benefit, commodity and advantage from time to time coming, growing, accruing and arising, by reason of the said invention, for and during the term of years herein mentioned, to have, hold, exercise and enjoy the said licences, powers, privileges and advantages hereinbefore granted or mentioned to be granted unto the said Robert Barnard Feather, his executors, administrators or assigns, for and during and unto the full end and term of fourteen years from the day of the date of these presents next and immediately ensuing, according to the statute in such case made and provided; and to the end that he, the said Robert Barnard Feather, his executors, administrators and assigns, and every of them, may have and enjoy the full benefit and the sole use and exercise of the said invention according to our gracious intention hereinbefore declared, we do by these presents, for us, our heirs and successors, require and strictly command all and every person and persons, bodies politic and corporate, and all other our subjects whatsoever, of what estate, quality, degree, name or condition soever they be, within our United Kingdom of Great Britain and Ireland, the Channel Islands and the Isle of Man, that neither they nor any of them, at any time during the continuance of the said term of fourteen years hereby granted, either directly or indirectly do make, use or put in practice the said invention or any part of the same so attained unto by the said Robert Barnard Feather as aforesaid, nor in anywise counterfeit, imitate or resemble the same, nor shall make or cause to be made any addition thereunto, or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors, deviser or devisers thereof, without the consent, licence or agreement of the said Robert Barnard Feather, his executors, administrators or assigns, in writing, under his or their hands and seals, first had and obtained in that behalf, upon such pains and penalties as can or may be justly inflicted on such offenders for their contempt of this our Royal command, and further to be answerable to the said Robert Barnard Feather, his executors, administrators and assigns according to law, for his and their damages thereby occasioned. And moreover we do by these presents, for us, our heirs and successors, will and command all and singular the Justices of the Peace, mayors, sheriffs, bailiffs, constables, head-boroughs and all other officers, and ministers whatsoever, of us, our heirs and successors for the time being, that they or any of them do not, nor shall at any time during the said term hereby granted, in anywise molest, trouble or hinder the said Robert Barnard Feather, his executors, administrators or assigns, or any of them, or his or their deputies, servants, or agents, in or about the due and lawful use or exercise of the aforesaid invention or anything relating thereto. Provided always, and these our letters patent are and shall be upon this condition, that if at any time during the said term hereby granted, it shall be made appear to us, our heirs or successors, or any six or more of our or their Privy Council, that this our grant is contrary to law, or prejudicial or inconvenient to our subjects in general, or that the said invention is not a new invention, as to the public use or exercise thereof within our United Kingdom

of Great Britain and Ireland, the Channel Islands and Isle of Man, or that the said Robert Barnard Feather is not the first and true inventor thereof within this realm as aforesaid, these our letters patent shall forthwith cease, determine and be utterly void to all intents and purposes, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. Provided also that these our letters patent, or anything herein contained, shall not extend or be construed to extend to give privilege unto the said Robert Barnard Feather, his executors, administrators and assigns, or any of them, to use or imitate any invention or work whatsoever which hath heretofore been found out or invented by any of our subjects whatsoever, and publicly used or exercised within our United Kingdom of Great Britain and Ireland, the Channel Islands or Isle of Man, unto whom our like letters patent or privileges hath been already granted for the sole use, exercise and benefit thereof. It being our will and pleasure that the said Robert Barnard Feather, his executors, administrators and assigns, and all and every other person and persons to whom like letters patent or privileges have been already granted as aforesaid, shall distinctly use and practise their several inventions by them invented and found out, according to the true intent and meaning of the same respective letters patent and of these presents. Provided likewise, nevertheless, and these our letters patent are upon this express condition, that if the said Robert Barnard Feather shall not particularly describe and ascertain the nature of the said invention, and in what manner the same is to be performed, by an instrument in writing under his hand and seal, and cause the same to be filed in the Great Seal Patent Office within six calendar months next and immediately after the date of these our letters patent: And also if the said Robert Barnard Feather, his executors, administrators and assigns, shall not pay or cause to be paid at the offices of our Commissioners of Patents for Inventors the sums following, that is to say, the sum of 40*l.* and stamp-duty payable in respect of the certificate of such payment, at or before the expiration of three years from the date of these our letters patent, and the sum of 80*l.* and the stamp-duty payable in respect of the certificate of such payment, at or before the expiration of seven years from the date of these our letters patent: And also if the said Robert Barnard Feather, his executors, administrators or assigns, shall not supply or cause to be supplied for our service all such articles of the said invention as he or they shall be required to supply by the officers or Commissioners administering the department of our service for the use of which the same shall be required, in such manner, at such times and upon such reasonable prices and terms as shall be settled for that purpose by the said officers or Commissioners requiring the same, that then and in any of the said cases these our letters patent and all liberties and advantages whatsoever hereby granted shall utterly cease, determine and become void, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. Provided that nothing herein contained shall prevent the granting of licences in such manner and for such considerations as they may by law be granted. And, lastly, we do by these presents, for us, our heirs and successors, grant unto the said Robert Barnard Feather, his executors, administrators and assigns, that these our letters patent, on the filing thereof, shall be in all things good, valid, sufficient and effectual in the law, according to the true intent and meaning thereof, and shall be taken, construed and adjudged in the most favourable and beneficial sense for the best advantage of the said Robert Barnard Feather, his executors, administrators and assigns, as well in all our Courts of Record as elsewhere, and by all and singular the officers and ministers whatsoever of our heirs and successors in our United Kingdom of Great Britain and Ireland, the Channel Islands and Isle of Man, and amongst all and every the subjects of us, our heirs and successors whatsoever and wheresoever, notwithstanding the not full and certain describing the nature and quality of the said invention or of materials thereunto conducting and belonging. In witness whereof we have, &c.

The disclaimer related to the parts of the specification relating to the rendering ships and boats impervious to shot, and which is referred to in the letters patent within brackets.

The Attorney General (Sir Roundell Palmer), the Solicitor General (Sir R. P. Collier), Phinn, Hindmarch and West, for the Crown (Jan. 24), cited and observed upon the following statutes, cases and authorities—

The King v. the City of Canterbury, T. Raym. 113, 114. *The East India Company v. Sandys*, 2 Skin. 197. *The Case of Monopolies*, 11 Rep. 86 b. Fitz. Nat. Brev. 222 a. *The King's Prerogative in Saltpetre*, 12 Rep. 12. *The Governor, &c., of the British Cast Plate Manufacturers v. Meredith*, 4 Term Rep. 794. *Brydall, Jura Coronæ*, 118. 21 Jac. 1. c. ss. 5, 6. 5 & 6 Will. 4. c. 83. 15 & 16 Vict. c. 83. s. 15. 22 Vict. c. 13. ss. 1, 3. *Ex parte Pering*, 4 Ad. & E. 949. *Hindmarch on Patents*, pp. 228, 229, 233. *Stockdale v. Hansard*, 9 Ad. & E. 1. *Basket v. the University of Cambridge*, 1 W. Black. 105. *Walker v. Congreve*, 1 Carp. Patent Cas. 356. *Ledsam v. Russell*, 1 H.L. Cas. 687, 696. *Tobin v. the Queen*, 16 Com. B. Rep. N.S. 310. *Brydall, Jura Coronæ*, p. 117, tit. 39, A.D. 1680. 2 Blacks. Com. 347. *Harris and Wing's Case*, 3 Leo. 242, 249. *The Rebeckah*, 1 Ch. Rob. 227, 230, per Lord Stowell, cited by Sir John Nicholl, in *The King v. Forty-nine Casks of Brandy*, 3 Hagg. Adm. 257, 271. *Englefield's case*, 7 Rep. 14. 5 Cruise's Dig. 53, tit. 34, ss. 28, 29, 30, 4th edit. *The Banne Fishery in Ireland*, Davis, 55, cited in 5 Cruise's Dig. 4th edit. tit. 34, s. 38. *Plowd.* 333, 334, 337. *The case of Alton Woods*, 1 Rep. 46 b, 49 a, citing 1 Hen. 7, 13 a. *The King v. Capper*, 5 Price, 217, 260-1. *The Magdalen College case*, 11 Rep. 73 b, 74 b. 42 Ass. pl. 5. *Dyer*, 268 b, pl. 18.

Bovill (J. Brown with him), for the suppliant (Jan. 24, 27), cited and observed upon the following cases, statutes and authorities—

2 Inst. 496. *The Queen v. the Eastern Archipelago Company*, 1 El. & B. 310, 337, 338. *Sir John Molyn's case*, 6 Rep. 6 a. *Whistler's case*, 10 Ibid. 65 a. Bac. Abr. tit. 'Prerogative,' (F.) 1, 4. *Advancement of Learning*, bk. 2. 5 & 6 Vict. c. 55. s. 20. *Walker v. Congreve*. *Norman on Patents*, 181. *Pettit Smith's Patent*. *Mansell's Patent*, 1 Carpm. 12. *Ryley's Pleadings in Parliament*. *Mowbray's Case*, p. 248. *Manning's Exch. Practice*, p. 84, 2nd edit. *Chit. Prerogatives of the Crown*, c. 13. pp. 339, 340, 348. *Tobin v. the Queen*. *Mackbeth v. Haldimand*, 1 Term Rep. 172. *Gidley v. Lord Palmerston*, 3 B. & B. 275. *The Athol*, 1 W. Rob. 374. *Mostyn v. Fabrigas*, Cowp. 161. *Buron v. Denman*, 2 Exch. Rep. 167. *The Banker's case*, 14 How. St. Tr. 45, 53, 82, 83; s. c. 1 Black. Com. 244; 3 Id. 115, 116, 254. *The Baron de Bode's case*, 8 Q.B. Rep. 208. *Theoloall, Digest des Brieves Originaux*, p. 70 b, 71 a, edit. 1579. *The Archbishop of York's case*, 2 Inst. 497. Vin. Abr. tit. 'Prerogative of the Crown,' 2nd edit. (Q 9) pl. 2, 7, 10 (Q 13), pl. 2. *Staunf. Prerogative*, c. 22. pp. 72, 73, 74. *Lane v. Sir Robert Cotton*, 1 Ld. Raym. 646. *Whitfield v. Lord Le Despencer*, Cowp. 754. *Gervais de Clifton's case*, 22 Edw. 3. fol. 5 a, pl. 12. *Conradus of Colon's case*. *Seddon v. Senate*, 13 East, 63. *Robert de Clifton's case*, 1 Rot. Parl. 416. *Viscount Canterbury v. the Attorney General*, 1 Phill. 306, 326. *Locke's Civil Government*, c. 18. s. 205.

The Attorney General replied.

COCKBURN, C.J. (Jan. 30) stated that judgment would be given for the Crown, and would be delivered shortly.

The judgment of the Court¹ was now (Feb. 23, 1865) delivered by—

COCKBURN, C.J.—On the demurrer to this petition of right two questions present themselves for our determination: first, whether by the effect of the letters patent the Crown is excluded from the use, except with the assent of the patentee, of the invention protected by the patent; secondly, whether, if the foregoing question be answered in the affirmative, a petition of right can be

(1) Cockburn, C.J., Crompton, J., Blackburn, J. and Mellor, J.

maintained by the suppliant against the Crown for the infringement of his patent right.

As regards the first, it is true that the patent gives to the patentee the sole privilege of making, using, exercising and vending the invention; but, on the other hand, there are no express words to take away from the Crown the right of using the invention. There can be no doubt that, in a grant between subject and subject, as, for instance, in the grant of a licence to use the invention, the words of the patent would be large enough to exclude the grantor; but will they suffice to exclude the Crown?

It is established on the best authority that, in construing grants from the Crown, a different rule of construction prevails from that by which grants from one subject to another are to be construed. In a grant from one subject to another, every intendment is to be made against the grantor, and in favour of the grantee, in order to give full effect to the grant; but in grants from the Crown an opposite rule of construction prevails. Nothing passes except that which is expressed, or which is matter of necessary and unavoidable intendment in order to give effect to the plain and undoubted intention of the grant. And in no species of grant does this rule of construction more especially obtain than in grants which emanate from, and operate in derogation of, the prerogative of the Crown. The rule is nowhere better expressed than in the clear and perspicuous language of Lord Stowell in the case of *The Rebeckah* (1 Ch. Rob. 227, 230). He there says, "All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away." Now, the present is clearly a grant made by virtue of the prerogative. In early times, when the confines between legislative and executive authorities were less carefully defined and ascertained than at present, the Crown, as the guardian of the trade and commerce of the realm, both foreign and domestic, assumed and exercised the right to make regulations and confer privileges relating thereto, and, in the exercise of this authority, took upon itself to grant monopolies in respect of particular articles of trade or manufacture. And though the granting of monopolies has been held by Courts of law and declared by statutes to be illegal, this has been, not because the Crown had not control and authority over such matters, when exercised for the public good, but because the exercise of its authority in granting these exclusive privileges was plainly contrary to the public weal, as being in restraint of trade and industry, and to the prejudice of the subject. The granting of monopolies in respect of inventions was, however, held good at the common law, on the ground that, by tending to promote inventions, it was in the end productive of advantage to the community. The statute of James was, in this respect, only declaratory of the common law; and these grants of monopoly in respect of inventions are not by force of the statute, but by virtue of the prerogative. They are, therefore, subject to the rule of construction applicable to grants of this nature.

This being so, it was contended, on the part of the Crown, that the terms, as well as the intention, of the grant would be satisfied by construing it to confer an exclusive right to the use of the invention as against all the subjects of the Crown; while, according to the established rule of construction, the Crown, not being expressly named, ought not to be taken to have precluded itself from the use of the invention.

Against this view, it was contended, on the part of the patentee, that the patent was based on a species of contract between the patentee and the Crown, in which the patentee, by communicating the secret of his invention to the public, gave a valuable consideration for the grant which he obtained; so that the grant, being based on such a consideration, should receive the

more liberal construction which it has been held that royal grants, when proceeding on a valuable consideration from the grantee, ought to receive. It appears to us that the assumption on which this presumption rests, namely, that of a contract between the Crown and the patentee, is altogether fallacious. The grant of the patent is, as has been explained, simply an exercise of the prerogative, in which—the ground on which alone the grant of a monopoly is justifiable being that the invention shall be made available to the public—the Crown annexes as a condition of the grant that the true nature of the invention, and the manner in which it can be used, shall be fully and unreservedly disclosed.

Our view as to the construction to be put on the terms of a grant of this nature becomes materially confirmed by what is clearly settled to be the law in respect of another class of grants emanating from the same branch of the prerogative. By virtue of its authority in matters of trade and commerce, the Crown from a very early period exercised the power of granting to individuals the right of holding fairs and markets, and, as incidental thereto, of taking tolls. Now, it is clear that, however general and universal by the terms of the grant the right to take toll may be as against the rest of the world, the Crown will nevertheless be exempt from toll—2 *Inst.* 221, and *Com. Dig.* tit. 'Toll,' (G 1). This appears strong to shew that in granting a privilege, otherwise of universal application, the Crown will not be bound unless it expressly declares its intention to that effect; and that grants of privilege, however general in their terms, can, in the absence of express words to bind the Crown, be taken only as conferring the privilege as against the subject, exclusive of the Crown.

It was, however, urged, on the part of the suppliant, that, however stringent might be the rule of construction with reference to royal grants in general, it was nevertheless apparent from the language of the patent that the Crown had excluded itself from the use of the invention. While it was admitted that the effect of the statement that the grant proceeded on the "certain knowledge and mere motion" of the Crown, which words are said to authorize a more liberal construction of a royal grant, was neutralized by the concomitant statement that it was made on the petition of the grantee, which recital would call for the more rigorous construction, it was insisted that the concluding clause of the letters patent, namely, that such letters patent are "to be taken, construed and adjudged in the most favourable and beneficial sense for the best advantage of the grantee," was strong to shew that the stricter rule of construction usually prevailing with reference to grants from the Crown ought not to be applied to patents for inventions. We, however, think that this clause ought not to have this effect. We think its true purpose and effect is that pointed out by Mr. Hindmarch, in his valuable work on *Patents*, pp. 72, 73, namely, that of preventing the want of certainty which ordinarily exists in the description of an invention in a patent, prior to the specification, from avoiding the grant for uncertainty. Possibly, the object of the clause may also have been to mitigate, in the event of any proceeding by *scire facias* to repeal the patent, the rigour of the conditions on which the patent is granted, and on non-performance of which it is to become void, more especially that of the stringent clause as to the specification of the invention, which immediately precedes it.

Another argument arising on the terms of the patent was founded on the clause which provides that the patentee shall supply the patented article, if required, for the service of the Crown, upon reasonable terms, which provision it was contended necessarily implied that the Crown could not itself have manufactured or prepared the article. In answer to this argument, it was suggested, on the part of the Crown, that the purpose of this clause was to enable the Crown, if it was found more convenient to have the patented article supplied by the patentee than to manufacture it, to compel the patentee to supply it; and this may, possibly, be the true purpose and effect of the

stipulation. But whether this be so or not we think that to give to this clause by implication the operation for which Mr. Bovill contended would be directly to violate the rule of construction which, according to the authorities, should be applied to grants from the Crown, and which prohibits any effect being given to the grant by implication, to the exclusion of the Crown, beyond what is clearly expressed in the grant.

It appears to us, on the other hand, that there are parts of the letters patent from which it is to be inferred that the Crown was not to be bound. The grant is of "especial licence, full power, sole privilege and authority, &c.," terms which appear referable to a right conferred as against the fellow-subjects of the grantee, rather than as against the Crown. This is followed by a prohibition to "all and every person and persons, bodies politic and corporate, and all other our subjects whatsoever," against making, using or practising the invention, "upon such pains and penalties as can or may be justly inflicted on such offenders for their contempt of this our Royal command"; and such offenders are further to be answerable to the patentee in damages. It is obvious that none of these provisions, by which the exclusive right of the patentee are protected, can be applicable to the Crown; all tend to shew that the privilege was intended to be against fellow-subjects.

Independently, however, of the arguments derived either from the rules of construction applicable to Royal grants or from the language of the letters patent, an argument was urged on the part of the suppliant which is well deserving of notice. It was said that, in the construction of grants, reference should be had to what was settled and understood to be the law at the time the grant was made; and that as, at the time this patent was granted, the general understanding among the officers of state, the law officers advising the Crown in respect of patents, and inventors, was that a patented invention could not be used in the public service except on payment to the patentee, the present patent, in conferring the exclusive privilege of using the invention, must be construed as a grant to the exclusion of the Crown.

It certainly appears that, at the time this patent was granted, a general understanding prevailed, founded on the practice of a long series of years, that if patented inventions were used in any of the departments of the public service, the patentees would be remunerated, by the ministers or officers of the Crown administering such departments, as though the use had been by private individuals. There can be no doubt that in numerous instances payments had been made to patentees for the use of patented inventions in the public service without objection or difficulty; and not only does no question appear to have been raised as to the right of the patentees by the ministers of the Crown, but the legal advisers of the Crown appear also to have considered the right, whether arising from the terms of the patent, or from the existing practice, as so well settled, that we find Sir John Jervis, the then Attorney General, on an application for a renewal of the patent of Pettit Smith, before the Judicial Committee of the Privy Council, in the year 1852, two years only before the date of this patent, endeavouring to obtain the insertion of a condition that the Crown should have the use of the invention without payment: a course which obviously would have been unnecessary if the Crown had been considered entitled to use the invention without such a provision. That the same view of the matter has prevailed till the present question was raised in this case, and that of *Clare v. the Queen* (Not reported), which immediately preceded it, is plain, as we find a similar application to that made by the Attorney General in the case of *Pettit Smith's Patent*, repeated in the subsequent cases of *Carpenter's* (In 1851) and *Lancaster's* (for the Lancaster gun) *Patent*, the application for the renewal of the latter having occurred as late as in the last year.

There can be little doubt that, on the faith of the understanding and practice referred to, many inventors have, at a great expense of time and money, perfected and matured inventions, and taken out patents, in the

expectation of deriving a portion of their reward from the adoption of their inventions in the public service; and it is not unreasonable to suppose that the suppliant, whose invention relates to ship-building, may have taken out his patent in the hope that his invention would be used in the Royal Navy to his profit and advantage. But these circumstances, though they tend to shew that the case is one of great hardship as regards the suppliant, do not, in our opinion, affect the construction to be put on the terms of this grant.

Assuming, according to the proposition relied on, that where there has been an exposition of the law by judicial decision, or a settled course of practice or understanding of the law among legal practitioners, the language of an instrument may, in certain cases, be interpreted according to such a standard, we have in the present instance nothing amounting to these conditions. All that is shewn is, that a practice has grown up—at what period does not distinctly appear—on the part of the servants of the Crown, of not insisting on the right of the Crown to use patented inventions without remuneration to the patentees. This may have arisen from a desire to encourage useful inventions, or perhaps from a sense of justice to inventors, whom it might be thought there was the greater reason for paying for their inventions now that articles used in the public service are paid for, not, as in ancient times, out of the immediate revenues of the Crown, but out of sums voted by parliament for the various departments of the State. Considerations of public convenience having now, as the Attorney General informs us, led the heads of the public departments to insist on the application of a stricter rule as regards the right of the Crown, though one's sense of justice may be shocked at the retrospective application of this doctrine to a patent taken out when a different practice and understanding prevailed, we cannot, when called on to interpret this patent according to the legal effect of its terms, do otherwise than deal with it according to the rules and principles that would have been applicable to it had such a practice never arisen. The language of the present grant is the same as is to be found in the patents granted immediately after the Statute of Monopolies; nay, it is to be found in patents for monopolies granted anterior to that statute. Dealing with it judicially, we are bound to give the same effect to it as though the question had arisen at an earlier period. The rules of law as to the construction of such grants have not been altered, nor have we power to vary them, our duty being to administer the law, not to make it. There can be little doubt that had the question, whether the Crown was precluded from the use of articles in respect of which such a privilege had been granted to a subject, arisen in the times when this form of grant was first adopted, the decision would, in accordance with the then established rules of construction, have been in favour of the Crown. At a time when almost every commodity was the subject of a monopoly, it cannot be supposed that it was intended that the Sovereign should be bound to respect the privilege thus conferred on subjects, or that the Crown lawyers would have allowed the grants to be conferred in terms which would thus have bound the Sovereign. At all events, in the absence of any authority to the contrary, we must give effect to this patent according to the rules which we find laid down from the earliest times as applicable to grants from the Crown; nor should we be justified in departing from them by reason of any practice or understanding which for a time may have arisen, but to which the language of the grant, remaining the same as heretofore, has no reference whatever.

Our view as to the construction to be put on the language of the patent is confirmed by a consideration urged upon us by the Attorney General. According to the statute of James, the power of the Crown to grant the right of monopoly in the case of inventions is not to be exercised where public inconvenience would ensue. Now a patentee, having the sole right to the use of his invention, is not bound to permit any one else to use it; so that, if the Crown were subject to the general restriction, the State might be deprived of the use of an article essential to the public service—possibly for

the defence of the realm—while a foreign power, perhaps an enemy, would have full opportunity to profit by the invention. It is true this inconvenience might be prevented by the introduction of a clause securing the use of the invention to the Crown. But such a clause has never yet been inserted in a patent. We must therefore consider the letters patent as they stand; and it seems to us that the circumstance that the construction contended for by the patentee would lead to the inconvenient consequence referred to, and so might have the effect of avoiding the patent altogether, is a strong argument against the construction contended for on his behalf.

Our judgment being, for the reasons we have given, in favour of the Crown on the first and main question arising on the demurrer, it might appear unnecessary to express any opinion on the second, namely, whether a petition of right can be brought against the Crown in respect of an alleged wrong; more especially as this question has recently been the subject of a decision of the Court of Common Pleas in the case of *Tobin v. the Queen* (16 Com. B. Rep. N.S. 310), which, as the decision of a Court of concurrent jurisdiction, we should of course be disposed to follow. Nevertheless, as we have been invited, on account of the importance of the question—especially as petitions of right have become of more frequent occurrence since the recent statute, 23 & 24 Vict. c. 34,—to pronounce an opinion on the subject, and as the matter was very fully discussed before us, we think it right to state we can see no reason for dissenting from the conclusion arrived at by the Court of Common Pleas. We concur with that Court in thinking that the only cases in which the petition of right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the Crown or for the public service. It is in such cases only that instances of petitions of right having been entertained are to be found in our books. No case has been adduced, after all the industry and learning that has been brought to bear on the subject, both in this case and in that of *Tobin v. the Queen* (16 Com. B. Rep. N.S. 310), in which a petition of right has been brought in respect of a wrong, properly so called. The case of *Gerveis de Clifton, Year-Book*, 22 Edw. 3. fol. 5. pl. 12, as was explained by Lord Lyndhurst in the case of *Lord Canterbury v. the Attorney General* (1 Phill. 306, 326), was, in fact, not a petition of right at all, but a petition addressed to the grace and favour of the King, praying, not for redress according to the ordinary course, but for the appointment of the petitioner to the stewardship of the Honour of Peveril, as a compensation for wrongs alleged to have been sustained at the hands of certain servants of the King. In *Conradus of Colon's case*, which was also relied on by Mr. Bovill, the petition had reference to a ship and cargo which had been seized as forfeited to the Crown by reason of the petitioner being in rebellion against the King; and the petition comes, therefore, under the class already referred to, in which the petition of right is a substitute for an action to recover restitution.

Not only is there no precedent for a petition of right being entertained in respect of a wrong, in the legal sense of the term, but, if the matter is considered with reference to principle, it becomes apparent that the proceeding by petition of right cannot be resorted to by the subject in the case of a tort. For it must be borne in mind that the petition of right, unlike a petition addressed to the grace and favour of the sovereign, is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the sovereign, a suit at law or in equity could be maintained. The petition must therefore shew on the face of it some ground of complaint which, but for the inability of the subject to sue the sovereign, might be made the subject of a judicial proceeding. Now, apart altogether from the question of procedure, a petition of right in respect of a wrong, in the legal sense of the term, shews no right to legal redress

against the sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the sovereign. For from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong. For to authorize a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorized it to be done. It follows that a petition of right which complains of a tortious act done by the Crown, or by a public servant by the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress. As in the eye of the law no such wrong can be done, so, in law, no right to redress can arise; and the petition, therefore, which rests on such a foundation falls at once to the ground. Let it not, however, be supposed that a subject sustaining a legal wrong at the hands of a minister of the Crown is without a remedy. As the Sovereign cannot authorize wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown. The learned counsel for the suppliant rested part of his argument on the ground that there could be no remedy by action against an officer of state for an injury done by the authority of the Crown, but he altogether failed to make good that position. The case of *Buron v. Denman* (2 Exch. Rep. 167), which he cited in support of it, only shews that where an act injurious to a foreigner, and which might otherwise afford a ground of action, is done by a *British* subject, and the act is adopted by the government of this country, it becomes the act of the state, and the private right of action becomes merged in the international question which arises between our own government and that of the foreigner. The decision leaves the question as to the right of action between subject and subject wholly untouched. On the other hand, the case of the general warrants, *Money v. Leach* (1 Term Rep. 493), and the cases of *Sutton v. Johnstone* (3 Burr. 1742) and *Sutherland v. Murray* (1 Term. Rep. 538), there cited, are direct authorities that an action will lie for a tortious act, notwithstanding it may have had the sanction of the highest authority in the state. But in our opinion no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown—a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other. We entertain no doubt that, if the effect of the letters patent had been to exclude the Crown from the use of the invention, an action could have been maintained by the patentee against any one by whom the invention had been used in the public service. On the other hand, as the infringement of a patent right constitutes a tort or wrong, in the proper sense of the term, and as no wrongful act can be alleged against the Crown, we are of opinion that, even if our decision on the first question had been in favour of the suppliant, a petition of right to the Crown would not be open to him as a means of redress. Our judgment must therefore be for the Crown.

Judgment for the Crown.

[IN THE QUEEN'S BENCH.]

May 3, 4, June 13, 1866.

KELLY v. SHERLOCK.

35 L. J. Q.B. 209; L. R. 1 Q.B. 686; 7 B. & S. 480; 12 Jur. N.S. 937.

Approved and applied, *Falvey v. Stamford*, [1875] E. R. A.; 44 L. J. Q.B. 7; L. R. 10 Q.B. 54; 31 L. T. 677; 23 W. R. 162 (Q.B.).*Libel—New Trial—Inadequacy of Damages—Provocation by Plaintiff.*

LIBEL AND SLANDER. PRACTICE.—*Libels of a gross and offensive character, respecting the antecedents and demeanour of the plaintiff as a clergyman, were published in the defendant's newspaper. In the action brought on account of these libels, no justification was pleaded. At the trial no special damage was proved, and it was shewn that after the publication of articles offensive to the plaintiff which were in evidence before the jury, but before publication of the more serious libels, the plaintiff, in a letter addressed to the editor of another newspaper, had spoken of the defendant's paper as "the dregs of provincial journalism," and in a sermon preached and circulated by him, before action brought, charged some of his opponents with subornation of perjury. The jury found for the plaintiff, with one farthing damages:—Held, by the majority of the Court (Blackburn, J., and Mellor, J.), that there were circumstances which might have led a jury to the conclusion that the plaintiff was not entitled to substantial compensation, and that a new trial could not be granted.*

Held, by Shee, J., that the verdict clearly shewed that the jury had come to a compromise without deciding upon the issues submitted to them, and that a new trial was necessary to prevent a failure of justice.

The declaration stated that the plaintiff was a clergyman of the Established Church and incumbent of St. George's Church, Liverpool, and contained counts for different libels upon the plaintiff, published in the defendant's newspaper. These libels consisted chiefly of articles upon the plaintiff's sermons and upon certain dissensions between him, the corporation, the churchwarden and the organist. They were full of abusive epithets, and the plaintiff was repeatedly charged in them with having desecrated a portion of the church by converting it into a cooking apartment.

At the trial, before Bramwell, B., at Manchester, at the Summer Assizes, 1865, it was proved that after publication of one of the libels and of a number of articles offensive to the plaintiff, which were put in evidence before the jury, a letter from the plaintiff had been published in the *Liverpool Courier*, in which, speaking of the defendant's paper, he said, "With that paper—the dregs, I consider, of provincial journalism, of which the town of Liverpool, and especially any class of religionists in it, ought to be ashamed—I desire to have nothing to do, not even in the way of contradicting its mis-statements." He had also printed and circulated a statement with reference to a charge of assault alleged to have been committed by the plaintiff upon a young man who had attempted to remove music-books from the church, in which were the words: "The only resource of hope is desperate; the penitent acknowledgment of the conspirators that, stung by resentment, and thinking they were doing society a service, they swore to the thing which is not."

The defendant, in a correspondence which took place before the action, declared that he considered that he was alluded to as one of the conspirators. It also appeared that the plaintiff had brought three other actions for libels at the same assizes. The jury found a verdict for the plaintiff, damages one farthing.

The plaintiff in person having obtained, in Michaelmas Term, 1865, a rule for a new trial, on the ground that the damages were inadequate—

T. Jones shewed cause.—It is conceded that the articles complained of are libels, for which substantial damages in certain circumstances might have been awarded. But the plaintiff has himself made use of language of such a description as to take away his right to complain. It is not easy to see how the jury could have excluded this circumstance from their consideration.

The plaintiff in person supported the rule, and contended that the words which he had used were not of such a character as to afford any provocation to the defendant.

Cur. adv. vult.

The following judgments (June 13) were now delivered.—

SHEE, J.—The plaintiff, who is a clergyman of the Established Church, and incumbent of St. George's Church, at Liverpool, brought his action to recover damages for a series of libels published in the defendant's newspaper, the *Liverpool Mail*, between the dates of the 21st of November, 1863, and the 13th of August, 1864, inclusively. The defendant pleaded not guilty, and gave notice, under Lord Campbell's Act (6 & 7 Vict. c. 96), of his intention to give, in mitigation of damages, an apology, which he had offered to the plaintiff. The cause, which resulted in a verdict for the plaintiff, damages a farthing, was tried, before Baron Bramwell and a special jury, at the Manchester Summer Assizes of the last year, and we have had the advantage of being furnished with a verbatim report of the trial, and with two appendices, containing the articles in full, of which parts are set out in the declaration, and with a correspondence between the attorneys of the parties, to all of which reference was made by the plaintiff, and by the learned counsel for the defendant, in their discussion before us, of the rule.

I agree with my learned Brothers that, regard being had to the number and character of the libels of which the plaintiff complains, and to the lateness and meagreness of the defendant's apology for them, a verdict for substantial damages would have been much more satisfactory, and more in accordance with the truth and justice of the case, than the verdict which has been given, and which, on the judgment of my learned Brothers, overruling my opinion, must stand. If a peremptory rule of practice prevents us from granting a new trial, because the damages are too low, unless there has been some mistake in point of law on the part of the Judge who presided, or in the calculation of figures by the jury, the application for a new trial in this case, which was acceded to by the Full Court, on neither of those grounds, ought not to have been entertained, and we ought not to have put the plaintiff to the trouble and exertion of endeavouring, as he did, with great ability and perfect propriety, to support his rule.

The cases which have been referred to by my learned Brothers, on the point of practice, do certainly shew that the Courts are reluctant to grant new trials in actions of tort, solely because the damages are too low; but they are not such as, in my judgment, should govern our discretion in a case like this, and are not the only cases on the point. In the first of them, *Gibbs v. Tunaley* (1 Com. B. Rep. 641), an action for negligence against a surgeon, the jury, having been properly told by the Judge that if they thought the defendant guilty of any negligence, the plaintiff would be entitled to nominal damages, but to serious damages if they thought that the loss of the plaintiff's limb was attributable to the defendant's carelessness, adopted the former alternative; with which course the learned Judge certified that he was satisfied. In *Rendall v. Hayward* (5 Bing. N.C. 424; s. c. 8 Law J. Rep. (N.S.) C.P. 243), a case of verbal slander, the damages were not of an amount so low as to indicate a desire to disparage the plaintiff, and would probably have been thought abundant had they been paid before action brought, that is, had it not been for the law of costs.

This Court, on the other hand, Lord Denman at the time presiding in it, and Patteson, J., Williams, J. and Coleridge, J. being members of it, held, in the case of *Armstrong v. Haley* (4 Q.B. Rep. 917; s. c. Law J. Rep. (N.S.) Q.B. 323),—an action to recover damages for an injury which the plaintiff had sustained through the negligent driving of the defendant's servant, although it was pressed upon them, in language which the Court had recently used, that it "would not take upon itself to unravel the grounds and motives which may have led to the determination of a case once settled by the jurisdiction to which the law has referred"—that a farthing damages were no damages at all, and granted a new trial. If, in a case of personal injury, the supposed rule of practice was deemed too weak to countervail the plain justice of the case, it ought not, surely, to be deemed inflexible where we think that an injury to personal feelings, to honour and character, such as entitled the plaintiff to substantial damages, has been done. We have, ourselves, twice during this Term, though there had been no mistake of the Judge in point of law and no miscalculation of figures by the jury, set aside verdicts, and granted new trials, on account of the inadequacy of the damages, because we, my Lord Chief Justice, my two learned Brothers and myself, were of opinion that there had been no real assessment of damages, and that the machinery of justice had failed.¹

I think it right to say, that much of what fell from the learned Judge in the course of the trial, and which has been made the subject of complaint to us, appears to me to have been misunderstood by the plaintiff; but I also think, that instead of giving the jury so many reasons for assessing the damages at a low amount, and instead of the nice disquisition (in answer to the question what amount of damages would carry costs) about the law of costs, and the mischief of giving a shilling more than the exact amount of damage proved to have been sustained (there being no proof of pecuniary damage) in order to give the plaintiff costs, the learned Judge would have done better to have advised them that, regard being had to the character, the falseness and the long continuance of the libels, and the inadequacy of the defendant's apology, in respect of time and substance, with reference to the requirements of the statute, under which alone it was admissible, the case was not one for nominal damages; and, upon the whole, the result of the plaintiff's appeal to the law of his country, adding, as it does, insult to injury, and giving a victory over him to his reviler, is, in my opinion, much to be regretted, and one which, with the utmost respect for the judgment of my learned Brothers, we might well have interfered to prevent.

MELLOR, J.—In this case a rule had been obtained by the plaintiff for a new trial, on the ground that the damages assessed by the jury were inadequate to compensate him for the various libels of which he complained. I should certainly have been better satisfied with the result of the trial if the jury had assessed the damages on a higher scale, as I think that the persistence of the defendant in the reiteration of defamatory statements concerning the plaintiff, either wholly untrue or grossly exaggerated, was not sufficiently met, either by his tardy and meagre apology, or palliated by any actual provocation which he individually had received. At the same time, I cannot perceive that there was, in the course of the trial, any misdirection in point of law by the Judge, or any mistake as to their duty on the part of the jury, or any unfair practice on the part of the defendant, which can bring this case within the exception to the general rule laid down and acted upon by the Courts with regard to their interference with the assessment of damages by the jury. In *Rendall v. Hayward* (5 Bing. N.C. 424; s. c. 8 Law J. Rep. (N.S.) C.P. 243), Chief Justice Tindal, in refusing the rule for a new trial, is reported to have said, "I think a more complete measure of justice would have been attained if the jury had given higher damages; but the Court never grants a new trial because the damages are low, unless there has been some mistake in point of law on the part of the Judge or in the calculation of figures by the jury." And in *Gibbs v.*

(1) See *Springett v. Balls*, 1 Law Journal Notes of Cases, 190.

Tunaley (1 Com. B. Rep. 641), the same learned Judge observed, "It is not usual for the Court to grant a new trial on the ground that the damages are smaller than the Court may think reasonable."

If, indeed, I could see that the jury had evaded the duty of applying their minds to the consideration of the amount of damages, we might and ought to treat it as no verdict at all, as we have done in other cases; but I am unable to perceive any such evasion of duty in the present case. In actions of libel and slander, and in other actions of tort not resulting in special damage which can be matter of computation, we think that we should be very chary in interfering with the province of the jury, and that the least which can be required of a plaintiff who complains of the inadequacy of the damages assessed by the jury, is that he should be able to shew that he has not afforded by his conduct any legitimate ground upon which the jury could fairly and reasonably have acted in estimating the damages to which he may be entitled at a nominal sum. Now, in the present case, it cannot be disputed that the plaintiff did, by preaching a sermon on the 8th of November, 1863, on the appointment of a Roman Catholic chaplain to the borough prison of Liverpool, and another sermon, on the following Sunday, on the occasion of the election of a Jew as a mayor by the corporation of Liverpool, and by publishing both sermons in the newspapers, challenge the criticism of the press and the public. Upon those sermons appearing in print, the defendant, as editor of the *Liverpool Mail*, published, on the 21st of November, an article in his newspaper, which comprised the libel complained of in the first count of the declaration, and which, undoubtedly, so far exceeded the bounds of criticism as to come within the legal definition of a libel. This article was followed by other articles, not complained of in the declaration, but which led to a letter from the plaintiff, published in the *Liverpool Courier* of the 5th of February, 1864, in which, in assigning reasons for not sending that letter for insertion in the *Liverpool Mail*, of which the defendant was editor, he described that paper as "the dregs of provincial journalism, of which town of Liverpool, and especially any class of religionists in it, ought to be ashamed." Other matters subsequently arose, all of which were the subject of comment and criticism in the defendant's newspaper; and other allegations of an offensive character were made with reference to the use of the church and the vestry by the plaintiff, which certainly appears to have been thoroughly explained, and to have been of a character entirely different from that represented by the defendant. Unfortunately, some other disputes occurred between the plaintiff and the organist of his church, which gave rise to proceedings against the plaintiff before the magistrates for assault, and the plaintiff himself took the opportunity of making observations in his church, as well as at a meeting, regarding those proceedings, of an offensive character, which he caused to be published in the newspapers, and which the defendant alleged that he understood to impute to him a charge of inspiring the complainant in the proceedings against the plaintiff for the assault, "to swear to the thing which is not," and also charging that iniquity had been worked against him by "perjury and conspiracy." These latter remarks the defendant alleged gave rise to the article complained of in the ninth count of the declaration, and, ultimately, after a correspondence with the plaintiff's attorney, in which an apology was offered, but not in terms satisfactory to the plaintiff, this action was commenced, amongst others. It is impossible to deny that these various matters being in evidence before the jury might reasonably affect the measure of damages. It is not enough to justify us in setting aside the verdict that we believe that the jury did not form the same estimate that we might have done of the fact that the libels extended over a long period of time, and reiterated imputations which had been satisfactorily explained. It may suffice to say, that as to the amount of damages, it was the province of the jury to weigh both the matters of aggravation and mitigation, and to determine the result. We are therefore of opinion that we cannot, without departing from a well-established practice, grant a new trial in the present case. This rule, therefore, will be discharged.

BLACKBURN, J.—In this case I have come to the same conclusion as my Brother Mellor. I do not think that there is any inexorable rule of practice by which we are precluded from ever granting a new trial on account of the smallness of damages. In several cases alluded to by my Brother Shee, where the smallness of the damages shewed that the jury had made a compromise, and, instead of deciding the issue submitted to them of guilty or not guilty, had agreed to find for the plaintiff without damages, the Courts granted a new trial; but there the case is much as if the jury had held out, and had been discharged without a verdict. But in the present case there could be no doubt that the publications were libels, and libels of gross and offensive character; and if the question had been one of punishing the defendant, no one could have doubted that the verdict ought to have been heavy. But the question was not what fine ought to be imposed on the defendant, but what compensation ought the plaintiff to have for his injured feelings, for it is to be observed that there was no actual pecuniary damage, and that no one who in these unhappy controversies was not already prejudiced against the plaintiff would think the worse of him in consequence of the vulgar abuse of the defendant. Now there can be no set-off of one libel or misconduct against another; but in estimating the compensation for the plaintiff's injured feelings, the jury might fairly consider his conduct and the degree of respect which he himself had shewn for the feelings of others; and finding, on the evidence, that he published in the local press sermons reflecting on the local authorities, that he published a statement which I own I think borne out by the articles, that the defendant's paper was so conducted as to justify the epithet of "the dregs of provincial journalism," and, above all, that he delivered from the pulpit and published in the provincial paper a statement that some of his opponents, no matter, in my opinion, whether including the defendant or not, had been guilty of subornation of perjury, and would, as he devoutly hoped, repent on their death-beds and confess their guilt, I cannot say that I think that the jury were bound to give him substantial damages, though I heartily wish that their verdict had not been such as to give an appearance of triumph to the defendant. The rule must, in conformity with the opinion of the majority, be discharged.

Rule discharged.

[IN THE HOUSE OF LORDS.]

May 7, 8, 11, June, 22, 1866.

LYLE AND ANOTHER v. RICHARDS AND OTHERS.

35 L. J. Q.B. 214; L. R. 1 H.L. 222; 15 L. T. 1; 12 Jur. N.S. 947.

Boundaries—Construction of Written Documents—Deed with Map Indorsed—Parcel or no Parcel—Parol Evidence—Falsa Demonstratio—Latent Ambiguity.

BOUNDARIES. DEED AND BOND. EVIDENCE.—A grant of a mine was made to L. by deed, with map indorsed; the southern boundary being described in the deed as "a straight line drawn from J. V.'s house" to a certain boundstone; and the description of parcels concluded with these words, "which said premises are particularly delineated by the map on the back thereof." On this map the line appeared to be drawn from the north-east corner of J. V.'s house. L. brought an action of trespass against R. for working through this southern boundary and taking the plaintiff's ore. At the trial, parol evidence was admitted to shew that J. V.'s house was wrongly placed on the map, and that if corrected the line would run to the south of J. V.'s house, and the whole question was

left to the jury:—Held, by Lords Cranworth (L.C.) and Chelmsford, (Lord Westbury dissenting), that, though it was properly a question of evidence for the jury to identify and determine the position of J. V.'s house, it was a question of construction for the Judge to decide what was the true meaning of the deed; that in so doing the Judge was bound to look at the map, and that he ought to have directed the jury that the true boundary line was that drawn from the north-east corner of J. V.'s house when identified and correctly placed.

This was an appeal on a joint case under the provisions of the Common Law Procedure Act, 1854, from a rule made by the Court of Exchequer Chamber, reversing a judgment of the Court of Queen's Bench which had discharged a rule to enter a verdict for the defendant or to reduce the damages, and ordering the verdict to be entered for the defendant.

The appellants and the respondents were lessees under the same freeholder of conterminous mining properties in Cornwall. The appellants (who were respondents in the Court of Exchequer Chamber and executors and personal representatives of the plaintiff in the Court below) claimed the West Basset Mine under a grant, by way of lease or sett, dated the 28th of February, 1852. The respondents (who were appellants in the Court of Exchequer Chamber and defendants in the Court below) claimed the South Frances Mine under a similar grant, dated the 13th of May, 1843.

In February, 1858, a Mr. Lyle, since deceased and now represented by the appellants, brought an action of trespass against the respondents, and charged them with breaking and entering into his, the plaintiff's mine and taking away 250 tons of copper and copper ore, of the value of 4,000*l.*, and he claimed 10,000*l.* The defendants paid into court 525*l.*, and pleaded that that sum was enough to satisfy the plaintiff's claim.

The action was tried at Bodmin, in August, 1858, before Mr. Baron Channell and a special jury, when the point in dispute was as to the true line of boundary between the plaintiffs' mine on the south and the defendants' mine on the north.

In the defendants' deed of grant, made in 1843, the boundary on the north of the South Frances Mine, thereby leased to them, is described as "a straight line against the Wheal Haste sett." The Wheal Haste sett was the same property as that leased to the plaintiff by the deed of 1852, under the name of the West Basset Mine. A lease of the Wheal Haste sett had been made by deed, dated the 10th of January, 1835, to other parties, who had assigned to the plaintiff, who then surrendered that lease and obtained the lease or grant made by the deed of 1852. The deed of 1835 was put in by the plaintiff, and was admitted by the defendants as evidence to explain the deed of 1852.

The description of the boundaries of the Wheal Haste sett, as contained in this deed, was identical with that of the boundaries of the West Basset Mine, as set out in the deed of 1852, except that there was a map indorsed on the deed of 1835, to which reference was made at the conclusion of the parcels in these words: "which said premises are particularly delineated by the map at the back of this sett," while on the deed of 1852 there was no map, and by consequence no words of reference. The parcels granted were in each of the deeds described as "bounded on the north and west by the estate of Bosleake, the property of E. W. W. Pendarves, Esq., and the estate of Treskillard, the property of Lord Granville, on the south, by a straight line of about 355 fathoms from John Vincent's house at the south-west extremity of the sett to a boundstone at the north-west extremity of the South Wheal Basset sett, and from thence eastward by the north side of the road leading to Carnkie to a boundstone fixed at the corner of the North Wheal Basset sett, and from thence due north about 170 fathoms to a boundstone fixed at the south-east corner of Bosleake estate."

As to the position of the boundstones, there was very little dispute; but John Vincent's house had a depth of about thirty feet, and the question was,

whether the damage should be assessed on the footing that the true southern boundary of the plaintiff's mine was a line drawn from the north-east corner of John Vincent's house, or a line drawn from the south-west corner of the house. In the latter case the amount paid into court would not be sufficient by many thousands of pounds. The question to be tried was, therefore, whether the triangle of land bounded by the house as its base and by the straight lines drawn from its north-east and south-west corners respectively to the boundstones, was or was not parcel of the grant made by the deed of 1835. If it was passed by that deed, it could not have been the subject of the grant made to the defendants in 1843, and the plaintiff would be entitled to it under his deed of 1852. If it was not passed by the deed of 1835, then the defendants were entitled to it under their deed of 1843. The map on which the determination of this question depended was drawn to a very small scale, John Vincent's house being represented by a very minute oblong rectangular spot, but it appeared with sufficient distinctness from the map on the lease, that the line to the boundstone was drawn from the north-east corner of the spot. But on the map, on the counterpart, it was drawn to the middle or a little below.

Parol evidence shewed that the house was misplaced some 150 yards too far westward, and some fifteen yards too far to the south, and the plaintiff claimed that the map should be corrected by placing the house in its proper position, leaving the line as nearly as possible as it was delineated on the map, thus making it run from the south angle of the house. And the defendants claimed that the house should be placed in its proper position and the line shifted northwards with it, thus preserving the north angle of the house as the starting-point. Parol evidence also shewed that there was to the north and to the east sides of the house a lean-to, and that if these additions were included in the house the whole would be represented by two parallelograms, and not by one oblong rectangle. The whole question was left to the jury, and it was agreed that in either case the damages should be assessed by arbitration. A great deal of other extrinsic evidence was laid before the jury, and they found by their verdict that the southern boundary of the plaintiff's mine should be a line drawn from the south-east corner of John Vincent's house to a boundstone at the north-west extremity of the South Wheal Basset sett. But leave was reserved to the defendants to move to enter a verdict the other way, or to reduce the damages on the footing of the other line of boundary, if the Court should be of opinion that the evidence did not warrant such a finding.

In pursuance of this leave reserved, a rule to enter the verdict for the defendants, or to set aside the verdict as against the weight of evidence, was granted in November, 1858; but it stood over for argument until the decision of the Court of Exchequer Chamber should be given in the case of *Reynolds v. Buckley*.

This case of *Reynolds v. Buckley* related to precisely the same premises and raised the same question, but was between different parties, that is to say, between grantees interested in the Wheal Haste sett, under the deed of 1835, as plaintiffs, and former grantees of the South Frances mine as defendants. In that case some evidence which was produced before the jury at the trial of the subsequent case of *Lyle v. Richards* was not produced; but the whole case was left to the jury, as in *Lyle v. Richards*.

The jury found that the boundary should run from the south corner of the house. This verdict had been disputed, on the ground that it was a question of construction for the Judge, and not one for the jury; and that, on the true construction of the deed, the line should run from the north corner. But the Court of Queen's Bench confirmed the verdict; Erle, J., in July, 1858, delivered the judgment of the Court, that an extrinsic evidence had raised an ambiguity in the application of a written document to land, it was properly left as a question of evidence for the jury as to the intention of the parties in respect of parcel or no parcel, and that it was not a question of construction for the Judge.

This judgment was, on appeal, confirmed by the Court of Exchequer

Chamber, but solely on the ground that the Court had come to the same conclusion as the jury; and Williams, J., in delivering the judgment of the Court (February, 1861), observed that it was not necessary to decide whether the construction of the lease in question was properly a question for the Court or a question for the jury; but his Lordship referred to the case of *Lord Waterpark v. Fennell* (7 H.L. Cas. 650).

The rule granted in 1858 in *Lyle v. Richards* came on for argument, before the Court of Queen's Bench, in January, 1862, when the Lord Chief Justice delivered the judgment of the Court that it was a matter for the jury on the whole evidence; but having regard to the fact that in *Reynolds v. Buckley* there had been, with reference to the same boundary, a verdict of another jury to the contrary, which verdict the Court of Exchequer Chamber had approved, leave was given for a new trial on payment of costs.

This decision was reversed by the Court of Exchequer Chamber in June, 1864, when Erle, C.J. delivered the judgment of the Court, that it was for the Judge to construe the written instrument; that as there was nothing in the delineation by the map that was repugnant to the description in words, there was no room for evidence to shew what the meaning of the plan was; and as the plan shewed clearly that the boundary ran from the north-east corner, the Court ordered the verdict to be entered for the defendants, unless the arbitrator should award that the 525l. paid into court was not sufficient to cover the damages sustained on the footing that the line ran from the north-east corner. But the Lord Chief Baron, while agreeing with the judgment of the Court, declared that his impression was, that a map ought to be considered as a species of respectable hearsay evidence, or (if admitted by both sides) as a kind of statement made by the parties themselves, in either case for the jury, and not for the Court to look at, and to say what it really is.

The present appeal was from this judgment.

The Solicitor General (Sir R. P. Collier) and Rolt (Buller with them), for the appellants.—This was properly a question to be decided by extrinsic evidence; for if the description of the parcels in the deed was not sufficient to determine the boundary, then the case of *Lord Waterpark v. Fennell* (7 H.L. Cas. 650) applies, viz., where parcels are described by words of a general nature or of a doubtful import, evidence, such as evidence of usage, is proper to be received to shew what the words comprehend. If, on the other hand, there is in the deed an adequate description, then the subsequent error in the map will not vitiate the description; for if the prior description of parcels sufficiently conveys, a further description, as of a wrong quantity, will be rejected as *falsa demonstratio*—*Llewellyn v. the Earl of Jersey* (11 Mee. & W. 183; s. c. 12 Law J. Rep. (N.S.) Exch. 243), *Morrell v. Fisher* (4 Exch. Rep. 591; s. c. 19 Law J. Rep. (N.S.) C.P. 273). The ambiguity only appears when you come to compare the external thing with the thing described. This is a latent ambiguity, and raises the question of fact, whether parcel or no parcel; and this may be explained by evidence—*7th Proposition of Wigram's Law of Extrinsic Evidence*; *Goodtitle v. Southern* (1 M. & S. 299). Though parol evidence may not be admissible to shew what was the intention of the parties, it must be employed to shew what was the external thing referred to; and if there are two things answering the same description, you may take parol evidence to shew which of the two was intended. Here John Vincent's house might have been a point, a stone; only when you get to the house you find that it has parts and magnitude; then the terms of the deed are found to be ambiguous, for the line might run from the north or from the south, or from the middle of the house. Such an ambiguity may be explained by evidence—*Paddock v. Radley* (1 Cr. & J. 90) and *Freeland v. Burt* (1 Term Rep. 701). It is for the jury to look at the extrinsic evidence thus admitted. The construction of written documents is for the Judge; but when it is shewn by extrinsic evidence that the terms used are ambiguous, evidence is admissible to explain the ambiguity, and then it is for the jury to say in what sense the ambiguous expressions were used—per

Maule, J. in *Smith v. Thompson* (8 Com. B. Rep. 45, and at p. 59). Where extrinsic evidence creates an ambiguity, extrinsic evidence may be employed to remove it—*Bacon's Maxims*, Rule 23. It is admitted that all that was passed by the deed of 1835 was passed by that of 1852, and the words of the deed of 1835 would pass the whole that the appellants ask for, because deeds are to be read most strongly against the grantor; if this was passed by the deed of 1835 the landlord could not have passed it to the respondents by the deed of 1843. The deed of 1835 would have passed all but for the map; but the map is wrong, as can be shewn by evidence and reference to roads, hedges, &c. John Vincent's house is misplaced. This was *falsa demonstratio*. Reject the *falsa demonstratio*, the rest is correct. If the appellants had rested on the deed of 1852, they would have been entitled to the land. If the deed of 1835 is to be admitted, then other extrinsic evidence must also be admitted, and in that case the appellants are entitled to succeed under the verdict of the jury upon such evidence.

The Attorney General (Sir R. Palmer) and *Karslake* (Pinder with them), for the respondents.—It is the duty of the Court to place questions of fact before the jury and direct them how to give their verdict according to their finding of the question. It is for the Court to construe written documents; the duties of the jury are confined to proof. In construing documents, it is the duty of the Judge to look to the deed, and not to take into consideration facts subsequent—*Drake v. Drake* (8 H.L. Cas. 172; s. c. 29 Law J. Rep. (N.S.) Chanc. 850). When the description in the deed comes to be applied to the external thing, two questions may arise, first, is there any ambiguity? and, secondly, is there any fact to be found which would remove the ambiguity and determine the verdict? In this case the plaintiffs' evidence raised no ambiguity and solved none; the deed of 1835, put in by the plaintiff, shewed clearly that the line ran from the north-east corner of the house. This deed was put in by the plaintiff, and must be taken most strongly in the defendants' favour—*Verba chartarum fortius accipiuntur contra proferentem*. If the appellants are restricted to their deed of 1852, and no other evidence is admitted, then they must fail upon the language of the deed. If an error in a map or plan indorsed on a deed makes the matter a question for the jury, as the appellants contend, then any error, however trivial, in map or plan would remove the construction of the instrument from the Judge, as a matter of law, to the jury as a matter of fact and evidence. If the appellants are confined to their deed of 1852 they cannot succeed, because the respondents had already obtained by their deed of 1843 the parcel of land in question; the landlord had no power to grant the same to another party in 1852. But suppose that they rely, as they have been allowed to do, on the deed of 1835, and to shew by evidence that the house was misplaced. Here there would be a description rendered inaccurate by the superfluous addition of the locality of the house, which superfluous addition is incorrect; but it is obvious that the whole of the class of cases in which an inaccurate description has been found sufficient merely by rejecting the superfluous words is one in which no ambiguity exists, and if there is no ambiguity, there can be no question for the jury. If in this case the superfluous addition is rejected, the description is correct. Suppose the grant referred to John Vincent's house, specifying the north-east corner as the starting-point, but going on to say that the house was built of so and so, or stood so and so, this addition being wrong; this erroneous addition would have been rejected. So, here, the position of the house is immaterial. The line is drawn on the map from the north-east corner, and whether or not the house is properly placed is immaterial.

The Solicitor General, in reply.—The other side admit that this was a proper case for parol evidence, but that upon such evidence it was a question of law for the Court to decide what was the effect of it. The Court of Exchequer Chamber treated the verdict of the jury as not to be considered, because it was come to after hearing parol evidence which ought not to have been given. The point is, whether or not this was a proper case for parol evidence. If it is a

proper case, the Court of Exchequer Chamber were wrong in disregarding the verdict.

The LORD CHANCELLOR.—This was an appeal under the Common Law Procedure Act, 1854, upon a case stated by the parties according to the directions of that act. The question arises in this way: a gentleman of the name of Lyle, since dead, who is represented by his executors, was the lessee of a certain mine in Cornwall. I do not know if the word "lessee" is the proper word to use, but he had the right to work the mine. We will call him the lessee. It was called the West Basset Mine. The defendants were the occupiers of a mine immediately south of the West Basset Mine, called the South Wheal Frances Mine, and the complaint of the plaintiff was that the defendants, the occupiers of this South Wheal Frances Mine, had been guilty of a trespass in working beyond their northern boundary into the mine of the plaintiff. On the trial of the action, the jury found for the plaintiff, subject to leave being reserved to set aside the verdict, and to enter the verdict for the defendants, if the Court should be of opinion that the evidence did not warrant such a finding; and eventually the case came before the Exchequer Chamber, which held that upon the evidence it was not competent for the jury to find for the plaintiff, and that consequently the verdict ought to be entered for the defendants. The question is whether that decision was right.

The question for the jury was, whether the *locus in quo* upon which the mine was worked by the defendants was parcel of the mine of which a sett was granted to the appellant in 1852. Parcel or no parcel is a question for the jury. It was properly left to them. But the Judge was bound to explain to them, for their guidance, what was the true construction of any documents necessary for the decision of the question "parcel or no parcel." In this case the dispute arose between the conterminous grantees. The plaintiff was grantee of a mine to the north, the defendants of a mine to the south. The defendants had worked to the north of their mine, and the question was, whether they had gone beyond the boundary line which divided their mine from that of the plaintiff. The boundary line of the plaintiff's mine, which separated it from the mine of the defendants to the south is described in the sett made to him in 1852. It was the duty of the Judge to decide what was the true meaning of the language there used for describing the boundary line. But, in order to adapt the description contained in a lease or other instrument of a boundary line (whether expressed by words or by a diagram), to the line in nature meant to be designated by the description, it is necessary to have recourse to parol evidence. The description in the deed cannot otherwise be identified with the thing intended to be described. In this case, therefore, the parol evidence was properly admitted for the purpose of shewing whether the place in which the trespass complained of was committed was or was not included in the sett granted to the plaintiff. We have no information as to what the direction was which the Judge gave to the jury; but the case was left to them on the terms that if they should find for the plaintiff, the verdict should be entered for him, and if according to the evidence they were bound to find for the defendants, then the verdict should be entered for them. The jury found for the plaintiff, but the Court of Exchequer Chamber has decided that the jury, on the evidence before them, were bound to find for the defendants; and whether the Court was right in that decision is what we have to determine. The whole question turns on what is the true boundary line between the two mines. In the plaintiff's sett of 1852 his southern boundary is described as "a straight line of about 355 fathoms from John Vincent's house, at the south-western extremity of the sett, to a boundstone at the north-western extremity of South Basset sett." It was the duty of the Court to interpret these words for the guidance of the jury. But of their meaning, aided by proof of the facts that there is near the south-west extremity of the plaintiff's sett a house called John Vincent's house, and that there is at the north-western extremity of South Wheal Basset sett a boundstone, there can be no doubt. The boundary line which the jury were bound

to take as that indicated in the plaintiff's sett was a line from John Vincent's house to the boundstone in question. This, however, does not make the exact line clear. The boundstone may for practical purposes be treated as a mere point, but this cannot be said of John Vincent's house, the depth of which from north to south is shewn by the evidence to be twenty or twenty-five feet. It is obvious, therefore, that the line, if drawn from the north-east corner of the house, will give the plaintiff a less quantity of mine than if drawn from the south-east. The question, therefore, whether the triangular space included between two lines drawn from the boundstone—one to the north-east, the other to the south-east corner of John Vincent's house—being the *locus in quo*, was or was not parcel of the mines included in the plaintiff's sett cannot be solved by a mere interpretation of the language of the sett of 1852, for that language is equally consistent with a line drawn from the north-east as with a line drawn from the south-east corner of the house. The jury, therefore, even supposing them to have received from the Judge a proper interpretation of the language of the sett of 1852, and to have acted upon it, were yet obliged, in deciding the question of parcel or no parcel, to have recourse to further evidence.

The evidence offered consisted, *inter alia*, of a prior sett in the year 1835, of the same mine as that which was granted to the plaintiff in 1852; and, secondly, of two setts in 1843, of the mines now worked by the defendants, and which, as I have already stated, adjoin on the plaintiff's mine, the southern boundary of the latter constituting the northern boundary of the former. In the sett of 1835, the language used in designating the boundaries may be taken as being identical with that afterwards used in the sett of 1852, save only that on the back of the sett of 1835 there is a map descriptive of the premises included in it, and the description of the parcels is followed by the words, "which said premises are particularly delineated by the map on the back of this sett."

It was the duty of the Judge to explain to the jury the true meaning of this deed, just as it was of the deed of 1852, and, in construing this deed of 1835, the Judge, or, according to the liberty reserved at the trial, the Court was bound to look at the map as forming part of the deed. Now, on the map the boundary line is clearly drawn from the north-east corner of John Vincent's house, and the Judge or the Court were bound to treat this as if in the description of the parcels the language had been, not a line drawn from John Vincent's house, but a line from the north-east corner of John Vincent's house. This shews that the *locus in quo* was not included in the sett of 1835. But if not included in the sett of 1835, it could not be included in that of 1852, for in the setts of 1843, under which the defendants derive title, their northern boundary is clearly made to be the same as the southern boundary of the plaintiff's sett established in 1835. The result is, that it is immaterial to consider what was the boundary line intended to be drawn in 1852, for even if it had been expressly designated as a line drawn from the south-east corner of the house, that would not have warranted a finding that the *locus in quo* was part of the plaintiff's sett. Lady Basset had already in 1843 granted to those under whom the defendants claim title a right to take all minerals south of the line adopted in 1835, *i. e.* south of the line from the north-east corner of John Vincent's house. Therefore, she had no power to grant to the plaintiff in 1852 that which she had already granted to the defendants, or to those under whom they derive title. Great reliance was placed on the fact that the map, on which so much depends, was shewn to be very inaccurate. John Vincent's house is placed on the map from forty to sixty fathoms more to the west, and considerably more to the south, than its true position would warrant; so, again, the boundstone appears by the map to be on the hedge or bank running along the south side of the road to Carnkie, whereas it is in fact in the middle of that road. These inaccuracies, however, appear to me to be unimportant. The map is referred to not for the purpose of shewing the site, either of the house or the boundstone. The facts as to the true position of the house and the boundstone are ascertained

by other means. The use of the map is to clear up what without it was uncertain, namely, from what part of the house the line was to be drawn, and for that purpose the exact site is immaterial. The map is undoubtedly drawn on a very small scale, and if from that circumstance, or from any other cause, it could be considered doubtful to what part of the house the line was drawn, the view I have taken might have been different. But the plan, though on a small scale, clearly indicates that wherever John Vincent's house was situate, the boundary line was to be drawn from its north-east corner. Translating (so to say) the map into words, it is as if the description had been, "the boundary to the south is a line drawn from the north-east corner of John Vincent's house, which is situated sixty fathoms to the west of the southernmost point of the road," whereas, in fact, the house is situate within five fathoms of this point. This inaccuracy would not, as I think, have been material. The boundary line would still be a line drawn from the north-east extremity of the house, wherever situate, assuming, of course, that the jury were satisfied that the house really existing is that which was referred to in the deed. The circumstance that its locality was erroneously described would not affect the description of the boundary line, namely, that it was to be a line drawn from the north-east corner. When once the jury was satisfied that the house known as John Vincent's house is that referred to in the deed, the error in the description of its locality is no more material than if it had been an error in describing it as brick-built instead of stone-built, or as a house of three stories instead of two. No error is material which would not prevent the jury from being satisfied that the existing house is the house referred to in the deed. I have treated it as clear (as did the Exchequer Chamber) that the boundary line on the map is drawn in a straight line from the boundstone to the north-east corner of the house, and that the existing house, called John Vincent's house, is that referred to in the sett of 1835. Strictly, these are both questions for the jury. It was for them to say, looking at the map, to what part of the spot there designated John Vincent's house the boundary line was drawn. But it is so plainly drawn to the north-east corner that this has always been assumed as a fact—that is, it has been assumed that if this precise point had been put to them they must and would have so found.

So, again, it was the duty of the Judge to ask the jury whether they were satisfied that the existing house, called John Vincent's house, is the house intended to be described on the map. In deciding this the jury would have to consider, on the one hand, the fact that there is no other house known by that name, and, on the other hand, the erroneous position of the house on the plan. Mere error of position on the plan cannot of itself be decisive. If the house itself had been five miles off, the jury would, of course, have come to the conclusion that such a house could not have been what was meant to be designated. If, on the other hand, the house drawn on the plan was only one yard out of its proper place, the jury would disregard such an inaccuracy—in fact, it is misplaced by about 100 or 150 yards to the west, and by 10 or 20 to the south. It was for the jury in these circumstances to say whether the actual house was or was not that intended in the sett and map of 1835 as forming one terminus of the boundary. Assuming, as we must assume, the jury to have been satisfied that in spite of the error in its position on the map the house as it exists on the land is the house intended, and that the line on the plan is drawn to the north-east corner of the house, it was the duty of the Judge to tell them, as matter of law, that the boundary line is the line drawn from the north-east corner of the actual house to the boundstone. The Court of Exchequer Chamber has assumed, and I think very reasonably assumed, that on these two questions of fact the jury must be considered to have found, first, that the line on the plan is drawn to the north-east corner of what is there called John Vincent's house; and, secondly, that the actual house, called John Vincent's house, is that referred to in the map and description under the name of John Vincent's house. Assuming this to be so,

it follows as matter of law (having regard also to the two setts of 1843) that the *locus in quo* could not form part of the sett of 1852. On these grounds I have come to the conclusion that the judgment of the Exchequer Chamber was right, and so that the judgment of your Lordships ought to be for the respondents, and that the appeal ought to be dismissed, with costs.

LORD CHELMSFORD.—The action upon which the judgment appealed from was pronounced was brought by the plaintiff, the appellant, for a trespass by the defendants upon his mine, called West Basset Mine, and taking away copper and other ore, and the sole question to be tried was whether the *locus in quo* was part of the plaintiff's mine. The plaintiff claimed under a lease from Lady Basset, dated the 28th of February, 1852, in which the mine was described to be bounded "on the south" (the only part of the description of boundaries necessary to be noticed) "by a straight line of 355 fathoms from John Vincent's house at the south-west extremity of the sett, to a boundstone at the north-west extremity of South Wheal Basset sett." At the trial, in Cornwall, the plaintiff, after putting in the lease of the 28th of February, 1852, called witnesses to prove that the line from John Vincent's house mentioned in the lease ought to be taken from the south side, or from about the centre of that house. In the course of the evidence he produced a former lease of the same mine, dated the 24th of March, 1835, which contained the same description of the boundaries as in the lease of 1852, and was similar to it in all respects, except that it contained a reference to a map in these words, "which said premises are particularly delineated by the map on the back of this sett." In this map the line described as the boundary on the south clearly appears to be drawn from the north-east corner of John Vincent's house to the boundary stone. Evidence was given on both sides to shew that the situation of John Vincent's house was incorrectly described upon this map. Both sets of witnesses agreed that it was placed upon the line too far to the west, but they differed as to the extent of the error in this respect. The appellant by the evidence shewed that Vincent's house was placed on the map too far to the south, while in the evidence for the respondents it was stated that if Vincent's house were plotted in on the plan in the Wheal Haste sett in its right place, the whole of the house would be to the south of the boundary line there shewn. The respondents put in evidence two leases from Lady Basset, both dated the 17th of May, 1843, under which they held, one of which was a lease of the estate of Grylls in the description of the boundaries included in the *locus in quo*. The whole case was left to the jury, and they found by their verdict that the southern boundary of the plaintiff's mine should be a line drawn from the south-east corner of John Vincent's house to a boundstone at the north-west extremity of South Wheal Basset sett.

The defendants in the following term obtained in the Court of Queen's Bench a rule to shew cause why the verdict should not be set aside, and a verdict entered for the defendants instead thereof, or why there should not be a new trial, on the ground that the verdict was against the evidence. Upon this rule being called on for argument it was ordered to stand over till after the decision of a case of *Reynolds v. Buckley and others*, which was an action of trespass between other parties interested in the same mines, in which an appeal to the Court of Exchequer Chamber was pending. There is no statement in the printed case before the House of the particulars of this case of *Reynolds v. Buckley and others*, nor any explanation given of the way in which it was supposed that the decision in that case would influence the judgment of the Court of Queen's Bench. But all that we are informed about it is, that after the decision of that case in the Exchequer Chamber, the Court of Queen's Bench ordered that "so much of the rule as sought to enter a verdict for the defendants, or reduce the damages, should be discharged, and that so much of the rule as prayed for a new trial should be suspended until the decision of the Court of Exchequer Chamber on this appeal, and that, in the event of this Court not entering the verdict for the defendants, the verdict obtained in the

cause should be set aside, and a new trial had between the parties upon payment of costs." Notice of appeal was given by the present respondents, and pursuant to the provisions of the Common Law Procedure Act, 1854, a case was stated between the parties, and the question for the opinion of the Exchequer Chamber was, whether the judgment of the Court of Queen's Bench, in discharging so much of that rule as was discharged, ought to be affirmed or reversed, or, in other words, whether the verdict given for the plaintiff ought not to be set aside, and a verdict entered for the defendants.

This question depends entirely upon what should have been the direction of the Judge to the jury upon the trial, whether he should not have told them that the southern boundary of the mine was a line drawn from the north-east corner of John Vincent's house, instead of leaving it to them to say from what part of the house that line ought to be drawn. I have had great difficulty in making up my mind whether upon the whole evidence the proper line of the southern boundary was matter of fact for the jury, or was a question for the Judge upon the documents produced. After careful consideration of the whole case, and having had the advantage of reading the opinion of my noble and learned friend on the woolsack, I agree in the conclusion at which he has arrived. The question to be decided was, what was the boundary intended to be described in the lease to the plaintiff of 1852? Lord Chief Justice Erle, in delivering judgment in the Exchequer Chamber, said, that "If the case stood upon that lease, it was very likely that the plaintiffs would be entitled to succeed." I shall have occasion presently to consider whether, looking at the question as one of judicial construction of this deed alone, the description of the boundary which it contains is not adverse to the plaintiff's claim; but the lease of 1835, with the map annexed, was put in evidence by the plaintiff, and the description of the boundaries corresponding exactly with those in the lease of 1852, the line of the southern boundary is marked on the map as proceeding from the north-east corner of John Vincent's house. If nothing more had been done than merely putting in this lease, as explanatory of the boundaries in the lease of 1852, the question would have been one entirely for the Judge. But the plaintiff, who had produced a lease and map, which on the face of them would have been destructive to his case, gave evidence to shew that the map was inaccurate as to the position of John Vincent's house, and thereupon contended that this raised a latent ambiguity, and opened the question as to the part of the house from which the boundary line was to be drawn. It is inaccurate to call this mistake in the map the disclosure of an ambiguity. It is merely the proof of incorrectness in a certain particular, in respect of which it appears that the map is not longer to be relied upon. The only inaccuracy which was proved to exist in the map was in the position of John Vincent's house, which is placed more to the west and to the south than it ought to have been; but whatever was its right position, there was nothing in the evidence to disturb the fact of the line being drawn from the north-east corner of the house, or to remove it from the fact of the map as part of the deed, where it was within the sole province of the Judge as a matter of construction. And upon considering closely the description of the boundaries in the lease of 1852, it appears to me materially to aid this construction; for when it is said that the mine is bounded on the south by a line from John Vincent's house, "at the south-west extremity of the sett," the proper construction of the words would seem to be a line from that part of the house which is nearest to the south-west extremity, which must be to the north side. Assuming, therefore, all the facts proved at the trial, the question turned upon the description of the boundaries in the leases of 1835 and 1852, and the Judge ought to have directed the jury that, whatever was the exact situation of John Vincent's house, the proper southern boundary line was from the north-east corner of the house. The Court of Exchequer Chamber has properly dealt with the case as one of judicial construction of written documents, and I agree with my noble and learned friend on the woolsack that their judgment ought to be affirmed.

LORD WESTBURY.—I am sorry to be obliged to differ from your Lordships. To render my opinion intelligible, it is necessary to state concisely the manner in which the question has arisen. The plaintiff claimed the minerals in question under a sett or grant made in 1852. The defendants insisted that the minerals were not included in the parcels of that sett, but were included, and in effect passed to the defendants under two prior setts made by the same grantor in the year 1843, which had not expired. These two setts were put in by the defendants. Anticipating this defence, the plaintiff put in evidence at the trial an earlier sett made by the same grantor in the year 1835, and which was in force at the date of the setts of 1843, for the purpose of proving that the minerals in question were included in the parcels of the sett of 1835, and did not, therefore, pass by the setts of 1843, nor were included in the parcels of those two setts. The parcels in the sett of 1835 were substantially the same as the parcels in the sett of 1852, with the exception of a map, which is indorsed on the sett of 1835, and referred to in the description of the parcels. The sett of 1835 was material on another ground, because in the parcels and plan of the setts of 1843 the southern boundary line in the sett of 1835 is referred to as forming the northern boundary line of the setts of 1843. The question, therefore, in effect came to be, what was the south boundary line described in the sett of 1835? When the sett of 1835 had been put in by the plaintiff the defendants fastened upon it, and insisted that it appeared on the map indorsed on the sett of 1835 (which being referred to in the parcels became part thereof) that the southern boundary of the sett thereby granted was formed by a line drawn from the north-east corner of a house (the site of which is laid down on the map, and called John Vincent's house) to a certain boundstone therein described. We accept, said the defendants, the line from the north-east corner of John Vincent's house as our northern boundary, and it gives us the minerals in question. To this the plaintiffs answered, that the fact of the boundary line appearing on the map to run from the north-east corner of John Vincent's house is an accident resulting from the circumstance of the site of John Vincent's house being inaccurately laid down in that map, and he adduced evidence to correct the map, by proving the true position of John Vincent's house, which, if substituted for the erroneous site in the map, would no longer leave the line to the boundstone running from the north-east corner of the house. This evidence was received, subject to any question of law, and the jury found in favour of the plaintiff, and that the southern boundary of the plaintiff's sett was a line drawn from the south-east corner of John Vincent's house (that is, according to its true site) to the boundary stone. Before the Court in Banco the defendants insisted that parol evidence was not admissible to prove and correct the error in the map, or, at all events, not to alter or effect the position of the boundary line, which, whatever might be the true site of John Vincent's house must, as the defendants contend, be drawn from the north-east corner of it. It is admitted that the map must be treated as incorporated into and forming part of the parcels in the sett of 1835. In my opinion the evidence was clearly admissible. Upon a question of parcel or no parcel parol evidence is always received. The error here is latent, not being discovered until it is shewn by extrinsic evidence what was the true site of the house incorrectly laid down in the map, and in a question of the extent or correctness of the parcels in a deed (which are a description of external objects) parol evidence, for the purpose of ascertaining the thing so described or referred to, is admissible. But then the defendants contend, that although evidence may be received for the purpose of correcting the error as to the site of John Vincent's house, and proving its true position, yet that it leaves untouched the position in the map of the boundary line, which they contend is equivalent to a statement in words that the line is to be drawn from the north-east corner of John Vincent's house, whatever may be its true site. This, they contend, is the material and important statement, and that the incorrect setting forth of the site of

the house is immaterial, being merely *falsa demonstratio*. But in this argument there is a false assumption. There is no express statement in words in the sett of 1835, that the boundary line is to run from the north-east corner of Vincent's house—that is collected only from the fact of the boundary line, as delineated in the map, meeting the north-east corner of John Vincent's house, because that house is incorrectly laid down in the map. But so soon as it is admitted, or proved, that the site of the house is erroneously laid down, the relative position on the map of the house and boundary line is disturbed, and it becomes impossible to know from the map or the parcels (as written) whether the boundary line does or does not hit the north-east corner of Vincent's house, according to its true locality. Whether it does or does not do so becomes a further question of fact, to be ascertained by evidence, and not by construction; and therefore for the jury, and not for the Court. A map is a picture or representation of external objects with their relative position, and if of two adjoining objects one is laid down incorrectly, the whole of the relative description of the two is incorrect. Suppose in a map of the two adjoining counties of Surrey and Sussex that Sussex is laid down erroneously, and in the map the eastern boundary of Surrey is made to run northwards from the extreme south-eastern boundary of Sussex, and the position of Sussex is then rectified, would it not be absurd to suppose that the alleged eastern boundary of Surrey must remain? The map here is not a statement that the southern boundary line is to run from the north-east corner of Vincent's house in its actual true position, but from the north-east corner of that false site which is erroneously laid down. There is no *independent* statement of the connexion of the boundary line with the house, but only with the site falsely attributed to the house. In short, the relative position of the boundary line and the house is part of the incorrect description of the site of the house, and the consequence of that error. As soon as the position on a map of one object is proved to be wrong, the whole of the representation of the relative positions of adjoining objects becomes erroneous, and the map must in this respect be re-drawn according to the facts, which must be ascertained from evidence.

It is, no doubt, true that the construction of written instruments is matter of law, and that when an instrument is laid before the jury they are bound to receive the interpretation of the effect of that instrument from the Judge. But the question here is not of the interpretation of the deed itself, nor even of the construction of the description of the parcels, but of the inference to be derived from a map as to the relative position of two objects laid down as adjoining each other where one is proved to be erroneously laid down. As soon as that proof was admitted, it became obvious that the true position in nature of the thing erroneously laid down, and the true relative position of the adjoining object, must both be ascertained by external evidence. If I rightly understand the judgment of the Court below, and the opinions of my noble and learned friends, it is assumed that the map amounts to a statement that the boundary line is to run from the north-east corner of John Vincent's house, whatever that house may be. But, with great submission, there is no such statement. The map only states that the line runs from the north-east corner of the house as there laid down. In any mode of regarding the case, even that adopted by my noble and learned friends, it appears to me that the whole question was one of fact, and not of law, and was for the jury and not for the Court; and therefore that the rule, so far as it was sent from the Queen's Bench to the Exchequer Chamber, ought to have been discharged.

Judgment affirmed, with costs.

[IN THE HOUSE OF LORDS.]

June 11, 22, 1866.

MITCALFE v. HANSON.

35 L. J. Q.B. 225; L. R. 1 H. L. 242.

Referred to, *Betteley v. Stainsby*, [1867] E. R. A.; 36 L. J. C.P. 293; L. R. 2 C.P. 568; 16 L. T. 701; 15 W. R. 1047 (C.P.). Followed, *Ex parte Wiseman*, '1872' L. R. 7 Ch. 35; 25 L. T. 545; 20 W. R. 138 (L. J.J.). Referred to, *Robinson v. Ommanney*, [1882] E. R. A.; 51 L. J. Ch. 894; L. R. 21 Ch. D. 780; 47 L. T. 78; 30 W. R. 939 (Ch. D.): affirmed, [1883] E. R. A.; 52 L. J. Ch. 440; L. R. 23 Ch. D. 285; 49 L. T. 19; 31 W. R. 525 (C. A.). Principle applied, *Deering v. Bank of Ireland*, [1887] E. R. A.; 56 L. J. P.C. 47; L. R. 12 App. Cas. 20; 56 L. T. 66; 35 W. R. 634 (H.L. Ir.).

The Bankruptcy Act, 1849, has been repealed by 32 & 33 Vict. c. 83. s. 20.

Bankruptcy Consolidation Act, 1849, section 178.—Covenant to pay Premiums not a Liability to pay Money within Statute.

BANKRUPTCY.—*A. borrowed money of B, and executed a deed of assignment, by way of mortgage, to B, of a policy of assurance on his own life, with a covenant to keep up the annual payments for premiums. A. became bankrupt:—Held, affirming the judgment of the Court of Exchequer Chamber, that there was not a liability to pay money upon a contingency provable under the 178th section of the Bankruptcy Act, 1849.*

This was a writ of error upon a judgment of the Court of Exchequer Chamber, affirming a judgment of the Court of Queen's Bench, in an action of covenant, in which action the present defendant in error, William Stonehewer Hanson, sued the present plaintiff in error, William Brodrick Mitcalfe, under the following circumstances:

In the year 1849, the plaintiff in error, Mitcalfe, borrowed of the defendant in error, Hanson, two sums of 600*l.* and 200*l.*, and by two several indentures, dated respectively the 5th of January and the 8th of May, in that year, and made between the same Mitcalfe of the first part, certain sureties of the second and third parts, and the same Hanson of the fourth part, Mitcalfe assigned to Hanson two policies of assurance on his own life, the one for 700*l.* the other for 250*l.*, and he covenanted, during his life, from time to time, to pay the two annual premiums of 17*l.* 12*s.* 4*d.* and 6*l.* 16*s.* 6*d.*, for keeping the said policies on foot, and, further, to repay, with interest, any moneys which Hanson should at any time thereafter advance or pay, through Mitcalfe's default, in respect of such premiums. Mitcalfe became bankrupt in October, 1854, and obtained his certificate in November, 1855. In the four years, 1856 to 1859, Mitcalfe made default in payment of four premiums of 6*l.* 16*s.* 6*d.* each on the policy of 250*l.*, and in 1859 and 1860 he also made default in payment of two of the premiums of 17*l.* 12*s.* 4*d.* each, payable on the policy of 700*l.* Hanson paid these premiums and sued Mitcalfe for the amounts; Mitcalfe pleaded his bankruptcy and his certificate, and that the cause of action arose before such bankruptcy. The action was tried in London in 1862, at the Sittings after Michaelmas Term, when Crompton, J. had directed the jury that the bankruptcy and certificate did not discharge the defendant from his liability, under the covenant, to pay the premiums to the insurance company. On bill of exceptions, the Court of Queen's Bench affirmed this ruling of the learned Judge; and the Court of Exchequer Chamber, in error, affirmed the judgment of the Court of Queen's Bench, and gave judgment in favour of the plaintiff (then, and now, the defendant in error).

On this judgment the present writ of error was brought to the House of

Lords, and the question was, whether the plaintiff was barred of his action upon the covenant by reason of the 178th section of the Bankruptcy Act, 1849, which section provides for the proof of claims in respect of a liability to pay money upon a contingency.

Manisty, and *J. Brown*, for the plaintiff in error.—This was a liability to pay money upon a contingency, viz., the life of the mortgagor, and the value of the claim could have been ascertained. It was therefore a contingent liability provable under the 178th section of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), and therefore the bankruptcy and certificate discharged the plaintiff in error from all claim in respect of it. The 154th section of the Bankruptcy Act, 1862 (24 & 25 Vict. c. 34), specially provides against the necessity of proving in similar cases; but the provisions of this act do not apply to bankruptcies under the act of 1849. As the introduction of such special provision into the later act was deemed necessary, it may be taken that the framers of that act considered that claims of this nature must be proved under the provisions of the act of 1849. The Courts below held that the covenant to repay was a contingent liability provable under the act of 1849; but the covenant to pay to the insurance office cannot be distinguished from that to repay; it was for the same amounts and for the same purpose; the two covenants must be held to be assimilated, and be treated as one covenant. The Courts below held that this was a case for damages, and that a covenant to pay to a third person was not within the statute; but if a covenant by A. to pay B. 50*l.* during life is capable of valuation, why should not a covenant to pay a like sum to an insurance office be also valued? If the value of the claim could be ascertained, it should have been proved—*Young v. Winter* (16 Com. B. Rep. 401; s. c. 24 Law J. Rep. (N.S.) C.P. 214). The only question for the Court is, whether the liability can be valued. Suppose a man covenanted to pay 500*l.* on a contingency, such as if a certain person should or should not marry; this would be a thing which could not be valued. But in this case there could be no difficulty in ascertaining the value; the whole amount could not exceed the value of the policies—*Brown v. Price* (4 Com. B. Rep. N.S. 598; s. c. 27 Law J. Rep. (N.S.) C.P. 290). Suppose this was a covenant made in 1855 for a single payment in 1856, this would be a claim for a money demand which would ripen into proof at a future period, and would be provable under the act of 1849. If proof can be admitted in the case of one single premium, it would be strange if proof for more than a single premium must be excluded. The only consequence would be that the winding-up of the estate might be delayed. The whole value might be entered against the claim, say 800*l.*; then the dividends would be retained upon that sum, and applied *de anno in annum* in payment of the premiums, if the debtor should be alive and should make default in paying them. The policy of the act was to relieve debtors as far as possible from these claims. Before 1849, under the act of 6 Geo. 4. c. 16, there had been numerous cases in which the bankrupt was held not to be discharged; the intention of the legislature was to remedy this evil, and therefore the act of 1849, after repeating, by sections 176. and 177, the provisions for proof of all the various claims provided for by the act of 6 Geo. 4. c. 16, introduced, by the 178th section, provision for a new claim when the trader had contracted to pay money upon a contingency, but which was not a contingent debt provable under the act of 6 Geo. 4. c. 16. This was the view taken by Lord Justice Turner in considering the doctrine laid down in *Warburgh v. Tucker* (5 B. & El. 384; s. c. 24 Law J. Rep. (N.S.) Q.B. 317) in his judgment in *Ex parte Barwise, in the matter of Strachan and others* (6 De Gex, M. & G. 762; s. c. 25 Law J. Rep. (N.S.) Bankr. 10).

The following authorities were also cited: *Hankin v. Bennett* (8 Exch. Rep. 107; s. c. 21 Law J. Rep. (N.S.) Exch. 326), *The South Staffordshire Railway Company v. Burnside* (5 Exch. Rep. 129; s. c. 20 Law J. Rep. (N.S.) Exch. 120), *Toppin v. Field* (4 Q.B. Rep. 386; s. c. 12 Law J. Rep. (N.S.) Q.B. 148), *Bennett v. Burton* (10 Law J. Rep. (N.S.) Q.B. 11), and *Archbold's Practice in Bankruptcy Claims*, p. 87.

Macnamara and Holl, for the defendant in error, relied on the judgment of Lord Campbell in *Warburgh v. Tucker* (1 El. B. & El. 914; s. c. 28 Law J. Rep. (N.S.) Q.B. 56). They cited also *Maples v. Pepper* (18 Com. B. Rep. 177; s. c. 25 Law J. Rep. (N.S.) C.P. 243), *Parker v. Ince* (4 Hurl. & N. 53; s. c. 28 Law J. Rep. (N.S.) Exch. 189), and *The General Discount Company v. Stokes* (17 Com. B. Rep. N.S. 765; s. c. 34 Law J. Rep. (N.S.) C.P. 25).

Manisty, in reply.

The LORD CHANCELLOR (LORD CRANWORTH).—This is a writ of error from a judgment of the Court of Exchequer Chamber, in an action by the defendant in error against Hanson, for breach of covenant. The defendant covenanted during his life to keep up one or more policies of insurance. He neglected to do so. This action was brought for the breach of covenant. And the question is, whether or not the plaintiff is barred of his action upon the covenant by reason of the 178th clause of the Bankrupt Act. The clause is a long one, and I need not read it to your Lordships, as it has been recently before your Lordship. I shall assume that it is in your minds. It is a clause which provides that contingent debts may, in certain circumstances there mentioned, be proved in bankruptcy, and, consequently, that such a claim would in those cases be barred. But I am of opinion that in this case judgment ought to be given for the defendant in error, on the short but all-sufficient ground that the liability of the plaintiff in error, under his covenant, was not a contingent liability within the 178th section of the 12 & 13 Vict. c. 106.

The plaintiff in error covenanted with the defendant in error that he would, during his life, from time to time, duly pay the annual premiums becoming due on a certain policy of insurance. This he omitted to do. The liability to which he exposed himself by entering into this covenant was absolute, except so far as it is made contingent by the fact that the annual payment cease to be payable at his death. During his life the liability of the defendant to make the annual payments is absolute. I agree with Lord Campbell that this is not a liability to pay money on a contingency within the meaning of the 178th section of the act. The contingency there contemplated is a contingency the happening of which will create an obligation to pay. The only contingency in this case is the contingency of the defendant being alive on the days on which he has covenanted to pay the premiums. This is an absolute liability to make periodical payments during the whole of his life. The contingency is not that which creates the liability, but that which may possibly defeat it. That this is no subtle or refined distinction seems to me apparent from the provisions of the act. They are directed to the case of a liability, and I incline to think of a single liability, arising on a contingency, and for meeting such a case are made, if not efficient, yet as nearly so as in the nature of things is possible. But they are inapplicable to the present case. The remedy given to the creditor is to make a claim for such sum as the Court may think fit. That must mean for such a sum as the Court shall think to be the fair extent of the liability, supposing there was no contingency; and then if the contingency happens within a limited time the creditor may turn his claim into a proof, and receive dividends as if his demand had been absolute and not contingent. But such a course of proceeding is not applicable to periodical payments, which are to cease on the death of the person who is bound to make them. In order to bring such a case within the statute, the party sought to be charged must be treated as having incurred, as to every annual premium, a liability contingent on his being alive at the time when by the terms of his contract the payment is to be made. There is no power, it will be observed, to enable the creditor to make a claim for the aggregate value of all the payments, *i. e.* to treat his demand substantially as one in the nature of an annuity, or as if there were only one contingency. The contingency, if contingency it can be called, is different in the case of every succeeding annual payment, *i. e.* the contingency of the debtor being then alive. For such a case the statute does not

appear to have made any provision. The decision, first, of the Court of Queen's Bench, and then of the Exchequer Chamber, in *Warberg v. Tupper* (10 Law J. Rep. (N.S.) Q.B. 11), from which this case in substance is an appeal, seems to me to have been perfectly correct.

I should have come to this decision even if the Bankrupt Act of 1861 had never passed. But the fact that in that statute there is a clause expressly directed to meet the present case is strongly confirmatory of the view I have taken.

No doubt the legislature may have mistaken the law as to the effect of the former statute. But the introduction of the 154th section into that act is strong to shew the view taken by the framers of it. I think, therefore, that in this case there ought to be judgment for the defendant in error.

LORD CHELMSFORD.—I agree with my noble and learned friend that a covenant to pay the annual premiums on a policy of insurance to keep it on foot, is not "a liability to pay money on a contingency" within the 178th section of the 12 & 13 Vict. c. 106. Even assuming that a covenant to pay the premiums during the life of the assured can be treated as a liability depending upon the contingency of the continuance of the life, yet the legislature in this section seems to have in view only a liability to pay money on one contingency, and not to intend to provide for a succession of liabilities arising on successive contingencies, which in such a covenant as this may be annually recurring.

I agree also with my noble and learned friend in thinking that this is not at all the case of a contingent liability. The covenant is to pay the premiums as long as the life continues. It is not a covenant to pay if a certain event happens, but until a certain event happens. It is an absolute covenant to pay as long as the life lasts. The contingency (if any) is the death of the assured, and then the liability to pay ceases.

But supposing that this covenant created a liability on a contingency, and that there was no objection on the ground of its not being a liability upon a single contingency, how can it be a covenant for payment of money within the 178th section? That section enables the person with whom a liability to the payment of money upon a contingency has been contracted to claim for such sum as the Court shall think fit, and to convert that claim into a proof. There is no liability under the covenant in question to pay money either to or for the covenantee. It is rather like a covenant to do an act, viz., to keep up the policy by paying the premiums. Can it be said that the covenantor is liable to pay the premiums? Liable to whom? Supposing he chose not to pay them, who could compel him? An action might be brought by the covenantee and damages obtained; but this would not be upon a liability to pay, which, if it existed, would be enforceable, but upon an undertaking which created a distinct and different liability, viz., in case of non-payment of the premiums to be answerable in damages for the breach of covenant. I think, therefore, that the judgment ought to be affirmed.

LORD WESTBURY.—I entirely agree with the conclusion to which your Lordships have come in this case. It is perfectly true that when the bill or act of 1861 was in course of preparation this question was much considered, and a clause was added to the act, providing for the occurrence of such questions in future. But although they may be regarded as a declaration of the opinion of the legislature, it would not be conclusive with reference to the claim put forward by the appellant in this case.

In the course of the argument, reference was made to two sections of the act of 1849, one with regard to which it was suggested that by possibility these premiums might be regarded as annuities, and that the party entitled to benefit by them might be regarded as an annuity creditor. Upon an examination of the section to which reference was made, namely, the 175th section, I think it is impossible to hold, without doing great violence to the language,

that the covenant here entitled to the benefit of the covenant can be regarded as coming within the description of an annuity-creditor. Those words in the statute undoubtedly mean a party entitled to the benefit of an annuity granted by the person who afterwards becomes bankrupt.

So, also, with regard to the next section, namely, that providing for contingent debts, it has been well settled, and cannot now be disturbed (although one may regret the confined interpretation put on the word "debt"), that the right of action under a covenant of this description cannot be regarded in law as amounting to a debt payable on a contingency.

These things were regarded as settled at the time of the passing of the act of 1849, and the legislature appears then to have endeavoured to provide for liabilities payable on a contingency; but whether the section does or does not include the present case must depend entirely on the consideration whether the machinery introduced by that section can be made applicable to the case before us, so as to admit of proof being brought forward under that section.

Now, I decline to give any opinion on the question whether the claim under this covenant is not a liability to pay money on a contingency. But assuming it to be so, it is quite clear that the 178th section was intended to apply, and does in terms apply, only to a demand of that description, which is truly ascertained upon some specified contingency; and the provisions which were introduced by the legislature were, that the Commissioner shall set aside a sum upon some estimate that he is to make of the contingency, and which sum shall be a reserved fund, to answer the proof that might be made upon the happening of the contingency. The words clearly refer to one proof and to one demand alone, because they direct that if the contingency shall happen after the bankruptcy, the person with whom the liability has been contracted shall be admitted to claim; and if the contingency has happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand. Now, here it is quite clear that if you refer these directions to the present case, you might have the administration of the bankrupt estate kept open during the whole of the man's life, during twenty, thirty or forty years; for the covenant being to pay the premium during the life of the person insured, the consequence would be that it would be the bounden duty of the Commissioner to reserve a fund during the whole period to answer the premiums that might become due during the whole period of the life, and then those premiums *de anno in annum* during an indefinite period of time would be made the subject of proof. Now, it is impossible that that could be the meaning of the act of parliament, because at the end of the section, in order to limit the possibility of inconvenience, there is a proviso introduced that where a claim, either in whole or in part, shall not have been converted into a proof within six months after the filing of the petition, it may, on the application of the assignees, if the Court shall think fit, be expunged. It is clear, therefore, that even if it were, by a violent construction of the words, to apply this clause to the case that has happened, possibly the application of it would produce no benefit at all; for, supposing the bankruptcy to occur within a month after the premium has been paid, then, under a return to be made under the direction of the Commissioner, application might be made by the assignees to expunge the claim altogether within six months; that would be four or five months anterior to the time when the next premium would become due and payable. I think, therefore, it is clear, from the language of the clause of the statute, and from the nature of the machinery provided, that it is impossible to conceive that the legislature had in its contemplation any such case as the present; that both the words are inadequate and the machinery inapplicable, and that, consequently, the Bankrupt Law as it existed at the time when this question arose had not in view any contingent claim of this kind.

I concur, therefore, in thinking that the decree should be affirmed.

Decree affirmed, with costs.

[IN THE QUEEN'S BENCH.]

Nov. 6, 1865.*

KELLY v. TINLING.

35 L. J. Q.B. 231; L. R. 1 Q.B. 699; 13 L. T. 255; 14 W. R. 51;
12 Jur. N.S. 940.

Followed, *Davies v. Duncan*, [1874] E. R. A.; 43 L. J. C.P. 185; L. R. 9 C.P. 396; 30 L. T. 464; 22 W. R. 575 (C.P.). Distinguished, *Purcell v. Sowler*, 1876, L. R. 1 C.P. D. 781; (C.P. D.): affirmed, [1877] E. R. A.; 46 L. J. C.P. 308; L. R. 2 C.P. D. 215; 36 L. T. 416; 25 W. R. 362 (C. A.).

Libel—Privilege—Conduct of Clergyman in Use of the Church and Vestry.

LIBEL AND SLANDER.—*Comments by a churchwarden upon the conduct of the clergyman, in taking meals in the vestry and in causing books to be sold in the church during service, are matters of public interest, and may lawfully be published, if they do not exceed the boundaries of fair criticism.*

The first count of the declaration stated that the plaintiff was in holy orders of the Church of England, and the beneficed incumbent of St. George's Church, Liverpool, and the defendant falsely and maliciously printed and published, in a newspaper called the *Liverpool Daily Courier*, the words following.—[The libel, which was contained in a letter written by the churchwarden to the plaintiff, was then set out. The material part of it was, "Again, with pain, I have observed the church turned into a bookseller's shop during divine service, your errand-boy selling books under the pulpit, and money being jingled about in giving change, to the annoyance of many of the congregation. Nor can I omit to allude to the desecration of the church by converting a portion of it into a cooking apartment, and endangering the sacred edifice, which I am bound to protect."]

Plea—not guilty; upon which issue was joined.

At the trial, before Bramwell, B., at Manchester, during the Summer Assizes of 1865, the learned Judge, in summing up the case said to the jury, "But is he (the plaintiff) entitled to maintain this action? I think every one of you has been present in court, and has heard what I said in the previous cases; but if any gentleman has not been in court, I will mention it again. You will remember that you have to consider, first, whether the publication is defamatory. If it is not, the defendant has his verdict. But if it is defamatory, you will have to consider whether it is within those reasonable limits of discussion I have endeavoured to explain on a former occasion."¹ The learned Judge concluded by saying, "If you think that all or any of them are defamatory publications, and not justified by the liberty of criticism accorded to the press, then you give your verdict for the plaintiff in respect of such part as is defamatory; but if you are of opinion that they are either

* Decided in Michaelmas Term, 1865.

(1) This was an allusion to the summing-up in the previous trial of *Kelly v. Sherlock* (*Kelly v. Sherlock*, 35 L. J. Q.B. 209), where the learned Judge directed the jury as follows: "Anything which is calculated to bring a person into ridicule, hatred or contempt, is a libel. Although that is true as a general rule, yet it is also true that every man—and happy for us it is that it is true—that every man has a right to discuss matters of public interest. It is the most fortunate thing in the world that it should be so. A clergyman with his flock, an admiral with his fleet, a general with his army, and a Judge with his jury—we are all of us the subjects for public discussion. So, also, it is matter of public interest the dispute between the plaintiff and his organist, and the way in which the church is used: they are all public matters, and may be publicly discussed. And provided a man, whether in a newspaper or not, publishes a comment on a matter of public interest, fair in tone and temperately, though he may express opinions that you may not agree with, that is not the subject of an action for libel, because whoever fills a public position renders himself—again happily—open to public discussion, and if any part of his public acts is wrong, he must accept the attack as a necessary though unpleasant circumstance attaching to his position."

not defamatory, or if defamatory justifiable, why then you will give your verdict for the defendant." The jury gave their verdict for the defendant.

Macnamara now moved for a new trial on the ground of misdirection.—A dispute between a clergyman and his churchwarden as to taking meals in the vestry is not a matter of public interest. In *Gathercole v. Miall*² it was doubted whether a journalist was entitled to any privilege in commenting upon sermons which had been preached and not published; and it was assumed that the conduct and management by the clergyman of a parish of a charitable society from the benefits of which Dissenters were by his sanction excluded, were not lawful subjects of public comment.

[COCKBURN, C.J.—It would be a strange proposition to ask us to hold that where a clergyman is guilty of indecent conduct in the pulpit, that his behaviour is not matter of public comment.]

What is complained of in this part of the libel took place in a private room. Secondly, the comments in the libel exceeded the limits of fair criticism. In *Campbell v. Spottiswoode* (3 Best & S. 769; s. c. 32 Law J. Rep. (N.S.) Q.B. 185) it was laid down that a writer in a public periodical has no greater liberty of criticism than a private individual.

COCKBURN, C.J.—There will be no rule. It has been urged by Mr. Macnamara that the conduct of a clergyman in the use of his church, which has been the subject of a dispute between him and a churchwarden, is not a matter of public interest. But what can be matter of greater public interest than that the sanctity of the sacred edifice should be respected? What is meant by the expression "public worship," if that worship is not matter of public interest? With regard to the comments, the language, no doubt, might have warranted the jury in coming to a different conclusion; but it was their right to say whether or not these comments were unfair, and the question was properly left to them by the learned Judge.

MELLOR, J., SHEE, J. and LUSH, J. concurred.

Rule refused.

[IN THE QUEEN'S BENCH.]

July 7, 1866.

DONALD v. SUCKLING.

35 L. J. Q.B. 232; 7 B. & S. 793; L. R. 1 Q.B. 585; 14 L. T. 772;
15 W. R. 13; 12 Jur. N.S. 795.

Approved, *Halliday v. Holgate*, [1868] E. R. A.; 37 L. J. Ex. 174; L. R. 3 Ex. 299; 18 L. T. 656; 17 W. R. 13 (Ex. Ch.). Referred to, *Webb v. Whinney*, 1868, 18 L. T. 523; 16 W. R. 973 (C. P.). Distinguished, *Mulliner v. Florence*, [1878] E. R. A.; 47 L. J. Q.B. 700; L. R. 3 Q.B. D. 484; 38 L. T. 167; 26 W. R. 385 (C. A.). Referred to, *Burdick v. Sewell*, [1883] E. R. A.; 52 L. J. Q.B. 428; L. R. 10 Q.B. D. 363; 48 L. T. 705; 31 W. R. 796 (Q.B. D.): reversed, [1884] E. R. A.; 53 L. J. Q.B. 399; L. R. 13 Q.B. D. 159; 51 L. T. 453; 32 W. R. 740 (C. A.): the latter decision reversed, [1885] E. R. A.; 54 L. J. Q.B. 156; L. R. 10 App. Cas. 74; 52 L. T. 445; 33 W. R. 461 (H.L.). Referred to, *Gilligan v. National Bank of Ireland*, [1901] 2 Ir. R. 513 (Q.B. D.).

Bailment—Pledge—Pawn—Right to Re-pledge—Pleading.

BAILMENT. DAMAGES.—*To a declaration in detinue for debentures, the*

(2) 15 Mee. & W. 319; s. c. 15 Law J. Rep. (N.S.) Exch. 179.

defendant pleaded that before the alleged detention the plaintiff deposited the debentures with S. as security for the repayment at maturity of a bill of exchange indorsed by the plaintiff and discounted by S, and upon the agreement that S. should have power to sell or otherwise dispose of the debentures if the bill was not paid when it became due; that the bill was not paid, but was dishonoured; that before the alleged detention and the commencement of this suit S. deposited the debentures with the defendant, to be by him kept as a security for and until the repayment by S. to the defendant of certain sums of money advanced by him to S. upon the securities of the debentures, which sums of money have been and remain wholly unpaid to the defendant, wherefore &c.:—Held, by Cockburn, C.J., Blackburn, J. and Mellor, J. (Shee, J. dissentiente), that the plea was good.

Held, by Cockburn, C.J., that the transfer of a pledge under such circumstances amounts only to a breach of contract, upon which the owner may bring an action for nominal damages if he has sustained no substantial damage, or for substantial damages if the thing pledged is damaged in the hands of the second pawnee, or if the owner has been prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged.

Held, by Blackburn, J., that a replication that the plaintiff had paid, or was ready and willing to pay, the bill, would have been good.

Declaration in detinue for four debentures of the British Slate Company (Limited).

Third plea—That before the alleged detention the plaintiff deposited the said debentures with one James Adolphus Simpson, as security for the due payment at maturity of a bill of exchange, dated the 25th of August, 1864, and payable six months after date, and drawn by the plaintiff upon, and accepted by, one Thomas Saunders, and indorsed by the plaintiff to, and discounted by, the said James Adolphus Simpson, and upon the agreement then come to between the plaintiff and the said James Adolphus Simpson, that the said James Adolphus Simpson should have full power to sell or otherwise dispose of the said debentures, if the said bill of exchange was not paid when the same became due; and the defendant further says, that the said bill has not been paid by the plaintiff nor by any other person, but was dishonoured, nor was the same so paid at the time of the said detention or at the commencement of this suit; and that before the alleged detention and the commencement of this suit, the said James Adolphus Simpson deposited the said debentures with the defendant, to be by him kept as a security for and until the repayment by the said James Adolphus Simpson to the defendant of certain sums of money advanced and lent by the defendant to the said James Adolphus Simpson upon the securities of the said debentures, and the defendant had and received the same for the purpose and on the terms aforesaid, which sums of money thence hitherto have been and remain wholly due and unpaid to the defendant, wherefore the defendant detained and still detains the said debentures, which is the alleged detention.

Demurrer, and joinder in demurrer.

Harrington (May 29), in support of the demurrer.¹—There are two questions raised by this demurrer: first, whether the pawnee of goods has a right to assign over the pawned goods to another person; secondly, if that question is answered in the affirmative, whether the defendant is in a position to avail himself of such right. It is submitted that a pawnee of goods has no such right. His position differs from that of a mortgagee, and from that of a person who has a lien on goods. The latter person has a right to detain the goods till his lien is satisfied, but no longer; the former has the absolute property

(1) The demurrer had been argued, in Easter Term, by Harrington, for the plaintiff, and by Gray, (Beresford with him,) for the defendant, before Blackburn, J. and Shee, J.; but those learned Judges requested that it should be re-argued.

in the goods made over to him. But a pawnee has only a special property in the goods, with a right to sell them, if the money in respect of which they are pledged is not paid at the day named, or within a reasonable time after. A mortgagor could not bring an action to recover the property. The law upon the subject is laid down by Chief Justice Holt in *Coggs v. Barnard* (1 Smith's Lead. Cas. 5th edit. p. 181): "As to the fourth sort of bailment, viz. vadium, or a pawn, in this I shall consider two things: first, what property the pawnee has in the pawn or pledge; and, secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as that it will be the worse for using, the pawnee cannot use it, as clothes, &c.; but if it be such as will never be the worse, as if jewels for the purpose were pawned to a lady, she might use them, but then she must do it at her peril. . . . And the reason is, because the pawn is in the nature of a deposit, and, as such, is not liable to be used. And to this effect is *Owen*, 123." And in the notes to the leading case at p. 194, it is said, "If the pawnor makes default in payment at the stipulated time, the pawnee has a right to sell the pledge, and this he may do of his own accord without any previous application to a Court of equity, . . . or he may sue the pawnor for his debt, retaining the pawn, for it is a mere collateral security. If he think proper to sell, the surplus of the produce, after satisfying the debt, belongs to the pawnor; while on the other hand, if the pawn sell for less than the amount of the debt, the deficiency continues chargeable upon the pawnor. . . . From all this it will be seen that a pawn differs on the one hand from a lien, which conveys no right to sell whatever, but only a right to retain until the debt in respect of which the lien was created has been satisfied, . . . and on the other hand, from a mortgage which conveys the entire property in the thing mortgaged to the mortgagee conditionally, so that where the condition is broken the property remains absolutely in the mortgagee; whereas a pawn never conveys the general property to the pawnee, but only a special property in the thing pawned; and the effect of a default in payment of the debt by the pawnor is not to vest the entire property of the thing pledged in the pawnee, but to give him a power to dispose of it, accounting for the surplus, which power if he neglect to use, the general property of the thing pawned continues in the pawnor, who has a right at any time to redeem it." There is a case in 1 *Atk.* 166, of *Ryall v. Rolle*, where goods had been mortgaged, and the following passage occurs in the judgment of Burnet, J.: "There is scarce any book that treats upon pawns but considers them in the possession of the pawnee; as where it is debated whether a pawn may not be used, and the difference laid down between a pawn and a distress is, that a distress may not be used, because the party in that case comes in possession by act of law, and in the other by the act of the party."—*Owen*, 124, 2 *Raym.* 917, *Salk.* 522, *Coggs v. Barnard* (1 Smith's Lead. Cas. 5th edit. p. 181). The distinction between mortgages and pawns is laid down in *Ratcliff v. Davis* (Cro. Jac. 244): "There is a difference between a mortgage of lands and pledging of goods; for the mortgagee hath an absolute interest in the land, but the other hath but a special property in the goods to detain them from his security." In *Reeves v. Capper* (5 Bing. N.C. 136; s. c. 8 Law J. Rep. (N.S.) C.P. 44) a chronometer had been pledged by the owner with the defendant for 50l., but he was allowed the use of it for a voyage. He afterwards deposited it with the plaintiff, but it was held that the 50l. never having been repaid to the defendant the property in the chronometer was in him. See also *Bell's Com. on the Law of Scotland*, 4th edit. p. 195, and *Pothier*, vol. v. cap. 4. (*Du Nautissement*), p. 475. The matter is also discussed at length in *Story on Bailments*, c. 5. s. 286 and the following sections. Section 319. shews that the contract of pawn is in the nature of a fiduciary contract, and in section 299. it is stated that if the pledgee voluntarily, by his own act, places the pledge beyond his own power to restore it, as by agreeing that it may be attached at the suit of a third person, that will amount to a waiver of his pledge. The

defendant will rely upon a number of passages to be found in these sections, and the one which bears principally against the view now submitted to the Court is to be found in section 327: "But whatever doubt may be indulged as to the case of a mere factor, it has been decided that in case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged." But it is submitted that that is not the law, and the authority given by *Story*, namely, *Jervis v. Rogers* (15 Mass. Rep. 389), is not sufficient to support it, for it was not necessary in that case to decide the point. The case was twice before the Court, and is reported first in 13 Mass. Rep. 105. It was trover for certificates for shares in the New England Mississippi Land Company. The opinion of the Court was delivered by Parker, C.J., who said, "The case is distinguishable from the common cases of agents, factors and commission merchants, to whom property has been transferred for special purposes, and who have no right to exceed that authority. We do not question any of those cases, nor those which have decided that he to whom property has been pledged cannot transfer a title in such property to another." He then goes on to decide the case upon the ground that the certificates had a negotiable character, being transferable by indorsement. The question came before the Court again in another action, when a new trial was moved for by the defendant, see 15 Mass. Rep. 369, and the question turned upon whether there was a lien arising from dealings between the testator of the defendant and the intestate of whom the plaintiff was administratrix. The Judges go rather wide of the mark and talk about pawns, and Jackson, J. gives the *dictum* upon which *Story* relies; but it was not necessary to decide the point, and, indeed, the authorities he refers to are no authority in themselves. In *Ratcliff v. Davis* (Yelv. 178) a hatband had been pawned to one Whitlock for 25*l.*; Whitlock's wife, with his assent, delivered it to the defendant, who converted it to his own use, although the plaintiff demanded it of him after tender of the 25*l.* to the wife, who was the executrix of Whitlock; the Court gave judgment for the plaintiff, for, "in case of a pawn he who pledges it has time to redeem it during his life." The case is somewhat differently reported in 1 Bulstr. 29, and is also reported in Cro. Jac. 244, and in *Noy*, 137. In *Mores v. Conham* (Owen. 123) the question was, whether the pawnee of goods could maintain an action of assumpsit against the defendant upon a promise to pay the money if the pawn was delivered up. The Court held that the action was maintainable, for there was a good consideration for the promise, "for he who hath goods at pawn hath a special property in them, so that he may work such pawn if it be a horse or an ox, or may take the cow's milk, and may use it in such manner as the owner would; but if he misuseth the pawn, an action lies; also he hath such interest in the pawn as he may assign over, and the assignee shall be subject to a detinue if he detains it upon payment by the owner," &c. This case is generally cited for the purpose of shewing how far the pawnee may use the pawn, and it was referred to in *Coggs v. Barnard* (1 Smith's Lead. Cas. 5th edit. p. 181) for that purpose.

[BLACKBURN, J.—The opinion of the majority of the Court is against you, and they refer to the 2nd Assize.]

But it must be remembered that Foster, J. differed. In *Demainbray v. Metcalfe* (2 Vern. 690) jewels and plate had been pawned by the pawnee, and the Lord Chancellor held that the original pawnor must pay all the money advanced upon the second pawn before he could be entitled to the jewels; but that was a decision in equity, and even if it be correctly decided, it does not touch the question of law. The case is reported also in the *Precedents in Chancery*, 419, *Gilb. Eq. Cas.* 104, and in 1 *Eq. Cas. Abr.* 324. Further, it is clear that if a pawnee has a right to repawn the pledge, his pawnee must have the same right, and so on for any number of transactions of the same kind. But if that be so, to whom is the owner of the pledge to make a tender of the money when he seeks to have the pledge returned to him? Suppose the plaintiff tendered the amount of his own debt to the defendant, who

received it and gave up the debentures, and afterwards Simpson had brought an action against the plaintiff, there would be no means of defending it.

[COCKBURN, C.J.—The tender must be made to his own creditor. BLACKBURN, J.—Would he not aver that he was ready and willing to pay to the person whom he meant to charge. He would have an action against the original pledgee if he refused to deliver the pledge.]

But the contract of pawn is a fiduciary personal contract, and the pawnor may have had confidence in his pawnee that he will not make a bad use of the pawn, but no intention that it should be handed over to another person. The result of holding that a pawn is assignable will be that for the first time it will be held that a chose in action is assignable. It is clear that a covenant to pay a mortgage debt cannot be assigned over. Next, whatever the general rule may be, this plea is bad; it alleges that Simpson, the pawnee, deposited the debentures with the defendant to be kept as a security for his own debt; and it is consistent with the statement that they may have been deposited before the bill became due, and also as a security for a debt larger than the amount for which they were deposited by the plaintiff with Simpson. The plaintiff ought not to be put in a difficulty by having his property repledged for a larger amount than he had ever intended to pay. In *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130), a person had deposited a dock-warrant for brandies with the defendant as a security for a loan to be repaid upon the 29th of January, or, in default, the brandies to be forfeited. On the 28th, the defendant agreed to sell the brandies, and on the 29th handed over the dock-warrant to his vendee. It was held that this was a conversion, as the owner had the whole of the 29th in which to repay the money and take the warrants back. Chief Justice Erle said, "The wrongful sale on the 28th, followed on the 29th by the delivery of the dock-warrant in pursuance thereof, was, we think, a conversion. The defendant wrongfully assumed to be owner in selling, and although the sale alone might not be a conversion, yet, by delivering over the dock-warrant to the vendees, in pursuance of such sale, he interfered with the right which Cumming had of taking possession on the 29th if he repaid the loan, for which purpose the dock-warrant would have been an important instrument." This is an authority to shew that the pledging by Simpson, during the currency of the bill, was a conversion; and the fact that Mr. Justice Williams differed from the rest of the Court upon the question as to the measure of damages, throws no doubt upon this decision.

Gray (Gadsden with him), contra.—By the contract of pledge the pledgor gives a right to the pledgee of which he can avail himself, so as to prevent the pledgor from getting the pledge again without repaying the money advanced. So long as the pledgor is not prejudiced, the pledgee cannot be prevented from dealing with the pledge as he pleases. There is no doubt that he must not use it so as to lessen its value; and in *Coggs v. Barnard* (1 Smith's Lead. Cas. 5th edit. p. 181), Lord Chief Justice Holt said, that if jewels are pawned to a lady she must use them "at her peril," but where no prejudice is done to the pledgor he cannot complain. If a pledgee takes reasonable care of the pledge, and as much as he would if it were his own property, he is not liable though the pledge be injured, and might recover the money advanced from the pledgor.

[COCKBURN, C.J.—But is not the careful keeping of the pledge a duty cast upon the pledgee inconsistent with his handing it over to a third person, as has been done here?]

No; he is entitled to deal with it as a thing in which he has a property, or the property, and to say to the pledgor, "Give me the money advanced to you first of all, and then you may have the pledge." So in the present case Simpson acquired a sufficient authority to entitle him to do all that the plea shews he has done. A part of the contract was that the plaintiff was to pay the amount of the bill to Simpson before he was to have the debentures returned to him, and he has never done it, the bill having been dishonoured.

There is a difference between the contract of pledge and the law of lien, for liens are personal, and cannot "be transferred to third persons by any tortious pledge of the principal's goods," as was said by Lord Ellenborough in *M'Combie v. Davis* (7 East, 5), observing upon the opinions of Lord Kenyon in *Daubigny v. Duval* (5 Term Rep. 604), *Sweet v. Pym* (1 East, 4) and *Kinloch v. Craig* (3 Term Rep. 119). The subject is treated of in *Com. Dig.* tit. 'Bailment,' (A.), where the author states, "If a man delivers goods to be kept, or, which is all one, to be safely kept, the bailee undertakes to keep them only from all damage that arises from his own negligence, and, the undertaking being only to keep them, he ought not to use them as though he had an interest in them." And under the same title (B.) he states, "Pledging is where goods and chattels are delivered in security for money lent, and by such pledging the pawnbroker hath more than the naked possession in the nature of a bailment, for he hath the property and interest in the thing itself, and by the better opinions shall have a reasonable use of it, so that it be without damage to the thing thus pledged." In support of this proposition the *Doctor and Student*, 130, and other authorities, are cited. The conclusion is that the pledgee may use the pledge, so long as he does not damage it, or prevent himself from delivering it to the owner when he calls for it and tenders the money. See also *Anon.* (2 Salk. 522). The law is stated in the same way in *Vin. Abr.* tit. 'Bailment.' Next *Mores v. Conham* (Owen. 123) is an authority which decides the case in favour of the defendant. It is true that Mr. Justice Foster differed from the rest of the Court, but the case decides that the pledgee may assign over the interest which he has, and that the pledgor may have the pledge again on payment of the money. The term "special property," which it is settled that the pledgee has, means a great deal more than the right to detain; it means a property for all purposes. No doubt the second pawnee can only stand in the shoes of the first; but it is not to be assumed that the defendant would do a wrong, and there is nothing at all to shew that the plaintiff has been injured—see *Ex parte Deeze* (1 Atk. 228). If the pledge be injured, the pledgor may have an action for the injury; but the contract is not thereby determined—see *Lee v. Atkinson* (Yelv. 172) and *Bac. Abr.* tit. 'Bailment' (C), par. 6, *Co. Lit.* 57 a. In *Demainbray v. Metcalfe* (2 Vern. 690) the Court treated the pledge in the same way as they would have treated a mortgage.

[SHEE, J.—The reporter has put a query to that case.]

Yes; but then, as is stated in a note in *Whittaker on Lien*, 140, it appears from the report in *Precedents in Chancery*, 419, that the day limited for redemption by the owner from the first pawnee had elapsed, and he had lost his right to redeem. In *Montague on Lien*, 22, it is said, "A pawnee may assign the pawn to the extent of his interest," citing *Mores v. Conham* (Owen. 123). For anything that appears, the plaintiff had to go to the defendant and say, "I have paid the money advanced; give up the indentures to me," but this he has not done; and he is in the same position as a vendee who has not paid for the goods sold, and has no remedy in trover against the vendor who has kept possession of them—see *Bloxham v. Sanders* (4 B. & C. 941), which was an action of transfer of hops sold by the defendant to a person who afterwards became bankrupt, and the Court said that as the price had not been paid or tendered, the action, which was not an action for special damage by a wrongful sale, could not be maintained. This case, as well as *Bloxham v. Morley* (Ibid. 951), are referred to in *Blackburn on Contract of Sale*, 320.

[BLACKBURN, J.—These cases have never been overruled, but the law as to an unpaid vendor is peculiar.]

But *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130) is to the same effect; and in that case the majority of the Court held, that "the wrongful act of the pawnee did not annihilate the contract between the parties, nor the interest of the pawnee in the goods under that contract." This decision is irreconcilable with the position that the right in the plaintiff to the chattel revives in him upon the dealing with it by the

pawnee. Again, there is authority of *Story*, who, in his work on *Bailments*, s. 324, says, "The pawnee may, by the common law, deliver over the pawn into the hands of a stranger, for safe custody without consideration, or he may sell or assign all his interest in the pawn, or he may convey the same interest conditionally by way of pawn to another person, without in either case destroying or invalidating his security. But if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor, as if he were the absolute owner; it is clear that in such a case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee. The only question which, under such circumstances, would seem to admit of controversy, is, whether the creditor should be entitled to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as if the case was a naked tort, without any qualified right in the first pawnee." And afterwards, in section 327, is the passage which has been mentioned in the argument on the other side, and which exactly applies to the present case. Next, the plaintiff would not have been obliged to go to the sub-pledgee, as he would have been entitled to have the debentures returned to him upon a tender of the proper amount to Simpson, and the plea shews that that proper amount is still unpaid. If the money advanced had been paid or tendered, there should have been a replication to that effect.

Harington replied.

Cur. adv. vult.

The Court differing in opinion, the following judgments were now delivered.—

SHEE, J.—To a declaration in detinue for debentures of the British Slate Company (Limited), claiming a return or their value, and damages for their detention, we have here a plea, and a demurrer to it—that before the alleged detention the debentures were deposited by the plaintiff with one Simpson, as security for the payment at its maturity of a bill of exchange discounted by him for the plaintiff, upon an agreement that Simpson should have full power to sell or otherwise dispose of the said debentures if the bill was not paid when it became due; that the bill was dishonoured when it became due, and is still unpaid; and that before the alleged detention, Simpson deposited the said debentures with the defendant, as security for and until the repayment of moneys advanced and lent to him by the defendant upon them, and which moneys are still unpaid. This plea sets up a right to detain the debentures, founded on a bailment of pawn by the plaintiff to Simpson, under which Simpson, if the bill should not be paid, had a right to sell the debentures, paying the overplus above the amount of the bill and charges to the plaintiff; that is, to sell on the plaintiff's account, and for his and Simpson's benefit, and a repawn of them by Simpson as a security for a loan to him by the defendant. It must be taken against the defendant that the debentures were pledged to him by Simpson before the plaintiff had made default; it must be taken too that the advance for which the debentures were pledged to the defendant by Simpson, was of a greater amount than the debt for which Simpson held them; it is consistent with the facts pleaded either that it was repayable before or repayable after the maturity of the plaintiff's bill, and that the debentures were pledged by Simpson along with other securities from which they could not at Simpson's pleasure, or on tender by the plaintiff of the sum for which they had been pledged to Simpson, be detached; and therefore that Simpson had put it out of his power to apply them, "by sale or otherwise," to the only purpose for which possession of them had been given to him, viz., to secure the payment of his debt and the release of the plaintiff by the sale of them, from liability on the bill which Simpson had discounted for him. Whether this pledge to the defendant by Simpson was such a conversion by

him of the debentures as destroyed his right of possession in them, and revested the plaintiff's right to the possession of them freed from the original bailment, is the question for our decision. The contention that a pawnee is entitled to exercise over the chattel pawned to him a power so extensive as the one which this plea sets up, was, before the case of *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130), if it be not now, wholly unsupported by authority.

A pawn is defined by Sir William Jones, *On Bailments*, 117, to be "a bailment of goods by a debtor to his creditor, to be kept by him till his debt is discharged"; and by Lord Holt—*Coggs v. Barnard* (1 Smith's Lead. Cas. 5th edit. p. 181)—to be "a delivery to another of goods or chattels to be security to him for money borrowed of him by the bailor"; and by Lord Stair,² "A kind of mandate whereby the debtor for his creditor's security gives him the pawn, or thing impignorated, to detain or keep it for his own security, or in the case of non-payment of the debt to sell the pledge, and pay himself out of the price and restore the rest, or restore the pledge itself on payment of the debt—all which is of the nature of mandate, and it hath not only a custody in it, but the power to dispose in the case of non-payment"; and by Bell, *Principles of the Law of Scotland*, 4th edit. p. 512, "a real right or *jus in re* inferior to property which vests in the holder a power over the subject, to retain it in security of the debt for which it is pledged, and qualifies so far and retains the right of property in the pledger or owner."

In the Roman Civil Law, as in our law—see *Pigot v. Cubley* (15 Com. B. Rep. N.S. 701; s. c. 33 Law J. Rep. (N.S.) C.P. 134)—the bailment of pawn implied what in this bailment is expressed, a mandate of sale on default of payment. Without it, as in the Scotch and French law, a right to have the pledge sold judicially for payment on default made, the security by way of pledge would be of little value. The pawnee is said, by Lord Coke, in his *Commentary on Littleton*, to have a "property," and in *Southcote's case* (4 Co. Litt. 480), to have a "property in and not a custody only" of the chattel pawned, by which Lord Holt—*Coggs v. Barnard* (1 Smith's Lead. Cas. 5th edit. p. 181)—understands Lord Coke to mean, a "special property," consisting in this, "that the pawn is a security to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him"; or, in the words of Fleming, C.J., in *Ratcliffe v. Davis* (Cro. Jac. 244), "a special property in the goods to detain them for his (the pawnee's) security," that is, not a property properly so called, but the *jus in re*, that is, *in re aliena* of the Roman lawyers: the opposite, as Mr. Austin says, *Lectures on Jurisprudence, Tables and Notes*, vol. iii. p. 192, to property, but a right of possession against the true owner and under a contract with him, until his debt is paid, and a power of sale for the reciprocal benefit of the pawnee and pawnor on default of payment at the time agreed upon.

Mr. Justice Story, *On Bailments*, s. 324, says, that "the pawnee may by the common law deliver over the pawn into the hands of a stranger for safe custody without consideration, for he may convey the same interest conditionally by way of pawn to another person, without in either case destroying or invalidating his security," but that he cannot pledge it for a debt greater than his own; that if he do so, he will be guilty of a breach of trust by which his creditor will acquire no title beyond that of the pawnee, and that the only question which admits "of controversy is, whether the creditor shall be entitled to retain the pledge until the original debt (that is, the debt due to the first pawnee) was discharged; or whether the owner might recover the pledge in the same manner as if the case was a naked tort, without any qualified right in the first pawnee." So much of this passage as is stated to be clear law, viz., that the pawnee may deliver the chattel pawned to a stranger for safe custody without consideration, or convey the same conditionally (*i.e.* it may be presumed on the same conditions as those on which he

(2) 1 Stair, "Institution of the Laws of Scotland," 18, s. 10, p. 126.

holds it), by way of pawn to another person for a debt not greater than his own, without destroying or invalidating his security, has no application to the case before us, inasmuch as the pawn by Simpson to the defendant was not for safe custody nor without consideration, nor conditionally, nor for a debt not greater than the debt due by the plaintiff to Simpson; and because the power given to the pawnee by this bailment to dispose of the debentures by sale or otherwise, should his debt not be paid, might probably be considered, at least after default made, to enlarge the ordinary right of a pawnee over the chattel pawned. There is nothing in the passage which affords any countenance, except by way of query to the position, that a pawnee who, having, as in this case, placed the chattel pawned out of the pawnor's power, and out of his own power to redeem it, by payment of the amount for which it was given to him as a security, and who has deprived himself of the power of selling it for the payment of the pawnor's debt, can by so doing shield the creditor to whom he repawns it from an action of detinue at the suit of the real owner. Mr. Justice Story, s. 299, indeed says, "that if the pledgee voluntarily and by his own act places the pledge beyond his own power to restore it, as by agreeing that it may be attached at the suit of a third person, that will amount to a waiver of the pledge."

It would be difficult to reconcile any other rule in respect of the pledging by pledgees of the chattels pawned to them with the well-established doctrine of our Courts, and the Courts of the United States of America, in respect of the pledging by factors of the goods intrusted to them. Factors, like pledgees, have a mandate of sale; sale irrespectively of default of any kind is the object of the bailment to them; they have a special property and right of possession against all the world except their principal—and against him if they have made advances on the security of his goods intrusted to them. To give effect to that security, they may avail themselves of their mandate of sale; but if they place the goods out of their own power by pledging them, although it be for a debt not exceeding their advances, the pawnee from them, except under the Factors Acts, is defenceless in trover or detinue even to the extent of his loan against the true owner. Why it should be otherwise between the true owner and the pawnee from a pawnee of the true owner's goods, no reason was adduced during the argument before us; nor indeed was it possible to adduce any reason, seeing that, in all the decisions on pledges by factors, the relation between a factor who has made advances on the goods intrusted to him and his principal, has been held not distinguishable, or barely distinguishable, in its legal incidents, from the relation between pawnee and pawnor—a factor being, as Mr. Justice Story says, s. 325, 327, citing *Daubigny v. Duval* (5 Term Rep. 604) and *M'Combie v. Davis* (7 East, 5), "generally treated in judicial discussions as in the condition of a pledgee."

The case of *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130) is a clear authority for holding that Simpson, in dealing with the debentures in the way which he must be taken on this plea to have done, was, as the defendant also was, guilty of a conversion of them; and unless that case is also an authority binding upon us for the doctrine that the conversion by a pawnee of the thing pawned is not such an abuse of the bailment of pawn as annuls it, but that there remains in him and in an assignee from him, and in an assignee from his assignee, and so on *toties quoties* without limit as to the number of assignments or the consideration for them, an interest of property in the pawn which defeats the owner's right of possession, the plaintiff is entitled to our judgment. As I read the case of *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130), and the cases of *Chinery v. Viall* (5 Hurl. & N. 288; s. c. 29 Law J. Rep. (N.S.) Exch. 180) and *Brierly v. Kendall* (17 Q.B. Rep. 937; s. c. 21 Law J. Rep. (N.S.) Q.B. 161), on the authority of which it proceeded, the judgments of the majority of the learned Judges of the Court of Common Pleas in the first of them, and the judgments of the Court of Exchequer and of the Court of Queen's Bench in the second and third, are based on the principle that in an

action to recover damages for the conversion, it is not an inflexible rule of law that the value of the goods converted is to be taken as the measure of damages; that when a suitor's real cause of action is a breach of contract, he cannot by suing in tort entitle himself to a larger compensation than he could have recovered in an action in form *ex contractu*; and therefore that when a verdict is obtained against an unpaid vendor for the conversion of the thing sold by him, or against an unpaid pawnee for the conversion of the thing pledged to him, he is entitled to be credited in the estimate by the jury of the damages to be paid by him, for the value of such interest or advantage as would have resulted to him from the contract of sale, or the contract of pawn, if it had been fulfilled by the vendee or pawnor. That this was the *ratio decidendi* in these cases seems to me clear from the facts of *Chinery v. Viall* (5 Hurl. & N. 288; s. c. 29 Law J. Rep. (N.S.) Exch. 180) and *Brierly v. Kendall* (17 Q.B. Rep. 937; s. c. 21 Law J. Rep. (N.S.) Q.B. 161), which raised no question between the litigant parties in any respect analogous to the question which we in this case have to decide. In *Chinery v. Viall* (5 Hurl. & N. 288; s. c. 29 Law J. Rep. (N.S.) Exch. 180) the plaintiff who was the vendee of forty-eight sheep, for five only of which he had paid under a bargain which entitled him to delivery of the whole lot before payment, brought his action against the vendor for a conversion by parting with the sheep to another purchaser. If the defendant's interest in the unpaid balance of the agreed price of the sheep had not been credited to him in the amount of damages, the plaintiff, who had only paid for five of them, would have pocketed the full value of the forty-three which had been converted. In *Brierly v. Kendall* (17 Q.B. Rep. 937; s. c. 21 Law J. Rep. (N.S.) Q.B. 161), an action of trespass, there was a loan by the defendant to the plaintiff, secured by a bill of sale of the plaintiff's goods, in which was a reservation to the plaintiff of a right to the possession of the goods until he should make default in some payment. Before any default, the defendant took the goods from the plaintiff and sold them. For this wrong he was liable in trespass; but the measure of damages was held to be, not the value of the goods, but the loss which the plaintiff had really sustained by being deprived of the possession. The wrongful act of the defendant did not annihilate his interest in the goods under the bill of sale; and such interest was considered in measuring the extent of the plaintiff's right to damages.

These cases are manifestly not in conflict with, if indeed they at all touch, the principle relied upon in the plea which is here demurred to, that if the pawnee converts the chattels pawned to him the bailment is determined, and the right of possession revested in the true owner of them.

In *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130) the defendant, a pawnee of dock warrants, had anticipated by a few hours only the time at which, under his contract with the owner of them, he might have sold and delivered them; he had applied before the time of action brought the proceeds of their sale to the discharge of the plaintiff's debt to him, or he held them specially applicable to that purpose, and the plaintiff, had he sued the defendant in contract for not keeping the pledge until default made, could not have proved that he had sustained any damage. The Chief Justice, speaking for himself and two of his learned Brothers, did, indeed, say, that "the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien, and that the wrongful act of the pawnee did not annihilate the contract between the parties, nor the interest of the pawnee in the goods under that contract"; but he cannot be understood to have meant by the words "interest and right of property in the goods," and by the words "more than a mere lien," other than a "special property," as defined by the authorities before referred to by me, viz., a real right or *jus in re*, a right of possession until default made, a right of retention or sale after default made; nor, as I think, to have intended

more by the words "the wrongful act of the pawnee did not annihilate the contract between the parties" than that the contract, in the breach of which consisted the tort of which the plaintiff complained, must still be considered to subsist, at least for the purpose of being referred to for the measure of damage sustained by the pawnor and of the damages to be recovered by him.

The case before us differs, as I think, in essential particulars as respects the principle upon which damages would have been measurable, had the action been in trover, from the case in the Common Pleas. The defendant, as assignee of the pawnee, could not surely have set up in mitigation of damages an interest derived by him from the pawnee before default made by the pawnor; the pawnee, by the express terms of the bailment to him not having the right to dispose of the debentures by sale or otherwise until after default made. Besides, it is impossible to shut one's eyes to the broad distinction between the case of the sale a few hours too soon of a pawn which, as in the case of *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130), the pawnor "had no intention to redeem,"—the proceeds of the sale being devoted before action brought to the discharge of the debt for which the pawn had been given as a security,—and the abuse of a pawn by the pawnee in wrongfully, for his own purposes, placing it out of his power and out of the pawnor's power, to redeem the pawn should he have the means and mind to do so.

By the contract of bailment between the plaintiff and Simpson, the proceeds of the sale of the debentures which are the subject of this suit had been specifically appropriated to the payment of the plaintiff's bill, in the event of his not being able to meet it with other means. Simpson held the debentures in trust, should the bill not be paid, to sell them on the plaintiff's account, or allow the plaintiff to sell them, or raise money on them, to pay his bill. Instead of that, Simpson, before default made by the plaintiff, converted them to his own use, obtaining their agreed value in pledge from the defendant, and imposing upon the plaintiff the burthen of making other provision to meet his bill.

By this act of Simpson, the plaintiff, in my judgment, did in fact sustain damage, and at the maturity of the bill, if not before, to the full amount of the current saleable value of the debentures. I am at a loss to see how the conduct of Simpson in thus dealing with the debentures, and how the title of the defendant claiming under him are to escape the operation of the rule, that if the pawnee, except conditionally (an exception for which the authority is but slender), parts with the possession of the pawn, he loses the benefit of his security—*Ryall v. Rolle* (1 Atk. 165), *Reeves v. Capper* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130), *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130), per Mr. Justice Williams, or the operation of the maxim, "*Nemo potest plus juris ad alium transferre quam ipse habet.*" For these reasons, as it seems to me, the case of *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130) ought not to govern our decision. It could not be followed by us as an authority in favour of the defendant without inattention to its true principle, viz., that between the parties to a contract the measure of damages for a breach of the contract must be the same, whether the form of action be *ex contractu* or *ex delicto*, and that in such a case general rules applicable to the latter form—the only one competent for the redress of injuries purely tortious—are not to be strained to the doing of manifest injustice. It is open also, in a right estimate of it as an authority for the case in hand, to this observation: The interest of a plaintiff in the damages recoverable by him for a tort, which is, in its true nature, a breach of contract, is restricted by the implied stipulations of the contracting parties to the amount which in the conscience of a jury may suffice to give him an adequate compensation. The action of detinue for a chattel of which the bailment has been abused against a person not party to the contract of bailment, is not based upon a breach of contract, and not within the rules applicable to actions of tort which are based

on breaches of contract. In detinue, the plaintiff sues not for the value "tantamount of the thing detained by him, but for the return of the thing itself, which may to him have a value other and higher than its actual value," and only for its value—*Tidd's Forms*, 388—"if the thing cannot be delivered to him," and for damages for its detention and his costs of suit. A judgment to recover the value only has been reversed for error—*Peters v. Heywood* (Cro. Jac. 682)—the integral undiminished thing itself unaffected by counter-vailing lien or abatement of whatever kind, being the primary object of the suit. In an action of trover for the conversion by the pawnee of the subject of bailment, the plaintiff, according to the judgment of the majority of the Court in *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130), is entitled only to recover the amount in money of the damage which he proves himself to have sustained; in an action of detinue for the recovery from the assignee of the pawnee of the chattel pawned, and of which the pawn has been abused and forfeited, the plaintiff is entitled to recover the chattel itself, because it was a term of the contract of pawn that if the pawn should be abused by the pawnee his right to the possession of it should cease; and the defendant can have derived no right of possession from one whose own right of possession was determined by his attempt to transfer it. Unless, therefore, we were prepared to hold, in disregard of the clearly expressed opinion of Story, and of Mr. Justice Williams,—*Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130), that detinue can in no case be for an unredeemed pawn, however much the bailment of it may have been abused, we are not at liberty to apply the *ratio decidendi* in *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130) to the case before us. It raises a strong presumption against the defence set up in this plea, that nothing bearing the slightest resemblance to the right of possession which it claims for the assignee of a pawnee, is to be found in the copious title of the *Digest*, lib. 20, tit. 'De Pignoribus et Hypothecis et qualiter ea contrahuntur et de pactis eorum,' or in the five following titles on the contract of pawn and hypothec and its incidents, or in the title, 'De Pignoratica actione vel contra,' or (*Dig.* lib. 13, tit. 7.) in the works of any English, French or Scotch jurist.

The dictum of the majority of the Court in the case of *Mores v. Conham* (Owen. 123), that the pawnee has such an interest in the pawn as he may assign over was not the point decided in that case, nor, as it seems to me, a point essential to its decision, the point decided being, that the surrender by the plaintiff of a chattel pawned to him by a third person was a good consideration for a promise by the defendant to pay the debt for which it had been given as security. It does not seem to follow from that decision that the surrenderee thereby acquired such an interest in the pawn as would enable him to defend a detinue at the suit of the true owner, the reunion of whose rights of property and possession was, unless they meant to rob him, the real object of the transaction. The inference drawn from this very obscure and superficially reasoned case in favour of the defendant's plea, is wholly irreconcilable with the doctrine of *Domat*, liv. 3. tit. 1. s. 3, the highest authority on all questions depending, as this question does, upon the rules and principles of the Roman Civil Law, that the bailments of *hypothèque* and "gage" last only as long as the thing hypothecated is in the hands of the person charging it, or the thing pawned in the hands of him who takes it for his security, and with the doctrine of *Erskine*, a jurist of nearly equal eminence, that "in a pledge of movables the creditor who quits the possession of the subject loses the *real right* he had upon it"—*Institute of the Laws of Scotland*, book 3, tit. 1, s. 33.

I think the bailment to Simpson was determined by the pledge by him to the defendant under the circumstances stated in the plea; that both of them have been guilty of a conversion; that the plaintiff might, as Mr. Justice Williams said in the case of *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130), lawfully, should the opportunity offer,

resume the possession of the debentures, and hold them freed from the bailment, and may, the defendant being remitted to his remedy against Simpson, and Simpson to his remedy upon the bill, recover them or their full value, if they cannot be delivered to him, in this action of detinue.

MELLOR, J.—In an action of detinue for four debentures of the British Slate Company (Limited), the defendant pleaded that the plaintiff had deposited them with one Simpson, as security for the due payment at maturity of a bill of exchange, payable six months after date, indorsed by the plaintiff, and discounted by Simpson, “upon the agreement that Simpson should have full power to sell, or otherwise dispose of, the said debentures, if the said bill was not paid at maturity.” It then alleged that the bill was not paid at maturity, nor at the commencement of the suit, and that before the detention and the commencement of this suit Simpson deposited the debentures with the defendant, to be by him kept as a security, for and until the repayment of certain money lent by the defendant to Simpson, upon the security of the debentures, which sum of money was then due and unpaid. To this plea the plaintiff demurred, and upon demurrer I think that we must assume that the pledging of the debentures by Simpson to the defendant took place before default was made by the plaintiff in payment of the bill of exchange at maturity, and that we must also assume that the money for which the debentures were pledged by Simpson, as a security to the defendant, was of larger amount than the amount of the bill of exchange discounted for the plaintiff by Simpson.

The question thus raised by this plea is, whether a pawnee of debentures, deposited with him as a security for the due payment of money at a certain time, does, by replacing such debentures, and depositing them with a third person, as a security for a larger amount, before any default in payment by the pawnor, make void the contract upon which they were deposited with the pawnee, so as to vest in the pawnor an immediate right to the possession thereof, notwithstanding that the debt due by him to the original pawnee remains unpaid. This result seems *prima facie* to be disproportionate to any injury which the pawnor would be likely to sustain from the fact of his debentures having been repledged before default made. Still, if the principles of law, as laid down in decided cases, satisfactorily support the proposition above stated, this Court must give effect to them.

There is a well recognized distinction betwixt a *lien* and a *pledge*, as regards the powers of the person entitled to a lien, and the powers of the person who holds goods upon an agreement on deposit by way of pawn or pledge for the due payment of money. In the case of simple lien, there can be no power of sale or disposition of the goods, which is inconsistent with the retention of the possession by the person entitled to the lien; whereas in the case of a pledge, or pawn of goods, to secure the payment of money at a certain day, on default by the pawnor, the pawnee may sell the goods deposited, and realize the amount, and become a trustee for the overplus for the pawnor; or even if no day of payment be named, he may, upon waiting a reasonable time and taking the proper steps, realize his debt in like manner. It is said by Mr. Justice Story—*Bailments*, tit. ‘Pawns or Pledges,’ s. 311—that, “The foundation of the distinction rests in this, that the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation; but in the case of a lien, nothing is supposed to be given but a right of retention or detainer, unless under special circumstances.” The question thus arises, is the right of retention in case of a lien, either by a custom or contract otherwise different from a deposit by way of pledge for securing the due payment of money, than in the incidental power of sale in the latter case on condition broken? In other words, on a contract of pledge, is it implied that the pledgee shall not part with the possession of the thing pledged until default in payment; and if so, is that of the essence of the contract, so that the violation of it makes void the contract?

In the case of *Legg v. Evans* (6 Mee. & W. 36; s. c. 9 Law J. Rep. (N.S.) Exch. 102), an action of trover having been brought against the defendants, as sheriffs of Middlesex, to recover the value of some pictures and picture-frames, the defendants justified under an execution against the goods and chattels of the plaintiff, to which the plaintiff replied, setting up a lien in respect of work done upon such goods and chattels, which had been delivered to him in the way of his trade by one Williams; and, further, set up an agreement between the plaintiff and Williams that the plaintiff should draw and indorse certain bills of exchange for the use of Williams, and should have a right to hold the said goods for securing the payment by Williams of the amount of the said bills of exchange; and it alleged that the said money and bills of exchange then remained wholly unpaid. The Court of Exchequer held, on demurrer to the replication, that it was a good answer to the plea, and Mr. Baron Parke is reported to have said, "If we consider the nature of a lien and the right which it confers, it will be evident that it cannot form the subject-matter of a sale. A lien is a *personal right* which cannot be parted with, and continues only so long as the possessor holds the goods. It is clear, therefore, that the sheriff cannot sell an interest of this description, which is a personal interest in the goods"; and further on he said, "Here the interest cannot be transferred to any other individual; it continues only as long as the holder keeps possession of the subject-matter of the lien, either by himself or his servant." In that case there was superadded to the lien, in respect of work done, an agreement that the person entitled to the lien should have a right to hold the said goods and chattels for securing the payment of the bills of exchange therein mentioned, and which then remained wholly unpaid. That case was treated as a simple case of lien or right "to hold," to secure the payment, not only of the amount due for work done on the goods by Williams, but also of the bills drawn and indorsed by him. It is, therefore, an authority, to the effect that in the case of lien, even to secure payment of money advanced, there is no implication of any power to sell or otherwise dispose of the subject-matter of the lien, because retention of possession by the party entitled to the lien is an essential ingredient in it.

It appears, therefore, that there is a real distinction between a deposit by way of pledge for securing the payment of money, and a right to hold by way of lien to secure the same object. In *Pothonier v. Dawson* (Holt's N.P. 383), cited in argument in *Legg v. Evans* (6 Mee. & W. 36; s. c. 9 Law J. Rep. (N.S.) Exch. 102), Chief Justice Gibbs said, "Undoubtedly, as a general proposition, the right of lien gives no right to sell goods; but when goods *are deposited by way of security* to indemnify a party against a loan of money, it is more than a pledge: the lender's rights are more extensive than such as accrue under the ordinary lien in the way of trade." It appears to me that considerable confusion has been introduced into this subject by the somewhat indiscriminate use of the words "special property" as alike applicable to the right of personal retention in case of a lien, and the actual interest in the goods created by the contract of pledge to secure the payment of money. In *Legg v. Evans* (6 Mee. & W. 36; s. c. 9 Law J. Rep. (N.S.) Exch. 102) "the nature of a lien is defined to be a personal right which cannot be parted with," but "the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation"—*Story on Bailments*, s. 289. In each case the general property remains in the pawnor; but the question is as to the nature and extent of the interest or special property passing to the bailee in the two cases. Mr. Justice Story, in his treatise *On Bailments*, s. 324, thus describes the right and interest of the pawnee: "He may, by the common law, deliver over the pawn into the hands of a stranger for safe custody, without consideration, or he may sell or assign all his interest in the pawn, or he may convey the same interest conditionally, by way of pawn, to another person, without in either case destroying or invalidating his security; but if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt of his own, or to make a transfer thereof to his own creditor, as if he were

the absolute owner, it is clear that in such a case he would be guilty of a breach of trust; and his creditor would acquire no title beyond that held by the pawnee. The only question is, whether the creditor should be entitled to return the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as in the case of a naked tort without any qualified right in the first pawnee." In *M'Combie v. Davis* (7 East, 5) it appeared that a broker had, for a debt of his own, pledged certain tobacco of his principals, upon which he had a lien, and in an action brought by the principal against the defendant in trover for the tobacco, Lord Ellenborough being of opinion "that the lien was personal, and could not be transferred by the tortious act of the broker pledging the goods of his principal," the plaintiff obtained a verdict; and upon motion for a new trial, Lord Ellenborough said that "nothing could be clearer than that liens were personal, and could not be transferred to third persons by any 'tortious pledge' of the principal's goods;" but he afterwards added "that he would have it fully understood that his observations were applied to a tortious transfer of the goods of the principal, by the broker undertaking to pledge them as his own; and not to the case of one who, intending to give a security to another, to the extent of his lien, deliver over the actual possession of the goods on which he has the lien to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him." It would therefore seem that in the case of a broker or factor for sale, before the Factors Acts, although he had no power to pledge his principal's goods, except to the extent of his own lien, with notice of the extent of his interest, yet, when he pledged the goods on which he had a lien tortiously, neither the factor nor the pawnee could retain them even for payment of the amount of the original lien. The case of *M'Combie v. Davis* (7 East, 5), however, shews that the factor or broker's lien, although simply a right to retain possession, as between him and his principal, might be transferred and made a security to a third person, provided he professed to assign it only as a security to the like amount of that due to himself.

Still the character of the transaction is that of lien, and not of deposit by way of pledge; and although the goods were intrusted to the broker for sale, and up to the time of sale remained in his hands upon a personal right to retain them for advances, yet he could not pledge them, and if he did, the act was an essential violation of the relation betwixt him and his principal, and entitled the latter at once to the recovery of the value of the goods in trover. "But the relation of principal and factor where money has been advanced on goods consigned for sale is not that of pawnor and pawnee," as was said by the Court in *Smart v. Sandars* (3 Com. B. Rep. 401; s. c. 16 Law J. Rep. (N.S.) C.P. 39), and the same case after amendment of the pleadings (5 Com. B. Rep. 895; s. c. 17 Law J. Rep. (N.S.) C.P. 258). There would therefore appear to be some real difference in the incidents between a simple lien, like that in *Legg v. Evans* (6 Mee. & W. 36; s. c. 9 Law J. Rep. (N.S.) Exch. 102), and the lien of a broker or factor before the Factors Acts, and the case of a deposit by way of pledge to secure the repayment of money, which latter more nearly resembles an ordinary mortgage, except that the pawnor retains the general property in the goods pledged, which he does not in the case of an ordinary mortgage—*Notes to Coggs v. Barnard* (1 Smith's Lead. Cas. 194): "A lien, as we have seen, gives only a personal right to retain possession; a factor or broker's lien was apparently attended with the additional incident that to the extent of his lien he might transfer even the possession of the subject-matter of the lien to a third person, appointing him as his servant to keep possession for him."

In a contract of pledge for securing the payment of money, we have seen that the pawnee may sell and transfer the thing pledged on condition broken; but what implied contract is there that the pledgee shall not in the mean time part with the possession thereof to the extent of his interest? It may be that upon a deposit by way of pledge the express contract between the parties may

operate so as to make a parting with the possession even to the extent of his interest before condition broken, so essential a violation of it as to revest the right of possession in the pawnor, but in the absence of such terms, why are they to be implied? There may, possibly, be cases in which the very nature of the thing deposited might induce a jury to believe and find that it was deposited on the understanding that the possession should not be parted with; but in the case before us we have only to deal with the agreement which is stated in the plea. The object of the deposit is to secure the repayment of a loan, and the effect is to create an interest and a right of property in the pawnee to the extent of the loan in the goods deposited; but what is the authority for saying that until condition broken the pawnee has only a personal right to retain the goods in his own possession?

In *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130), one Cumming, a bankrupt, had deposited with the defendant 243 cases of brandy, to be held by him as a security for the payment of an acceptance of the bankrupt for 62l. 10s., discounted by the defendant, and which would become due on the 29th of January, 1863, and in case such acceptance was not paid at maturity, the defendant was to be at liberty to sell the brandy and apply the proceeds in payment of the acceptance. On the 28th of January, before the acceptance became due, the defendant contracted to sell the brandy to a third person, and on the 29th delivered to him the dock warrant, and on the 30th such third person obtained the actual possession of the brandies. In an action of trover, brought by the assignee of the bankrupt, the Court of Common Pleas held that the plaintiff was entitled to recover, on the ground that the defendant wrongfully assumed to be owner in selling, and although that alone might not be a conversion, yet, by delivering over the dock warrant to the vendees in pursuance of such sale, "he interfered with the right which the bankrupt had on the 29th if he repaid the loan"; but the majority of the Court (Erle, C.J., Byles, J. and Keating, J.) held that he was only entitled to nominal damages, on the express ground that the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created *an interest and a right of property in the goods which was more than a mere lien*; and the wrongful act of the pawnee *did not annihilate the contract between the parties, nor the interest of the pawnee in the goods under that contract.*"

From that view of the law, as applied to the circumstances of that case, Mr. Justice Williams dissented, on the ground "that the bailment was terminated by the sale before the stipulated time, and, consequently, that the title of the plaintiff to the goods became as free as if the bailment had never taken place."

Although the dissent of that most learned Judge diminishes the authority of that case as a decision on the point, and although it may be open to doubt whether in an action of *trover* the defendant ought not to have succeeded on the plea of not possessed, and that the plaintiff's only remedy for damages was by an action on the contract, I am nevertheless of opinion that the substantial ground upon which the majority of the Court proceeded, viz., that the "act of the pawnee did not annihilate the contract nor the interest of the pawnee in the goods," is the more consistent with the nature and incidents of a deposit by way of pledge. I think that when the true distinction between the case of a deposit by way of pledge of goods for securing the payment of money, and all *cases of lien* correctly so described is considered, it will be seen that in the former there is no implication in general of a contract by the pledgee to retain the personal possession of the goods deposited, and I think that although he cannot confer upon any third person a better title or a greater interest than he possesses, yet if, nevertheless he does pledge the goods to a third person for a greater interest than he possesses, such an act does not *annihilate the contract of pledge* between himself and the pawnor, but that the transaction is simply inoperative as against the original pawnor, *who, upon tender of the*

sum secured, immediately becomes entitled to the possession of the goods, and can recover in an action for any special damage which he may have sustained by reason of the act of the pawnee in re-pledging the goods; and I think that such is the true effect of Lord Holt's definition of a "vadium, or pawn" in Coggs v. Barnard (1 Smith's Lead. Cas. 5th edit. p. 181), although he was of opinion that the pawnee could in no case use the pledge if it would thereby be damaged, and must use due diligence in the keeping of it, and says that the creditor is bound to restore the pledge upon payment of the debt, because by detaining it after the tender of the money he is a wrongdoer, his special property being determined; yet he nowhere says that the misuse or abuse of the pledge before payment or tender annihilates the contract upon which the deposit took place.

If the true distinction between cases of lien and cases of deposit by way of pledge be kept in mind, it will, I think, suffice to determine this case in favour of the defendant, seeing that no tender of the sum secured by the original deposit is alleged to have been made by the plaintiff; and considering the nature of the things deposited, I think that the plaintiff can have sustained no real damage by the repledging of them, and that he cannot successfully claim the immediate right to the possession of the debentures in question. I am therefore of opinion that our judgment should be for the defendant.

BLACKBURN, J.—This is a question arising on demurrer to a plea. The count is in detinue for certain debentures. The plea is, that the plaintiff deposited the debentures with one Simpson as security for the due payment of a bill of exchange, indorsed by plaintiff to Simpson, and discounted by him, and that it was agreed between the plaintiff and Simpson, that Simpson should have full power to sell or otherwise dispose of the debentures if the bill of exchange was not paid when it became due; that the bill was dishonoured, and not yet paid by any one, and that Simpson deposited the debentures with the defendant as a security for the repayment of money advanced by the defendant to Simpson on the security of the debentures.

To this plea there was a demurrer. The plea does not expressly state whether the deposit with the defendant by Simpson was before or after the dishonour of the bill of exchange; and, as against the defendant, in whose knowledge this matter lies, it must be taken that it was before the bill was dishonoured, and consequently at a time when Simpson was not yet entitled by virtue of his agreement with the plaintiff to dispose of the debentures. We cannot construe the plea as stating that Simpson agreed to transfer to the defendant, as indorsee of the bill, the security which Simpson had over the debentures and no more. We must, I think, as against the defendant, construe the plea as stating that Simpson deposited the debentures, professing to give a security on them for the repayment of a debt of his own, which may or may not have exceeded the amount of the bill of exchange, but was certainly different from it. And it is quite clear that Simpson could not give the defendant any right to detain the debentures after the bill of exchange was satisfied, so that a replication that the plaintiff had paid, or was ready and willing to pay the bill, would have been good. The defendant could not in any view have a greater right than Simpson had. But there is no such replication; and the question which is raised on this record, and it is a very important one, is, whether the plaintiff is entitled to recover in detinue the possession of the debentures, he neither having paid nor tendered the amount for which he had pledged them with Simpson.

In detinue the plaintiff's claim is based upon his right to have the chattel itself delivered to him, and if there still remain in Simpson, or in the defendant as his assignee, any interest in the goods, or any right of detention inconsistent with this right of the plaintiff, the plaintiff must fail in detinue, though he may be entitled to maintain an action of tort against Simpson or the defendant for the damage, if any, sustained by him in consequence of their unauthorized

dealing with the debentures. The question therefore raised on the present demurrer is, whether the deposit by Simpson of the debentures with the defendant, as stated in the plea, put an end to that interest, and right of detention till the bill of exchange was honoured which had been given to Simpson by the plaintiff's original contract of pledge with him.

There is a great difference in this respect between a pledge and a lien. The authorities are clear that a right of lien, properly so called, is a mere personal right of detention, and that an unauthorized transfer of the thing does not transfer that personal right. The cases which established that, before the Factors Acts, a pledge by a factor gave his pledgee no right to retain the goods, even to the extent in which the factor was in advance, proceed on this ground. In *Daubigny v. Duval* (5 Term Rep. 604), Mr. Justice Buller put the case on the ground that "a lien is a personal right and cannot be transferred to another." In *M'Combie v. Davis* (7 East, 5), Lord Ellenborough puts the decision of the Court on the same ground, saying "that nothing could be clearer than that *liens* were personal, and could not be transferred to third persons by any tortious pledge of the principal's goods."

Story, in his treatise on *Bailments*, ss. 325, 326 and 327, is apparently dissatisfied with these decisions, thinking that a factor, who has made advances on the goods consigned to him, ought to be considered as having more than a mere personal right to detain the goods, and that a pledgee from him ought to have been considered entitled to detain the goods until the lien of the factor was discharged. This is a question which can never be raised in this country, for the legislature has intervened, and in all cases of pledges by agents within the Factors Acts the pledge is now available in all cases to the extent of the factor's interest.

But, on the facts stated in the plea, Simpson was not an agent within the meaning of the Factors Acts; and we have to consider whether the agreement stated to have been made between the plaintiff and him did confer something beyond a mere lien, properly so called, an interest in the property, or real right, as distinguished from a mere personal right of detention.

I think that both on principle and on authority, a contract such as that stated in the plea, pledging goods as a security, and giving the pledgee power in case of default to dispose of the pledge (when accompanied by an actual delivery of the thing) does give the pledgee something beyond a mere lien; it creates in him a special property or interest in the thing. By the Civil Law such a contract did so, though there was no actual delivery of possession, but the right of hypothec is not recognized by the common law. Till possession is given, the intended pledgee has only a right of action on the contract, and no interest in the thing itself—*Howes v. Ball* (7 B. & C. 481). I mention this because in the argument several authorities, which only go to shew that a delivery of possession is, according to the English law, necessary for the creation of the special property of the pawnee, were cited as if they determined that it was necessary for the continuance of that property.

The effect of the civil law is thus stated by *Story*, in his treatise on *Bailments*, s. 328: "It enabled the pawnee to assign over or to pledge the goods again to the extent of his interest or lien on them; and in either case the assignee was entitled to hold the pawn until the original owner discharged the debt for which it was pledged." But, beyond this, the second pledge was inoperative, and conveyed no title, according to the known maxim, "*Nemo potest plus juris ad alium transferre quam ipse habet.*"

In England there are strong authorities that the contract of pledge, when perfected by delivery of possession, creates an interest in the pledge, which interest may be assigned. This was the very point decided by the Court in *Mores v. Conham* (Owen. 123), where the Court say that the pawnee is responsible if he misuseth the pawn, "also he hath such an interest in the pawn as he may assign over, and the assignee shall be subject to detain if he detains it upon payment of the money by the owner." It is true that one

Judge, Mr. Justice Foster, dissented on this very point. That may so far weaken the authority of the decision, but it shews that there could be no mistake in the reporter, and no oversight on the part of the majority, but that it was a deliberate decision.

It is laid down by Lord Holt, in his celebrated judgment in *Coggs v. Barnard* (1 Smith's Lead. Cas., 5th edit. p. 181), that a pawnee "has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him"—language certainly seeming to indicate an opinion that he has an interest in the thing, or real right, as distinguished from a mere personal right, of detention. And Story, in his treatise on *Bailments*, s. 327, says, "But whatever doubt may be indulged as to the case of a factor, it has been decided," (that is, in America) "that in the case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

In *Whittaker*, on *Lien*, p. 140 (published in 1812), the law is laid down to be that the pawnee has a special property beyond a lien. I do not cite this as an authority of great weight, but as shewing that this was an existing opinion in England before Story wrote his treatise.

But there is a class of cases in which a person, having a limited interest in chattels, either as hirer or lessee of them, dealing tortiously with them, has been held to determine his special interest in the things, so that the owner may maintain trover as if that interest had never been created. But I think in all these cases the act done by the party having the limited interest was wholly inconsistent with the contract under which he had the limited interest, so that it must be taken from his doing it that he had renounced that contract, which, as was said in *Fenn v. Bittleston* (7 Exch. Rep. 152; s. c. 21 Law J. Rep. (N.S.) Exch. 41), operates as a disclaimer of a tenancy at common law; or, as it is put by Mr. Justice Williams in *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130), he may be said to have violated an implied condition of the bailment. Such is the case where a hirer of goods, who is not to have more than the use of them, destroys them or sells them; that being so wholly at variance with the purpose for which he holds them that it may well be said he has renounced the contract by which he held them, and so waived and abandoned the limited right which he had under that contract. It may be a question whether it would not have been better if it had been originally determined that, even in such cases, the owner should bring a special action on the case, and recover the damage which he actually sustained, which may, in such cases, be very trifling, though it may be large, instead of holding that he might bring trover and recover the whole value of the chattel without any allowance for the special property. But I am not prepared to dissent from these cases where the act complained of is one wholly repugnant to the holding, as I think it will be found to have been in every one of the cases in which this doctrine has been acted upon.

But where the act, though unauthorized, is not so repugnant to the contract as to shew a disclaimer, the law is otherwise. Thus, where the hirer of a horse for two days to ride from Gravesend to Nettlestead, deviated from the straight way and rode elsewhere, it was held that the hirer had a good special property for the two days, and although he misbehaved by riding to another place than was intended, that was to be punished by an action on the case, and not by seizing the gelding—*Lee v. Atkinson* (Helo. 172). This certainly was a much more equitable decision than if a rough rule had been laid down that every deviation from the right line, however small, was to operate as a forfeiture of the right to use the horse for which the hirer had paid; and it may be reconciled to the decisions already referred to, because the wrongful use, though wrongful, was not such as to shew a renunciation of the contract with the owner of the horse. Now, I think that the subpledging of goods, held in security for money, before the money was due, is not in

general so inconsistent with the contract as to amount to a renunciation of that contract. There may be cases in which the pledgor has a special personal confidence in the pawnee, and therefore stipulates that the pledge shall be kept by him alone; but no such terms are stated here, and I do not think any such term is implied by law.

In general, all that the pledgor requires is the personal contract of the pledgee that on bringing the money the pawn should be given up to him, and that in the mean time the pledgee shall be responsible for due care being taken for its safe custody. This may very well be done though there has been a subpledge; at least the plaintiff should try the experiment whether, on bringing the money for which he pledged these debentures to Simpson he cannot get them. And the assignment of the pawn for the purpose of raising money (so long at least as it purports to transfer no more than the pledgee's interest against the pledgor), is so far from being found in practice to be inconsistent with or repugnant to the contract, that it has been introduced into the Factors Acts, and is in the Civil Law (and according to *Mores v. Conham* (Owen. 123) in our law also) a regular incident in a pledge. If it is done too soon, or to too great an extent, it is doubtless unlawful, but not so repugnant to the contract as to be justly held equivalent to a renunciation of it.

The cases of *Bloxham v. Sanders* (4 B. & C. 941) and *Milgate v. Kebble* (3 Man. & G. 100; s. c. 10 Law J. Rep. (n.s.) C.P. 277) are cases of unpaid vendors; and therefore are not authorities directly applicable to a case of pledge. But the position of a partially unpaid vendor who irregularly sells the goods, which have only been partially paid for, is very analogous to that of a pledgee, and in *Milgate v. Kebble* (3 Man. & G. 100; s. c. 10 Law J. Rep. (n.s.) C.P. 277) Chief Justice Tindal is reported to have used language that seems to indicate that in his opinion a pledgor could not have maintained trover any more than the vendee in that case. But the latest case, and one which I think is binding on this Court, is that of *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (n.s.) C.P. 130). I think that the decision of the majority of the Court of Common Pleas in that case is an authority that, at all events, there remains an interest, not put an end to by the unauthorized transfer, such as is consistent with a right in the pawnor to recover in detinue. In that case the goods had been pledged as a security for a bill of exchange, with a power of sale if the bill was not paid at maturity. The pledgee sold the goods the day before he had a right to do so. The assignees of the bankrupt pledgor brought trover, and sought to recover the full value of the goods, without any reduction. Mr. Justice Williams thought that they were so entitled, giving as his reason "that the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods, freed from the bailment, and might have held them rightfully when so resumed as the absolute owner, against the whole world." And if this was correct, the present plaintiff is entitled to judgment. But the majority of the Court decided that "the deposit of the goods in question with the defendant, to secure repayment of a loan to him on a given day, with power to sell in case of default on that day, created an interest and right of property in the goods which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties, nor the interest of the pawnee in the goods under that contract." This can be reconciled with the cases above cited, of which *Fenn v. Bittleston* (7 Exch. Rep. 152; s. c. 21 Law J. Rep. (n.s.) Exch. 41) is one, by the distinction that the sale, though wrongful, was not so inconsistent with the object of the contract of pledge as to amount to a repudiation of it, though I own that I do not find this distinction in the judgment in *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (n.s.) C.P. 130). It may be that the conclusion from these premises ought to have been that the defendant was entitled to the verdict on the plea of not possessed in trover, unless the Court thought fit to let the plaintiff, on proper terms, amend by substituting a count

for the improper sale; but this point as to the pleading does not seem to have been presented to the Court of Common Pleas. The fact that they differed from Mr. Justice Williams shews that after consideration they *meant to decide* that the pledge gave a special property, which still continued; and though I have the highest respect for the authority of Mr. Justice Williams, I think we must in a Court of co-ordinate jurisdiction act upon the opinion of the majority, even if I did not think as I do, that it puts the law on a just and convenient ground. And, as already intimated, I think that, unless the plaintiff is entitled to the uncontrolled possession of the things, he cannot recover in detinue.

For these reasons, I think we should give judgment for the defendant.

COCKBURN, C.J.—The question in this case is, whether, where debentures have been deposited as security for the payment of a bill of exchange, with a right on the part of the deposittee to sell or otherwise dispose of the debentures in the event of non-payment of the bill,—in other words as a pledge,—and the pawnee pledges the securities to a third party on an advance of money, the original pawnor, the bill of exchange remaining unpaid, can treat the contract between himself and the first pawnee as at an end, and, without either paying or tendering the amount of the bill of exchange, for the payment of which the security has been pledged, bring an action of detinue to recover the thing pledged from the holder, to whom it has been transferred.

I think it unnecessary to the decision in the present case to determine whether a party with whom an article has been pledged as a security for the payment of money has a right to transfer his interest in the thing pledged (subject to the right of redemption in the pawnor) to a third party. I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee seems quite inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. In some instances it may well be inferred from the nature of the thing pledged,—as in the case of a valuable work of art,—that the pawnor, though perfectly willing that the article should be intrusted to the custody of the pawnee, would not have parted with it on the terms that it should be passed on to others and committed to the custody of strangers. It is not, however, necessary to decide this question in the present case. The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action for nominal damages, if he has sustained no substantial damages,—for substantial damages if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged. We are not dealing with a case of lien, which is merely the right to retain possession of the chattel, and which right is immediately lost on the possession being parted with, unless to a person who may be considered as the agent of the party having the lien for the purpose of its custody. In the contract of pledge the pawnor invests the pawnee with much more than the mere right of possession. He invests him with a right to deal with the thing pledged as his own if the debt be not paid and the thing redeemed at the appointed time.

It seems to me that the contract continues in force, and with it the special property created by it, until the thing pledged is redeemed or sold at the time specified. The pawnor cannot treat the contract as at an end until he has done that which alone enables him to divest the pawnee of the inchoate right of property in the thing pledged which the contract has conferred on him.

The view I have taken of this case, and which I should have arrived at independently of authority, is fully borne out by the decision of the majority of the Court of Common Pleas in the case of *Johnson v. Stear* (15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. (N.S.) C.P. 130). There, goods which had been pledged as security for the payment of a bill of exchange, having been sold before the falling due of the bill, the Court held, on an action of trover being brought to recover the goods, that although the owner was entitled to maintain an action against the pawnee for a breach of contract in parting with the goods, yet that the contract itself was not put an end to by the tortious dealing with the goods by the pawnee so as to entitle the owner to bring an action to recover the goods as if the contract never had existed. This decision appears to me to be a direct authority on the present case, and to be binding upon us. It is true that Mr. Justice Williams dissented from the other three Judges constituting the Court, holding that the contract was put an end to, and the plaintiff remitted to his absolute rights of ownership by the conversion of the goods by the pawnee. But, however I may regret to differ from that very learned Judge, I concur, for the reasons I have given, with the majority of the Court of Common Pleas, in holding that a pawnor cannot recover back goods (and the same principle would obviously apply to debentures) pledged as security for the payment of a debt or bill of exchange until he has paid or tendered the amount of the debt. I am, therefore, of opinion that our judgment should be in favour of the defendant.

Judgment for the defendant.

[IN THE QUEEN'S BENCH.]

June 14, 1866.

THE QUEEN v. STEPHENS.

35 L. J. Q.B. 251; 7 B. & S. 710; L. R. 1 Q.B. 702; 14 L. T. 593;
14 W. R. 859; 12 Jur. N.S. 961.

Distinguished *R. v. Holbrook*, [1879] 48 L. J. Q.B. 113; L. R. 4 Q.B. D. 42; 39 L. T. 536; 27 W. R. 313 (Q.B. D.). Not applied, *Chisholm v. Doulton*, [1889] E. R. A.; 58 L. J. M.C. 133; L. R. 22 Q.B. D. 736; 60 L. T. 966; 37 W. R. 749 (Q.B.D. Div.). Referred to, *Sherras v. De Rutzen*, [1895] E. R. A.; 64 L. J. M.C. 218; [1895] 1 Q.B. 918; 72 L. T. 839; 43 W. R. 526 (Q.B.D. Div.). Principle applied, *Coppen v. Moore*, [1898] E. R. A.; 67 L. J. Q.B. 689; [1898] 2 Q.B. 306; 78 L. T. 520; 46 W. R. 620 (Q.B.D. Div.).

Nuisance—Obstruction of River—Master and Servant—Indictment—Evidence.

MASTER AND SERVANT. WATER AND WATERWAYS.—*The workmen of the defendant, a colliery owner, in working the colliery, stacked the refuse in such a manner that it fell into a navigable river, and caused an obstruction therein. The defendant was indicted for a nuisance in causing such obstruction:—Held, that the facts of his not having personally superintended the works, of his having given express orders to the workmen that the refuse should be deposited in a particular place where it would not do any harm, and that it was not to be thrown into the river, would not relieve him from liability upon this indictment.*

The first count of the indictment was for a nuisance in causing an

obstruction of the ancient navigable river Towy, by casting into it quantities of slate, stone, earth, rubbish and other materials.

The second count charged that the defendant was the owner of divers large quantities of slate ground from certain quarries near to the river, and that he kept and suffered to be and remain the said large quantities of slate sunk in the said river, so that, &c.

At the trial, which took place before Blackburn, J., at the last Spring Assizes for Pembrokeshire, it was proved that the defendant was a master quarryman who had owned a colliery on the banks of the river Towy for thirty or forty years before the obstruction complained of occurred. The men employed by him were competent to perform their duties, but in the course of their works at the colliery, they stacked the rubbish and refuse in such a manner that it fell into the river, and caused the obstruction complained of. It was alleged on behalf of the defendant, that he was eighty years of age, that he had not personally superintended the works, but that he had given express orders to his workmen that the rubbish and refuse was to be deposited in a particular place where it would not do any harm, and was not to be thrown into the river.

The counsel for the defendant proposed to prove these facts, but the learned Judge held that they would not raise any defence to the indictment, even if it could be proved; and he told the jury that the defendant would be liable for the acts of his workmen in depositing the rubbish from the quarries belonging to him, so as to become a nuisance and obstruction to the river, although it were done by them without his knowledge and against his orders.

The jury returned a verdict of guilty.

A rule was subsequently obtained calling upon the prosecutrix to shew cause why the verdict should not be set aside, and a new trial had, on the ground that the learned Judge misdirected the jury, in telling them that the defendant would be liable as above set out.

Giffard and *Poland* shewed cause against the rule.—The direction was right; for it was the duty of the defendant to keep the refuse from causing an obstruction, and he has not done so; the facts of his not superintending the works, and of his having desired his men to put the rubbish in a safe place, cannot free him from liability unless there be some rule of law that in such a case there must be proof of the *mens rea*. In general, it may be necessary to prove the *mens rea* in the case of an indictment; but the rule is not an inflexible one, and it is submitted that it is not necessary in the present case. The evidence given at the trial would have been sufficient to justify a verdict against the defendant in the case of an action—see *Tenant v. Goldwin* (1 Salk. 360). In this particular case an action would not have been maintainable, because the injury was not one which peculiarly affected the individual more than the whole public, and the proceeding by indictment was the proper one. In 3 *Black. Com.* it is said, “Therefore no action lies for a public or a common nuisance, but an indictment only, because the damage being common to all the king’s subjects, no one can assign his particular proportion of it, or if he could, it would be extremely hard if every subject in the kingdom were allowed to harass the offender with separate actions. For this reason no person, natural or corporate, can have an action for a public nuisance, or punish it; but only the king in his public capacity of supreme governor and *paterfamilias* of the kingdom. Yet this rule admits of one exception, where a private person suffers some extraordinary damage beyond the rest of the king’s subjects, by a public nuisance, in which case he shall have a private satisfaction by action.” But, further, it was held in *The King v. Medley* (6 Car. & P. 292) that the directors of a gas company were answerable for an act done by their superintendent and engineer, under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, and though such plan was a departure from the original and understood method, which the directors had no reason to suppose was discontinued. In summing up the case Lord Chief Justice

Denman said, "It is said that the directors were ignorant of what had been done. In my judgment, that makes no difference; provided you think that they gave authority to Leadbeter to conduct the works, they will be answerable. It seems to me both common sense and law that if persons for their own advantage employ persons to conduct works, they must be answerable for what is done by those servants." Further, the whole matter is set at rest as soon as it is settled that a corporation is indictable for a nonfeasance and also for a misfeasance; for a corporation cannot have the *mens rea*. But that is shewn by *The King v. Medley* (6 Car. & P. 292), *The Queen v. the Birmingham and Gloucester Railway Company* (3 Q.B. Rep. 223), *The Queen v. the Great North of England Railway Company* (9 Q.B. Rep. 315; s. c. 16 Law J. Rep. (N.S.) M.C. 16), and many other cases. In *The King v. Pedley* (1 Ad. & E. 822; s. c. 3 Law J. Rep. (N.S.) M.C. 119) the defendant was held to be liable, in an indictment for a nuisance, which existed by reason of the necessities attached to some houses which were occupied by his tenants being left in a filthy state. It was there argued that he could not be liable unless he had been guilty either of creating or permitting the nuisance; but the Court held that he was liable.

[SHEE, J.—I see that Mr. Justice Littledale said: "If a nuisance be created, and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance." BLACKBURN, J.—In that case the defendant seems not even to have had the power to stop the nuisance.]

No; it seems, therefore, that it is not necessary that the prosecution should prove any *mens rea*.

[MELLOR, J.—There would be a great difficulty in obtaining redress if the servant was the only person liable.]

Just so. Suppose a case where the master had told his servants that the river belonged to him, the servant could not be convicted, nor could the master, if the argument on behalf of the defendant be right, unless it could be proved that he had a guilty knowledge. In *Manley Smith's Law of Master and Servant*, the law is thus laid down, at p. 181: "Again, masters are liable to indictments for public nuisances, such as carrying on offensive trades, committed by their servants, although their masters have nothing to do personally with the nuisance complained of. In such cases, also, if a master could shield himself from criminal responsibility, on the ground that he personally had nothing to do with the carrying on the trade, the real offender might escape with impunity, and the public grievance remain unredressed. It has, indeed, scarcely ever been contended that the master in such cases was not guilty, on the ground that the nuisance was perpetrated through the agency of others; and where that objection has been taken, it has been speedily overruled." And he cites *Turberville v. Stampe* (1 Ld. Raym. 264), *Bush v. Steinman* (1 Bos. & P. 404) and *The King v. Pedley* (1 Ad. & E. 822; s. c. 3 Law J. Rep. (N.S.) M.C. 119).—They also referred to *Reedie v. the London and North-Western Railway Company* (4 Exch. Rep. 244; s. c. 20 Law J. Rep. (N.S.) Exch. 65), *The King v. Dixon* (3 M. & S. 11), *The King v. Moore* (3 B. & Ad. 184) and to 1 *Russell on Crimes*, by Greaves, 4th edit. p. 456.

Bowen and Hughes, in support of the rule.—This indictment is a criminal proceeding, and the defendant cannot be held liable, unless he gave an order, either express or implied, to do the thing which is complained of. The learned Judge misdirected the jury in saying that the defendant could not avail himself of the proposed evidence. No doubt such evidence would not raise a defence to a civil action; but neither the defendant nor a corporation would be liable to be convicted upon an indictment if such facts could be proved as the defendant was in a position to prove. There is a dearth of

authority upon the subject; but the question whether this is a criminal proceeding or not is set at rest by *The Queen v. Russell* (3 El. & B. 942, s. c. 23 Law J. Rep. (N.S.) M.C. 173). That was an indictment for the obstruction of a navigation; and Lord Chief Justice Campbell said that it was a criminal proceeding.

[BLACKBURN, J.—I think that the reasoning of the other Judges does not follow Lord Campbell, and I think that they are against you. MELLOR, J.—Surely the defendant was bound not only to give orders, but to see that they were carried out. BLACKBURN, J.—He gives orders to work the quarry, and it is so worked by his servants as to become a nuisance; he would be civilly liable, and why should he not be criminally liable? SHEE, J.—If he is not liable, who is?]

The foreman of the works would be. *The King v. Medley* (6 Car. & P. 292) ought hardly to be considered as an authority to justify the direction of the learned Judge. Mr. Taylor, in his work on *Evidence*, 4th edit. 124, says, "This case certainly carries the doctrine to its furthest extent." Indeed, the case differs from the present one in this, that the defendant was able to shew that the work was done without his knowledge and against his intentions. In *The King v. Huggins* (Ld. Raym. 1574, 1580) it was held that the defendant, who was Warden of the Fleet, was not liable criminally, although he would be civilly, for the acts of his deputy; and in *Hearne v. Garton* (28 Law J. Rep. (N.S.) M.C. 216) this Court decided that the appellant could not be convicted of sending oil of vitriol by railway, if he did so without knowing what the contents of the vessels sent by him were.—They also referred to *Whitfield v. the South-Eastern Railway Company* (27 Law J. Rep. (N.S.) Q.B. 229), *The King v. Almon* (5 Burr. 2686) *Reedie v. the London and North-Western Railway Company* (4 Exch. Rep. 244; s. c. 20 Law J. Rep. (N.S.) Exch. 65), *The Queen v. the Birmingham and Gloucester Railway Company* (3 Q.B. Rep. 223), *The Queen v. the Great North of England Railway Company* (9 Q.B. Rep. 315; s. c. 16 Law J. Rep. (N.S.) M.C. 16), *The King v. Pedley* (1 Ad. & E. 822; s. c. 3 Law J. Rep. (N.S.) M.C. 119), and *The Attorney General v. Siddon* (1 Cr. & J. 220).

MELLOR, J.—In this case I am of opinion, and in that opinion my Brother Shee concurs, that the direction was right. It is quite true that this, in point of form, was what may be called a criminal process, or criminal procedure; but when you come to look at it in point of substance, one can see no reason why a different rule should prevail, in such an act as this, between proceedings which are civil and proceedings which are criminal. I think that the rule must depend on the nature of the act complained of. I think there may be, and I should be unwilling to decide that there cannot be, acts of nuisance of such a character that the rule I am applying here would not be applicable; but here it is perfectly clear that the only reason for proceeding criminally consists in this,—the nuisance, instead of being a nuisance merely affecting an individual, or one or two individuals, affects a public navigable river, and therefore, in that sense, affects a number of individuals, and therefore, no private individual, without receiving some special injury, could have maintained an action. Then, if the contention to those who say the direction is wrong is to prevail, see the difficulty in getting redress. The object is to get redress and to prevent the recurrence of the nuisance. They cannot proceed by action, but must proceed in the form of an indictment, and then they are to be met by this, "There is no *mens rea*." You are charging the defendant as a criminal, when, in reality, you have no proof that he actually knew of the act done, or that he actually himself gave orders to the servants not to do a particular act. Still, at the same time, the defendant is perfectly well aware that he finds the capital, and carries on the business; it is carried on for his benefit, and although, from age or infirmity, he does not go near the premises, it is carried on by his sons, or, at all events, by his agents. Under such circumstances, it appears to me that

he must necessarily give to the parties all the authority that is incident to the carrying on the business. And it is not because he himself at some time or other had given direction that the works should be so carried on as not to allow the materials to fall into the river, and may have provided some other place for them, when for a considerable time they have been falling into the river and have become prejudicial to the public, that he may not be liable. Under these circumstances it appears to me that all it is necessary to prove is, that this was done in carrying on the works of the quarry. That being so, I think that my Brother Blackburn's direction to the jury was quite right. I quite agree with Mr. Hughes that the authorities are very bare of anything that directly affects the question. In the case to which Mr. Bowen referred us, and in which he relied very much on the observations of Lord Campbell, it may be that the observations of that learned Judge were justified by the circumstances of that case, though, as I understand the case, the judgment of the other Judges did not proceed on the same reasons. It is therefore the opinion of Lord Campbell as applied to that case; and whether there is or not any satisfactory distinction between that case and the present, may be open to question; but it appears to me, if there is no distinction, I should be prepared rather to have acted upon the inferences which influenced the other Judges, than upon those which influenced Lord Campbell. Under these circumstances, being of opinion that the object in this case is not to punish, but really to prevent, the recurrence of this mischief, and to prevent this nuisance from being continued, the prosecution is driven, under the particular circumstances, to an indictment instead of an action. I think that can make no difference as to the evidence necessary to support it. Therefore, this rule, which was obtained against my Brother Blackburn's direction, is discharged. As I have said, my Brother Shee agrees with me in that opinion.

BLACKBURN, J.—I need only say that I see no reason to change the opinion I had at the time of the trial, and I only wish to guard myself against its being supposed that, either at the trial or now, anything was done that infringes upon the rule that the principal is not responsible criminally for the acts of the servant or agent. All that is necessary to say is this, that where a person maintains works by his capital and employs servants, and uses things so that in fact the works are a nuisance, if the circumstances under which he maintains those works are such that for the nuisance an action upon the case would lie by a private person, and if the nuisance includes an injury upon a public right so that a private action would not lie, but the remedy would be by indictment, the same proof that would prove the nuisance so as to entitle a person to recover in the action would prove the nuisance so as to entitle the public to indict. That is all that it is necessary to decide and all that is decided.¹

*Rule discharged.*²

(1) Shee, J. had gone to chambers.

(2) In Michaelmas Term, *Bowen* asked for leave to appeal, but the Court stated that no appeal could be allowed, as the indictment was a criminal proceeding, to which the power of appeal created by the Common Law Procedure Act did not apply.

[IN THE COURT OF EXCHEQUER.]

Nov. 3, 1865.

THE QUEENSHEAD INDUSTRIAL SOCIETY (LIMITED) v. PICKLES
AND ANOTHER.35 L. J. Ex. 1; 3 H. & C. 857; L. R. 1 Ex. 1; 13 L. T. 295; 14 W. R. 30;
11 Jur. N.S. 877.*Industrial and Provident Societies Act, 1862 (25 & 26 Vict. c. 87),
section 6.—Action—Parties.*

INDUSTRIAL SOCIETY.—*The 6th section of the 25 & 26 Vict. c. 87. enacts, that "the certificate of registration under that act shall vest in the society all the property that may at the time be vested in any person in trust for the society":—Held, that an action on a bond given to trustees of an industrial society before the act may, after registration under the act, be brought in the name of the newly-incorporated body.*

The declaration,—which was on a bond, dated the 8th of June, 1861, by which the obligors, the defendants, bound themselves to the trustees for the time being of the Queenshead Industrial Society, as sureties for the good behaviour of William Pickles while acting as salesman in the service of the society,—contained an averment that "afterwards the said society were duly registered by their then name of the Queenshead Industrial Society (Limited), under and by virtue of the Industrial and Provident Societies Act, 1862; and thereupon the Registrar of Friendly Societies of England gave his certificate of such registration; and thereupon the said society became a body corporate by the name described in the said certificate. That thereupon the name of the society became, by due course of law altered, and the plaintiffs then became incorporated by the name whereby they sue in this action; and the plaintiffs further say, that at the time of the giving and issuing of the said certificate of registration as aforesaid, the said bond and causes and rights of action were then vested in the said trustees, in trust for the said society; and thereupon all things and conditions having happened, &c., the same then became and still are vested in the plaintiffs, under and by virtue and in pursuance of the said act."

The defendants pleaded, *inter alia*, that the plaintiffs did not become incorporated as alleged, and that the property in the said bond and the right to maintain an action thereon did not vest in the plaintiffs.

Issue thereon.

The 6th section of the 25 & 26 Vict. c. 87. (the Industrial and Provident Societies Act, 1862,) enacts, that "the certificate of registration shall vest in the society all the property that may at the time be vested in any person in trust for the society, and all legal proceedings then pending by or against any such trustee or other officers on account of the society, may be prosecuted by or against the society in its registered name without abatement."

The action was tried, at the Leeds Summer Assizes, 1865, before Mellor, J., when a verdict was entered for the plaintiffs for 100l., with leave for the defendants to move to enter a nonsuit, on the ground that the action was not properly brought in the name of the society.

Manisty now moved accordingly, contending that the action was wrongly brought,—on the authority of *Dean v. Mellard* (15 Com. B. Rep. N.S. 19; s. c. 32 Law J. Rep. (N.S.) C.P. 282) and *Linton v. the Blakeney Co-operative Industrial Society* (34 Law J. Rep. (N.S.) Exch. 211). In those cases the question was as to the defendants being sued in the name of their newly-incorporated body, but the same principle is to be applied in this case where the new corporation are plaintiffs; for it cannot be supposed that the statute has provided for the transfer to the new corporation of the *rights* of the trustees

without at the same time transferring their *liabilities*. In any case, the right of action upon this bond is not "property" within the meaning of the 6th section of the act.

POLLOCK, C.B.—We are all of opinion that there should be no rule in this case.

BRAMWELL, B.—The contention on the part of the plaintiffs is, that at the time the action was brought the statute had given them a right to bring in their own name an action upon a bond that had been given to trustees for their benefit. That is denied by the defendants. For my own part, I cannot see any reason why the statute should not give the plaintiffs this right. What reason can there be why the beneficial owners of a thing—I will not call it property—cannot bring the action in their own names? But it is said that we must not interpret the act of parliament according to our notion of what it should be, but according to what it is. And what is it? The 6th section says, "The certificate of registration shall vest in the society all the property that may be at any time vested in any person as trustee for the society." That must mean that it should give them something more than they had before; and on the supposition that before they had an equitable interest, it must be that they should now have a legal interest.

Then we are told that this bond, or the cause of action upon it, is not a "property." Now, "property" is not a term of art, but it is an ordinary English word. It is to be understood in its popular sense, and it is quite certain that "property" includes the debts and claims that a man has upon others, which the law calls "choses in action"; and when one sees that all legal proceedings pending by the trustees are to be continued in the name of the company, it is impossible to suppose that they cannot initiate proceedings in their own name, the property having been vested in them. It is clear that an action brought by the trustees upon a bond before the act might have been continued in the name of the company.

The two cases cited, in my opinion, have no application. If there had been a provision in the statute that the certificate of registration shall impose upon the society all debts formerly due by any person on account of the society, then those two cases would have been in the same situation as the present one is. But there is no such provision. There is no general imposition of liability on the society for the debts due from individuals on account of it, as there is a general vesting of the property in the society.

But I also think that the question arises upon the record, for if this debt is not a property within the statute, it could not vest as alleged in the declaration, which therefore contains an erroneous proposition of law, and ought to have been demurred to, rather than traversed. It seems to me, therefore, that the learned Judge at the trial was quite right in directing the verdict for the plaintiffs, and that the defendant's objection is not a well-founded one.

CHANNELL, B.—I am very much disposed to think that, if there be any objection at all, it is an objection upon the record. To decide the case on that view, however, would be taking a very narrow ground. I think the broader view may be taken, and that this application for a nonsuit should be refused on the merits.

In both the cases cited—*Dean v. Mellard* (15 Com. B. Rep. N.S. 19; s. c. 32 Law J. Rep. (N.S.) C.P. 282) in the Court of Common Pleas, and *Linton v. the Blakeney Joint Co-operative Industrial Society* (34 Law J. Rep. (N.S.) Exch. 211) in this Court—the question arose as to the form in which the societies were sued. I quite concur in the decision, that the language of the 6th section of the act of 1862 is not sufficient to impose a liability on the defendants in those cases to be sued in the name of the new corporation. We are now dealing, however, with quite a different question—the right of the plaintiffs to sue in this particular form. The old company was not a corporation, and the intervention of the trustees was, if not absolutely

necessary, at least highly useful. But by the act of 1862, it was intended to transfer the property from the unincorporated company to the incorporated company created by the new act. Then it appears to me that the intervention of such trustees was no longer necessary. It would be putting a very limited construction upon the language of the act to hold that it was intended to transfer to the incorporated company the interest which existed before in the unincorporated company, and was not intended to transfer at the same time all the incidents necessary to give effect to the transfer of the property. I think the effect of the act was to put an end to the trusteeship altogether.

PIGOTT, B. concurred.

Rule refused.

[IN THE COURT OF EXCHEQUER.]

Nov. 18, 1865.

STUBLEY v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

35 L. J. Ex. 3; 4 H. & C. 83; L. R. 1 Ex. 13; 13 L. T. 376; 14 W. R. 133; 11 Jur. N.S. 954.

Applied, *Skelton v. London & North-Western Railway*, [1867] E. R. A.; 36 L. J. C.P. 249; L. R. 2 C.P. 631; 16 L. T. 563; 15 W. R. 925 (C.P.).
Observed upon, *Clarke v. Midland Railway*, 1880, 43 L. T. 381 (Ex. D.).

Railway—Negligence—Level Crossing—Footpath.

CARRIERS. NEGLIGENCE.—*The defendants' railway crossed a foot-path on the level close to a station. At a swing gate or turnstile erected by the company for foot passengers, which was some few yards from the line, the view of the line was very confined, but at the point at which a passenger, after passing the swing gate, would step on to the line, there was a clear view of 800 yards in each direction. A woman stepped on to the line immediately after a train had passed in one direction, and was knocked down and killed by another train coming in the opposite direction on the further line of rail. At least thirty-six trains passed the spot every day. There were caution-boards near the crossing, but there was no person stationed there by the railway company to warn passengers of trains being due. A person who was near the spot at the time the deceased was waiting for the first train to pass, called out to warn her that there was another train coming, which she could not see for the passing train, but she did not hear him:—Held, that there was nothing in the circumstances to shew that the railway company were guilty of negligence in not stationing a watchman at the crossing to warn people, or in not taking any other special precaution; and that, therefore, the company were not liable in an action brought by the husband of the deceased.*

Bilbee v. the London, Brighton and South Coast Railway (18 Com. B. Rep. N.S. 584; s. c. 34 Law J. Rep. (N.S.) C.P. 182.—See the next case, commented upon.

This was an action by the husband and administrator of Mary Stubley, deceased.

The declaration stated that the defendants were possessed of a railway which crossed on the level thereof a public highway, and were also possessed of an engine and train of carriages then travelling upon and along the said railway under the care and management of their servants, yet the defendants

did not take reasonable and proper care, or use reasonable and proper means for the protection of persons using the said highway where it was so crossed by the said railway, and by their servants drove and managed the said engine and train of carriages upon and along the said railway in a careless and negligent manner, whereby the said Mary Stubley, who was then lawfully using the said highway where it was so crossed by the railway, was knocked down by the engine and train of carriages, and thereby wounded and injured, and by reason of the wounds and injuries thereby occasioned to her afterwards, and within twelve calendar months next before this suit, died.

The defendants pleaded, first, not guilty; secondly, that the deceased was not using the highway as alleged; and, thirdly, that the railway did not cross the highway as alleged. Issues thereon.

At the trial, before Blackburn, J., at the Leeds Summer Assizes, 1865, the following facts appeared in evidence. Near the Batley Station, between Leeds and Dewsbury, on the defendants' railway, the line crosses a footpath on the level; and this footpath the deceased was using at the time when she met with her death. Before stepping on the line the foot passengers have to pass through a swing gate on a bank some few yards from the railway, and at this gate a person cannot see more than thirty yards along the line in the direction of Leeds, the view being somewhat obstructed by the pier of an arch by which the Great Northern Railway is carried across the defendants' railway; but at the point where a passenger would step on the line after approaching it from the swing gate, there is a clear view of 300 yards up and down the line in either direction.

On the 9th of December, 1864, the deceased, having passed through the swing gate, was seen by one Joseph Dean waiting at the side of the railway till a goods train from Dewsbury to Leeds had passed the crossing; he called out to her twice that there was a train coming in the other direction (which she could not see for the passing train); but she did not hear, and crossed immediately after the goods train had gone by, and was at once knocked down and killed by the express train from Leeds which passed at that moment along the other line of rails.

It was proved that caution-boards were erected near the crossing; also that thirty-six passenger trains passed the spot daily, besides goods and other trains. There was no person stationed there by the company to warn foot passengers of trains being due.

The Judge asked the jury whether, assuming that the law cast upon the defendants the obligation of taking all reasonable precautions, the defendants ought reasonably to have stationed a man at the crossing to warn people of the danger; and, secondly, if they thought that a reasonable precaution, whether the absence of such a man was the cause of the accident. The jury found a verdict for the plaintiff, and Blackburn, J. having reserved leave to move to enter a nonsuit if the Court should think there was no reasonable evidence to go to the jury,—

Overend obtained a rule accordingly, and

Manisty and *Kemplay* now shewed cause.—There was evidence of negligence in the company in not taking reasonable precautions to protect the public footway, for although the legislature has authorized them to cross it on the level, they are not thereby exempted from their common law liability. If they abuse their privileges so as to endanger life, they are guilty of negligence. In *Bilbee v. the London, Brighton and South Coast Railway Company* (18 Com. B. Rep. N.S. 584; s. c. 34 Law J. Rep. (n.s.) C.P. 182), where a foot passenger was killed under circumstances very similar to those of the present case, the defendants were held liable. The company must not be allowed to set a trap for the public—see *Ford v. the London and South-Western Railway Company* (2 Fost. & F. 730), per Erle, C.J. No general rule of law can be laid down as to when the state of things is such as to call for unusual precautions; that must be in each case a question for the jury.

Overend (Maule with him), in support of the rule.—It was the duty of the Judge, if he saw no reasonable evidence of negligence, to tell the jury so. There is no obligation cast upon the company to guard the foot-path. There is a difference in this respect between a footway and a turnpike road. *Bilbee's case* (18 Com. B. Rep. N.S. 584; s. c. 34 Law J. Rep. (N.S.) C.P. 182) was that of a carriageway, although the case did not turn upon that.¹ The danger here was obvious, and the case is governed by *Wilkinson v. Fairrie* (32 Law J. Rep. (N.S.) Exch. 73). The company used all necessary precautions, and there was nothing undone by them which they ought to have done. They cannot prevent the public from crossing the line. (He was then stopped.)

POLLOCK, C.B.—In this case it is said that the learned Judge should not have left the matter to the jury, as if there was any negligence on the part of the company. Now the railway appears to have been in a straight line for 100 yards on either side of the crossing; and we must take it that the legislature saw there was no mischief in allowing a footway to be crossed on a level by the railway at that point. Then there does not appear to me to be anything in the circumstances and the occasion to make it incumbent on the defendants to have a watchman on the spot, or to take any other special precaution, and I therefore think there is no evidence of negligence, and that the rule ought to be made absolute to enter a nonsuit.

BRAMWELL, B.—I am entirely of the same opinion. It is very easy to sue general expressions, and to impute "negligence" (which is the word commonly used) or "wrong" generally to the defendants, and to say that they ought to have had some person stationed for the purpose of actually detaining the deceased when there was imminent danger to her, as one should restrain a person from committing suicide. But let us look at the actual facts of the case, and see whether there is any reason why a person should be placed in danger from the circumstance of the gate being where it is. It is said, that a man standing at the gate (which is on a bank), he cannot see a train unless it is within 30 yards of the level crossing; well, but when at the gate the passenger has to go some yards further down the bank before he reaches the railway, and when he gets on a level with the line, he then, before stepping on the line, as I understand, sees 300 yards in each direction. That is a little more than the sixth of a mile, and a train running at 30 miles an hour would take twenty seconds to traverse the sixth of a mile. Now, having regard to the width of the line, is it necessary that there should have been anybody there to tell the deceased that she would be quite safe if she would only take common caution? Why warn people of that which they can see if they will only take the trouble to look about them? Then, it is said, here the trains are double, and they meet each other at this very point, and therefore there should be somebody to warn people. To warn people to do what? If they will not take the trouble to think, not only on railways, but on ordinary roads, that when on one side of the road they must have their eyes open to what is going on on the other side of the road—if people forget for the moment what they are about, are they to be warned? To me, it seems too much to say that the community at large can, by reason of their own folly and carelessness, impose such a duty on a company. It would be a very mischievous thing if they could do so. The consequence would be that at every part of a railway or a canal or a road, wherever people's improvidence might put them into danger, somebody ought to be stationed to say, "Exercise your common sense, and do not cross, or you will cross at your peril if you do!" I am very much inclined to think that all regulations and provisions framed for the purpose of taking care of people when they ought to take care of themselves, are mischievous.

(1) The 8 & 9 Vict. c. 20. s. 47. refers to *turnpike* roads. See note (6) to the next case, page 9.

The deceased, supposing it was all safe when the first train had passed on one side, and without looking to see whether another train was coming on the other, stepped down, as though she believed there was no danger in the way. Now, it is manifest to me that the deceased brought this on herself: not only was there no negligence on the part of the company in this case—nothing wrong; not only was there not anything that they could reasonably have provided with a view of preventing the mischief; but, had the deceased used the ordinary caution that I have suggested, I doubt whether she would have been hurt. I am therefore of opinion that this rule should be made absolute.

I do not treat *Bilbee v. the London and Brighton Railway Company* (18 Com. B. Rep. N.S. 584; s. c. 34 Law J. Rep. (N.S.) C.P. 182) as an authority. I do not mean that it was not rightly decided; but it establishes no precedent, and lays down no principle. The learned Lord Chief Justice there seems to have intended to guard against its being cited as an authority. One can readily understand that if a railway is made with a curve so abrupt that a person cannot see the approach of a train, or if there be a tunnel in a curve, so that one could not see through the tunnel, in such a case a passenger might say, "No care on my part would warn me of the danger." He must stop there for ever unless there is somebody to tell him. That is all the case of *Bilbee v. the London and Brighton Railway Company* (18 Com. B. Rep. N.S. 584; s. c. 34 Law J. Rep. (N.S.) C.P. 182) seems to have decided.

Here it is manifest to me that if this woman would but have waited till the train on the one side had fully passed, she would have had ample opportunity of seeing the train on the other side; it was her own improvident act of stepping down, and, consequently, there was no negligence on the part of the defendants.

CHANNELL, B.—I am also of opinion that this rule should be made absolute to enter a nonsuit. At the trial the learned Judge's attention was called to the recent case of *Bilbee v. the London and Brighton Railway Company* (18 Com. B. Rep. N.S. 584; s. c. 34 Law J. Rep. (N.S.) C.P. 182; and the only doubt I have felt is whether our decision might not appear to clash with that authority; but it appears to me that, on the ground stated by my Brother Bramwell, it is not a decision which concludes this case: it does not lay down any distinct principle that we can apply to the present inquiry. I think the question really is this—Was there any evidence of negligence on the part of the company that ought to have been submitted to the jury? I place my judgment on the ground that there was no negligence on the part of the company, and I observe that the Judge (probably pressed with the authority of *Bilbee v. the London and Brighton Railway Company* (18 Com. B. Rep. N.S. 584; s. c. 34 Law J. Rep. (N.S.) C.P. 182), some circumstances of which case no doubt resembled those in this case) considered it convenient to leave the question to the jury. But I observe the learned Judge most carefully laid down the general rule of law; and without going into more particulars he directs the jury to assume (guarding himself against giving a decided opinion), for the purposes of the case, that such and such might be the law, and then, after the answer of the jury he distinctly reserved the point which remains for our decision.

Now there was on one side of the railway a warning-board; and no complaint is made of the want of a whistle; nor is it suggested the train was going at an improper speed for an express train. It appears to me, under these circumstances, there was no evidence to go to the jury upon the point of negligence.

I take it that a passenger crossing a footpath on a level with the railway would be warned to exercise ordinary and reasonable care, or be expected to look up and down as far as he could, to see whether there was danger or not. If it had not been for the luggage train, I cannot doubt that this woman would have seen the express train coming up; but she crosses immediately the luggage train had passed. The only want of caution alleged is,

that the company were wanting in caution in not having a watchman stationed at the place. Now, would a watchman have answered the purpose of preventing this woman going across the line? There was, what was equally useful for the purpose, viz. a person who was near called out to the woman twice, and who is of opinion that if she had heard him and stopped, the accident might have been avoided. If there had been a watchman, I do not see that he could have done any more than the passenger did to avert this calamity; and without at all doubting the judgment of the Lord Chief Justice of the Common Pleas in the case of *Bilbee v. the London and Brighton Railway Company* (18 Com. B. Rep. N.S. 584; s. c. 34 Law J. Rep. (N.S.) C.P. 182), I think there was not evidence to go to the jury in this case to establish the liability of the railway company.

PIGOTT, B.—I am of the same opinion. The learned Judge seems to have taken great care to sum this case up to the jury, and to leave the questions to them with great accuracy; and as they have found a verdict for the plaintiff, I should be sorry to disturb it if I could see any reasonable evidence on which it could be supported; but I can find none.

The case of *Bilbee v. the London and Brighton Railway Company* (18 Com. B. Rep. N.S. 584; s. c. 34 Law J. Rep. (N.S.) C.P. 182) depended on its own circumstances; and this is another case that must depend upon its own circumstances. Now the suggestion is, that there should have been a watchman in this case. I can only say if we look to what the watchman's duty would have been if he had been there he could not have done more than the only witness in the case for the plaintiff did, viz., call to the deceased twice. He could not have stopped her. She was a deaf woman, and stepped into the danger and met with her death. One cannot help saying that she put herself into the condition of taking her chance of what would happen. Under these circumstances it is perfectly clear that there was no negligence on the part of the company. I should be far from saying that in no case ought they to have a watchman; the circumstances must be exceptional to require it, and if it is a matter left rightly to the jury whether or not they ought to have a watchman, I do not know how that would be sufficient, unless the watchman had authority not only to call out to people, but to take hold of them and stop them; for in the case of a deaf person, calling out would be of no use. I give my judgment in favour of the defendants, because I cannot see a tittle of evidence to shew negligence on their part.

Rule absolute to enter a nonsuit

[IN THE COURT OF EXCHEQUER.]

Nov. 14, 25, 1865.

STAPLEY AND ANOTHER v. LONDON, BRIGHTON & SOUTH COAST RAILWAY COMPANY.

35 L. J. Ex. 7; 4 H. & C. 93; L. R. 1 Ex. 21; 13 L. T. 406; 14 W. R. 132; 11 Jur. N.S. 954.

Discussed, *Lunt v. London and North Western Railway*, [1866] E. R. A.; 35 L. J. Q.B. 105 (sub nom. *Lunn*); L. R. 1 Q.B. 277; 14 L. T. 225; 14 W. R. 497 (Q.B.). Distinguished, *Skelton v. London and North Western Railway*, [1867] E. R. A.; 36 L. J. C.P. 249; L. R. 2 C.P. 631; 16 L. T. 563; 15 W. R. 925. (C.P.). Followed, *Wanless v. North Eastern Railway*, 1871, L. R. 6 Q.B. 481; 25 L. T. 103 (Ex. Ch.): affirmed, [1874] E. R. A.; 43 L. J. Q.B. 185; L. R. 7 H.L. 12; 30 L. T. 275; 22 W. R. 561 (H.L.).

Railway—Negligence—Level Crossing.

CARRIERS. NEGLIGENCE.—*The defendants' railway crossed a highway on*

a level close to a station. On each side of the railway were gates across the carriageway, and swing gates or turnstiles for foot passengers. By the defendants' rules and regulations the carriage gates were always to be kept closed across the carriageway, except when opened to allow carriages to cross, and they were never to be opened until the gateman had satisfied himself that no train was due or in sight. A foot passenger crossing the railway was killed by an express train which passed through the station without stopping. There was no servant of the defendants at the gate or on the platform of the station. The carriage gate on the side from which the deceased came was seen, after the accident, to be partly open. It had been shut half an hour previously, and there was no evidence of how it came to be open, or whether the deceased came through the carriage gate or through the turnstile. The train was four minutes overdue. There was a curve in the line at the spot, and the train would not be visible to a person standing at the gate till it came within 600 yards. The deceased was deaf. He was in the habit of coming to the station, and knew the times of the trains:—Held, in an action brought by the executors of the deceased, that a foot passenger who found the carriage gate open would be led to believe that no train was due, and that upon the whole case there was some evidence of negligence to be left to the jury.

Bilbee v. the London, Brighton and South Coast Railway (18 Com. B. Rep. N.S. 584; s. c. 34 Law J. Rep. (N.S.) C.P. 182) supported.

In this case the declaration,—after stating the incorporation of the defendants by an act of the 9 & 10 Vict., entitled “An act to consolidate and unite the London and Brighton and the London and Croydon Railway Companies, and the undertakings belonging to them,”—averred that the defendants' railway crossed a certain highway on a level at a place near the Portslade station, to which station there was an approach from the said highway across the railway used by passengers with the knowledge and leave of the defendants. It then stated that the defendants were subject to the provisions relating to level crossings contained in the said act, and the acts incorporated therewith, and alleged neglect of duty on the defendants' part in the management of the railway and the gates erected, as required by the statute, at the crossing, and in not providing a safe access for passengers from the highway to the station, and also negligence in running a train across the highway without giving any notice or signal of its approach. It then alleged that John Stapley, whilst lawfully on his way from the highway through the gates and across the railway to the station, for the purpose of becoming a passenger, was killed by the train; and claimed damages for the plaintiff, as his executors, for the benefit of his widow and son.

The defendants pleaded the general issue, and that the said John Stapley was not lawfully on the railway as alleged.

At the trial, before Pollock, C.B., at the Sittings in London after last Trinity Term, the following facts were proved:

The Portslade station is on the South Coast Railway, between Brighton and Worthing. Close to the station, and on the Brighton side of it, a highway running north and south crosses the line on a level. There are swing gates across the carriage-way, and wicket gates for foot passengers, the wicket-gates being never fastened. The platform of the station, on the south side, slopes down to the level of the roadway, about a yard from the gate, and it is a common practice for persons coming to the station from the north to pass through the wicket gate on the north side of the rail, and cross the line diagonally to the south platform, instead of crossing the line directly and passing out through the wicket-gate on the south side, which involved re-entering the station from the outside. Mr. Stapley, the deceased, was a land agent. He lived at Worthing, and was in the habit of travelling along the line, and was familiar with the Portslade station. On the 3rd of January last, he went from Worthing to Portslade, taking a return ticket. Having transacted his business

at Portslade he came back to the station, and was in the act of crossing the line from the north to the platform on the south in the diagonal manner mentioned above, when he was run over and killed by an express train from Brighton, which did not stop at the Portslade station. The deceased was deaf, and was in the habit of walking with his head bent down and his eyes fixed on the ground. The porter, who came on to the platform of the station just before the accident, shouted to him, but he did not hear him. Owing to a curve in the line, a train coming from Brighton was not visible to a person standing at the north gate till it emerged from a bridge about 600 yards distant. The time that it would take an express train to run that distance would be about twenty-eight seconds, about the same time that it would take a person to cross the line. The driver of the train put on the break directly he came through the bridge and saw the deceased, but he did not whistle till just before the buffer of the engine struck him—another step would have placed him in safety. There was no servant of the company at the gates to warn persons wishing to cross that the express train was expected. There was evidence that there had been a man kept at the gates till a few weeks previously, when one of the servants had been killed at the station and his place had not been filled up; and the gateman had been taken away to perform other duties at the station. No one was on the platform when the deceased commenced crossing the line. The swing gate on the north side was partly open, but there was no evidence as to how it came so. The express train left Brighton immediately before the stopping train which Mr. Stapley came to meet, and it was seven or eight minutes behind its time on this occasion.

The by-laws and regulations of the company for the guidance of their servants were called for by the plaintiff and produced at the trial. They contained the following rules:

" 219. Each gateman must look to the working of his own signals, and immediately report to the traffic manager any defect in their working.

" 220. The gate must be kept shut across the carriage road, except when required to be opened to permit of the railway being crossed.

" 225. Whenever it is required to cross the railway the gateman must satisfy himself before opening the gate that no train or engine be due or in sight. He must then shew his stop signals, which must remain exhibited until the line is clear."

The question of negligence was left to the jury, and they found a verdict for the plaintiffs. The amount of damages was by agreement left to be assessed by an arbitrator to be appointed by the parties.

Early in Michaelmas Term—

Bovill obtained a rule *nisi* for a new trial, on the ground that the verdict was against the weight of evidence, and that the learned Judge misdirected the jury, inasmuch as he ought to have told them that there was no evidence of any neglect of duty on the part of the company, and he had not sufficiently left the question of contributory negligence to the jury. Against this rule—

Manisty, Garth and Marshall Griffith shewed cause.—There was ample evidence of negligence on the part of the defendants. There was no man at the gates; the gates were partially open, so as to mislead foot passengers into a belief that it was safe for them to cross; and the engine-driver ought to have whistled on approaching the station. Although the company are by their act of parliament authorized to run trains across this highway on a level, they are not relieved from the common law duty to do all that is necessary to secure the safety of the public. The amount of precaution taken should vary with the danger of the legalized act. There was evidence that it was the custom to have some one on the platform at the station to prevent people from crossing the line when there was danger. In fact, there had been a man kept for that purpose, and it was only after the accidental death of one of the servants at the station that he had been taken off, the company choosing to work the station short-handed. After the accident to Mr. Stapley, a man was placed at the gates. The 225th by-law shews the view taken by the company of their

statutory duty. *Fawcett v. the York and North Midland Railway Company* (16 Q.B. Rep. 610; s. c. 20 Law J. Rep. (N.S.) Q.B. 222) confirms this view. There a railway company was held bound to make compensation for the loss of two horses which had strayed on to a high road and through an open gate on the railway where they had been killed, although the only statutory duty on the part of the company was to keep the gate closed so as to prevent horses and cattle "passing along the road" from getting on to the railway. Then, again, the engine-driver ought to have whistled. There was evidence that he did not whistle because it was not the custom to do so. It is no answer to say that the deceased would have heard the noise of the train if he had not been deaf, for all people whether young, thoughtless, old, decrepit or deaf, are entitled to protection.

[POLLOCK, C.B.—But a lame or deaf man ought not to place himself in a position of danger without making extra use of his eyes. This however cannot be a question of law; it is a question for a jury.]

But the company took no precautions. The plaintiffs are not bound to rely on any one particular piece of negligence, with respect to any one precaution which they say ought to have been adopted. It is sufficient for them to shew that the company did nothing at all to prevent accident.

[POLLOCK, C.B.—Has not the doctrine laid down in *The King v. Pease* (4 B. & Ad. 30) been qualified?]

It has been observed on, but not qualified. It was upheld in the case of *Vaughan v. the Taff Vale Railway Company*¹ where the common law obligations of a railway company were much considered. Although the judgment in the Exchequer was reversed in the Exchequer Chamber, and it was decided that there was no negligence on the part of the company, yet, as stated by Willes, J., there was no difference in opinion in point of law between the Court of Exchequer Chamber and the Court below, and the judgments in both Courts support my argument.

[POLLOCK, C.B.—The precautions to be taken by the company must be continually increasing, for they are bound to use the latest improvements, whether it be in making their line or fishing the rails, or muffling the chimneys of their engines.]

Everything which is reasonable and practicable must be tried if it tends to the protection of human life. The recent case of *Bilbee v. the London, Brighton and South Coast Railway Company* (18 Com. B. Rep. N.S. 584; s. c. 34 Law J. Rep. (N.S.) C.P. 182) is strongly in the plaintiffs' favour, and the circumstances there were very similar to those in this case. The Court of Common Pleas there held, that there was evidence to go to the jury of negligence on the part of the railway company. [The case of *Marfell v. the South Wales Railway Company* (8 Com. B. Rep. N.S. 525; s. c. 29 Law J. Rep. (N.S.) C.P. 315) was also referred to.]

Bovill, Denman and *Hannen* supported the rule.—The only duty by law cast upon the defendants is their statutory duty.² The plaintiffs cannot point out any particular thing which they can say has been neglected. The fact that the gate was open is no evidence of negligence; and as the gates on the south side were closed the deceased ought to have been led to conclude that a train was expected instead of the reverse. There was no evidence that the company's servants had left the gate open, but only that it was partially open. These gates were never intended for the use of foot-passengers. The drivers of the

(1) 3 Hurl. & N. 743; s. c. 28 Law J. Rep. (N.S.) Exch. 41; and in the Exchequer Chamber 5 Hurl. & N. 679; s. c. 29 Law J. Rep. (N.S.) Exch. 247.

(2) The statutory regulations concerning gates at level crossings are contained in 2 & 3 Vict. c. 45. s. 1, 5 & 6 Vict. c. 55 s. 9 and 8 & 9 Vict. c. 20. s. 47. They enact that the gates shall be kept shut across the roadway, except when opened for the purpose of allowing horses, cattle, carts and carriages to cross the railway. They apply to gates across the carriage-way only, and make no mention of wicket-gates for persons on foot. By 8 & 9 Vict. c. 20. s. 48, it is enacted that where a railway crosses a *turnpike road* on a level near a station, trains shall not pass over them at a greater rate of speed than four miles an hour.

engines were not in the habit of whistling when they approached the station, because the trains could be seen from the station for at least 600 yards. The company were not bound to have a man at every gate. The man who came on to the platform shouted to the deceased, but he did not hear him. A gate-keeper could have done no more. But the main defence to the action is, that there was contributory negligence on the part of the deceased—*Wilkinson v. Farrie* (1 Hurl. & C. 633; s. c. 32 Law J. Rep. (N.S.) Exch. 73). The remark made by Erle, C.J., in *Cotton v. Wood* (8 Com. B. Rep. N.S. 568; s. c. 29 Law J. Rep. (N.S.) C.P. 333), that it is as much the duty of foot passengers to look out for carriages as of drivers to look out for foot passengers, applies more strongly to railways than to ordinary roads. *Bolch v. Smith* (7 Hurl. & N. 736; s. c. 31 Law J. Rep. (N.S.) Exch. 201) and *Cornman v. the Eastern Counties Railway Company* (4 Ibid. 781; s. c. 29 Law J. Rep. (N.S.) Exch. 94) are also in point.

The Court reserved their judgment till the argument in the case of *Stubley v. the London and North-Western Railway Company* (35 L. J. Ex. p. 3) should have been heard; and on the 25th of November judgment was delivered by—

CHANNELL, B.—The application on the part of the company for a new trial in this case was made, first, on the ground that the verdict was against the weight of evidence, and that the deceased by his own want of care contributed to the accident; and, secondly, on the ground of misdirection, in that the Lord Chief Baron ought to have directed a verdict for the defendant. The rule having been granted, the case came on for argument before the Lord Chief Baron, my Brother Pigott, and myself. My Brother Bramwell was not present, and therefore takes no part in the judgment of the Court. The Lord Chief Baron, my Brother Pigott and myself are of opinion that the rule should be discharged. When the argument closed we took some time to consider, there being another case in the paper which in some respects resembled this.

Upon the points that the verdict was against the weight of evidence, and that the plaintiff by his own negligence contributed to the cause of the accident, the Court entertained no doubt that, if there was any evidence of negligence on the defendants' part, the verdict ought not to be disturbed. But it was strongly argued that there was no evidence that ought to have been left to the jury, and that the Lord Chief Baron ought to have withdrawn the case from their consideration. We are not of that opinion. The case is that the deceased was run down by an express train at the Portslade station, and that the station was, as is very ordinarily the case, at a point where the railway intersected a public carriageway and a public footway. For any other purposes than the present case, I do not make a distinction between a footway and a carriageway, the latter involving the former. The railway crosses the carriageway on a level. On each side of the railway were gates across the carriageway, and it did not appear that these gates were kept fastened or locked. The deceased arrived at the station four minutes after the train was due; and he was crossing the railway at this place in a direct line, making rather towards the station. It was objected that he brought the accident on himself by his own negligence; that he was deaf, and that had he taken more care than a person in the possession of all his faculties would have been bound to do, perhaps the accident would not have happened. That is not, however, in our opinion, a ground for disturbing the verdict as against evidence. It appeared, further, that one of the carriage gates had been opened. It had been seen closed about half an hour before the train came up, but it was open at the time. By the side of the carriage gates on either side of the railway was a swing gate or turnstile, which served for foot passengers who might want to cross the railway at a time when no carriages were about to cross, and when, therefore, the carriage gates might be properly shut. It did not appear who opened the gate, or how it came to be open, nor did it appear exactly whether the deceased came through the open carriage gate, or whether he came through the turnstile. It was argued that any obligation which there might be by statute, or by the rules

of the company, to have the gates kept shut, was for the protection of persons with cattle or carriages; and that neither the statute nor the rules had any application to the case of a foot passenger, who was bound to take care of himself. Now the 225th of the printed rules provides that the gate shall only be opened when no train is due or in sight. The gateman was not there. The gate was open. The train was due four minutes before the accident happened. The obligation imposed upon the defendants' servants was that they should keep the gate shut when the train was overdue and not allow carriages and passengers to cross. The view that the Court takes of this case is, that if the carriage gate was left open through the negligence of the company, and there was an implied invitation to cross held out to foot passengers, there was an act of negligence which was properly put before the jury.

The principle on which we desire to act is that laid down in *Bilbee v. the London, Brighton and South Coast Railway* (18 Com. B. Rep. N.S. 584; s. c. 34 Law J. Rep. (N.S.) C.P. 182), that although it is the duty of the Court not to impose on railway companies burthens larger than the legislature intended them to bear, and they may not be bound to place men at every gate along the line, yet it may be a duty incumbent on them to do so where there is an immense amount of traffic, or where there are other circumstances which require it. We are of opinion, that upon the whole case there was evidence which the Lord Chief Baron could not properly have withheld from the consideration of the jury, and we think we ought not to interfere with the verdict at which they have arrived.

POLLOCK, C.B.—I entirely concur in what has been said by my Brother Channell, as to his opinion of the question, and I wish merely to add that I ruled at the trial that I could not withdraw from the jury a piece of negligence on the part of the company with reference to the gates opening and shutting upon the carriageway. It seemed to be admitted that if this had been a case, not of a foot passenger, but of a carriage or vehicle which was endeavouring to cross, there would have been a just ground of complaint. But it was urged that the deceased was a foot passenger. The rules and regulations required that at the time of the passing of a train there should be a man at the gate. There was not a man at the gate. The reason of that was that a man had not been appointed specially for that purpose, and that in the absence of the station master, the same person performed the office of station master and gateman. The deceased coming to the spot, looking around him, and seeing no man attending the gate would conclude that no train was due; it was said that he was still bound to look about him, and not to expose himself to peril, but if there was that which amounted to a general direction to everybody, that no train was expected because, by the regulations of the company, if a train had been expected, a man ought to have been there, it cannot be fairly said that the railway company had been guilty of no negligence *quoad* the gates, and that that circumstance may not have deceived the deceased. I own I am not dissatisfied at the result at which the Court has arrived.

Rule discharged.

[IN THE COURT OF EXCHEQUER.]

Nov. 23, 24, 25, 1865.

SMITH AND ANOTHER v. RIDGWAY.

35 L. J. Ex. 11; L. R. 1 Ex. 46; 4 H. & C. 37; 13 L. T. 561; 14 W. R. 207 (Ex.): affirmed, [1866] E. R. A.; 35 L. J. Ex. 198; L. R. 1 Ex. 331; 4 H. & C. 577; 14 L. T. 632; 14 W. R. 868; 12 Jur. N.S. 742 (Ex. Ch.).

Referred to, *Cuthbert v. Robinson*, [1882] E. R. A.; 51 L. J. Ch. 238; 46 L. T. 57; 30 W. R. 366 (Ch. D.); *King v. King*, 1885, 13 L. R. Ir. 531 (V.C.). See *Seal v. Taylor*, [1894] E. R. A.; 63 L. J. Ch. 275; [1894] 1 Ch. 316; 70 L. T. 329 (C. A.).

Will, Construction of—Appurtenances—Description.

WILL.—*A testator was possessed of buildings used for the manufacture of earthenware, situated partly on the west side and partly on the east side of a street. Originally the buildings on the two sides had formed separate manufactories, but for very many years they had been used together, and occupied by the same tenants, and it would have been necessary to build a chimney and do other repairs to the buildings on the east side, in order to render them available as a separate manufactory. The value of the buildings on the east side was about half that of those on the west. The testator, by a codicil to his will, devised his manufactory on the west side of the street, describing it as in the occupation of A. and B, with the outbuildings and appurtenances thereto belonging, to certain devisees. The buildings on the east side were not specifically mentioned either in the will or codicil, but there was in the will a general devise of all the real property to trustees for sale:—Held, that the buildings on the east side, although at the time forming part of the manufactory in the occupation of A. and B, did not pass under the words of the devise in the codicil, as appurtenant to the manufactory on the west side.*

Declaration.—For that Joseph Mayer, since deceased, being seised in fee of and in a certain manufactory, land, buildings and premises, and also of a certain other manufactory, land, buildings and premises, demised the same to Leonard James Abington and the defendant, as tenants, to wit, from year to year, at the rent of 10l. per week, payable weekly by the said Leonard James Abington and the defendant to the said Joseph Mayer for the same; and that the said Leonard James Abington and the defendant thereupon became, and were and continued tenants of the said several manufactories, lands, buildings and premises, upon the terms and at the rent aforesaid; and Joseph Mayer afterwards and during the said tenancy, to wit, on the 28th of June, 1860, died, having, by his last will and testament, devised the first-mentioned manufactory, land, buildings and premises to the plaintiffs and the said Leonard James Abington, so being such tenant as aforesaid, and their heirs in fee; and the defendant and the said Leonard James Abington then, under and by virtue of the said demise and the said will, and not otherwise, continued tenants to the plaintiffs in respect of, that is to say, two undivided third parts of the first-mentioned manufactory, land, buildings and premises, and so continued until and at the time of the accruing of the rent hereinafter mentioned, to wit, on the 1st of June, 1865, when a large sum of money, to wit, the sum of 266l. 13s. 4d., became and was due and owing to the plaintiffs for and in respect of, to wit, two-thirds of such portion of the rent aforesaid as ought to be apportioned to the plaintiffs as to the said first-mentioned manufactory, land, buildings and premises for, to wit, 102 weeks, which had elapsed since the death of the said Joseph Mayer, and before this suit, and whilst the plaintiffs were so seised as aforesaid. And the plaintiffs aver performance of all conditions precedent, and that all things have been done and happened, and that

all times have elapsed before this suit necessary and proper to entitle the plaintiffs to maintain this action for the breaches hereinafter in this count mentioned, yet the defendant did not nor would pay the said sum so due as aforesaid to the plaintiffs or any part thereof, but therein wholly made default, and the same is still wholly due, in arrear and unpaid.

Second count—For money payable for the use of messuages, buildings and lands of the plaintiffs, and for money found to be due, on accounts stated.

The pleas traversed all the material allegations in the first count of the declaration and averred payment of the sum claimed. To the money counts there were pleas of never indebted and payment.

The plaintiffs, by their particulars of demand, claimed four-sixths of the weekly rent of 3*l.* 6*s.* 8*d.*, payable by the defendant to the plaintiffs, as devisees under the will of Joseph Mayer, deceased, for the use and occupation by the defendant of the plaintiffs' four-sixths of the manufactory, consisting of five hovels, slip-kilns, workshop, warehouse, cellars, marl-banks and pools on the east side of High Street, in Hanley, in the parish of Stoke-upon-Trent, in the county of Stafford, in the occupation of the defendant for 102 weeks from the 11th of June, 1863, to the 28th of May, 1865, amounting to 226*l.* 13*s.* 4*d.*

It was proved at the trial, before Bramwell, B., at the Summer Assizes at Liverpool, that, in the year 1860, Joseph Mayer was the owner of buildings used for the manufacture of earthenware, situated partly on the west and partly on the east side of High Street, in the town of Hanley. They had been occupied since the year 1848 by the defendant and Leonard James Abington jointly, as tenants from year to year, under a verbal agreement, at an undivided rent of 520*l.* per annum, payable weekly.

Mayer, by his will, dated the 23rd of April, 1860, devised all his real estate to Leonard James Abington, Paul Smith and Thomas Goddard, their heirs, executors, administrators and assigns, upon trusts for sale. By a codicil, dated the 26th of June, 1860, after bequeathing various legacies, the testator devised certain tenements to Leonard James Abington and Abner Wedgwood absolutely, as tenants in common. The devise included "My messuages, cottages, manufactory and land on the west side of High Street, in Hanley aforesaid, in the occupation of Ridgway and Abington, and others; my messuage on the east side of High Street, in Hanley aforesaid, in the occupation of Mrs. Ridgway; my messuage on the east side of High Street in Hanley aforesaid, in the occupation of Mrs. Adams; and my five messuages or cottages at the corner of Broom Street, Hanley aforesaid, in the occupation of William Chesters and others, all which said messuages, lands, hereditaments and premises are situate in the parish of Stoke-upon-Trent aforesaid, together with the stables, warehouses, outbuildings, yards, gardens and all other rights, members and appurtenances to the said messuages or tenements, lands and hereditaments belonging or appertaining."

The testator died on the 28th of June, 1860. At that time Abington was with the defendant, his partner, in the occupation of the manufactory buildings on both sides of the street in Hanley. He was devisee under the codicil, as tenant in common, with Wedgwood, of the manufactory on the west side of High Street. He was also, according to the contention of the plaintiffs in this action, devisee in trust under the will jointly with the plaintiffs of all the lands and hereditaments not specifically devised by the codicil, including the manufactory buildings on the east side of the High Street.

The defendant refused to pay any rent to the plaintiffs, and the present action was brought to recover a portion of the whole rent payable by the defendant as being due in respect of the buildings on the east side. The principle on which the declaration was framed was, apparently, that the total rent payable by the defendant was to be apportioned to the west and east side buildings, and that, with respect to the latter, the plaintiffs were entitled to two-thirds of the rent, Abington's interest as occupier merging in his reversion as devisee.

Evidence was given for the plaintiffs at the trial that the value of the premises on the east side was about half that of those on the west side. The contention of the defendant was, that although the buildings on the east and west sides of the street had at one time formed distinct manufactories, yet for very many years they had been used as one; that the more important portions of the factory were on the west side, so much so, that the buildings on the east side could not be used separately as a manufactory; and that the testator, when he specifically devised his manufactory on the west side, describing it as in the occupation of Abington and Ridgway, must be taken to have intended to include in that description the buildings on the east side, which, therefore, would be taken out of the general devise in the will to the plaintiffs and Abington as trustees for sale.

The plaintiffs maintained that the chief deficiency of the buildings on the east side consisted in the absence of a slip-house, which, during the period of the joint occupation of the two premises had been suffered to go to decay, the slip-house on the west side being found sufficient for both buildings. They proved, moreover, that the buildings on the east side could be put into working order by repairing the slip-house and building a new chimney.

It was also objected on the part of the defendant that Abington ought to have been joined as a co-plaintiff.

The only question left to the jury was the relative value of the premises on the east and west sides of the street, and a verdict was entered for the plaintiffs for the amount of rent assessed by the jury, the points of law being reserved. A rule *nisi* having been obtained to enter a non-suit, on the ground that the property in question did not vest in the plaintiffs under the will and codicil of the testator, and that they were not entitled to maintain the action,—

Milward and Baylis shewed cause (Nov. 23, 24).—By a slight alteration the buildings on the east side could be made into a separate manufactory; and being in value one-third of the combined value of the east and west buildings, it cannot be said that they can pass as appurtenant to the other buildings. The appurtenances mentioned in the codicil are those to the messuages and tenements, and not those to the manufactory on the west side. This is a question of parcel or no parcel, and should have been left to the jury if the defendants wished to insist upon it. The only question left to the jury was as to the apportionment of the rent.

W. H. Terrell and Quain supported the rule.—The word “appurtenances” is a most flexible word, and will in a will carry everything used or enjoyed, or usually occupied, with the principal subject of demise—*Ongley v. Chambers* (1 Bing. 483). *Boocher v. Samford* (Cro. Eliz. 113) is precisely similar to this case. There a devise of a “tenement with the appurtenances in which H. B. dwelleth in Ebley,” was held to include lands not in Ebley, which for sixty years had been used with the tenement, and were in the occupation of H. B. With respect to description by words pointing to the tenant or occupier, the cases have gone so far that a devise of Blackacre, in the possession of A, will pass Whiteacre, in the possession of A, if an intention that it should pass can be made out. The question of parcel or no parcel is a mixed question of law and fact, and if the question should have been left to the jury in this case, the plaintiffs should have suggested it, as it lay on the plaintiffs to shew that the premises passed to them under the general devise in the will. It was shewn that the occupation of the east was essential to the proper enjoyment of the west. The words, “now in the occupation of Abington and Ridgway,” were applicable to both buildings, and the words “on the west side,” &c. are mere false demonstration. The case of *Goodtitle v. Southern* (1 M. & S. 299) is similar to this. *Griffith v. Penson* (9 Jur. N.S. 385) and *Webber v. Stanley* (16 Com. B. Rep. N.S. 698; s. c. 33 Law J. Rep. (N.S.) C.P. 217) are also authorities in the defendant’s favour. Again, the plaintiffs ought to have been nonsuited because of the non-joinder of Abington as a co-plaintiff.—[The case of *Badeley v. Vigurs* (4 El. & B. 71; s. c. 23 Law J. Rep. (N.S.) Q.B. 377) was,

however, referred to as deciding this point in the plaintiff's favour, and no further argument took place upon it.]

Cur. adv. vult.

The judgment of the Court¹ was delivered on the 25th of November by—

POLLOCK, C.B.—In this case the question was on the construction of a will. The testator had a manufactory on the west side and another on the east side of a street. They were two distinct manufactories and were capable of being occupied separately and used separately, but for many years past they had been occupied by the same tenant, who had suffered a chimney to go to decay, so that the smaller manufactory, on the east side, could not be used as a manufactory without being put into a state of repair by constructing a new chimney, or in some other way doing repairs. The manufactory on the east side was of about half the value of the manufactory on the west side, and the testator devised the manufactory on the west side to the claimants, together with all the appurtenances, saying nothing about land occupied with it. There was no necessary connexion between the two sets of buildings, nor was there any such actual connexion between them as there was in the case cited, where land had been purchased and used for a long series of years with the subject of the devise. We are of opinion that this is not a question of parcel or no parcel, but a pure question of construction. Nothing passed under what may be called the body or substance of the devise in the codicil, except the manufactory on the west side of the street, and we think that the manufactory which was situated on the east side cannot be considered to pass as appurtenant to it.

The verdict for the plaintiff must, therefore, stand. The point was reserved, and the parties have an opportunity of appealing, if necessary.

Rule discharged.

[IN THE COURT OF EXCHEQUER.]

Nov. 15, Dec. 5, 1865.

JOHNSON v. BARRATT.

35 L. J. Ex. 15; 4 H. & C. 16; L. R. 1 Ex. 65; 13 L. T. 597; 14 W. R. 194;
11 Jur. N.S. 1028.

Principle applied, *Poole v. Willats*, [1869] E. R. A.; 38 L. J. Q.B. 255; L. R. 4 Q.B. 630; 20 L. T. 1006; 17 W. R. 1009 (Q.B.).

Debtor and Creditor—Deed of Assignment and Composition—Debtor continuing in Possession—Release—Bankruptcy Act, 1861, section 129, condition 7.

BANKRUPTCY.—By a deed expressed to be made between the defendant of the first part, E. G., on behalf and with the assent of the creditors of the defendant parties thereto, of the second part, and the several persons, &c. "who are creditors of the defendant," of the third part, the defendant covenanted with E. G. and all his said creditors to pay a composition of 5s. in the pound, by two instalments, and assigned all his estate and effects unto the said E. G., with a proviso that until default should be made in payment of the instalments, the defendant should hold and enjoy the estate and effects thereby assigned, and deal with the same without interruption from the said E. G. or any of the creditors; and with another proviso that the said E. G. might at

(1) Pollock, C.B., Martin, B., Channell, B. and Pigott, B.

any time enter on the defendant's premises and take an inventory of his effects. There was a further proviso, that in case of default in paying the instalments, the estate should be administered as if the defendant had been adjudicated a bankrupt. In consideration of this the creditors released the defendant from all debts, &c.:—Held, that it was no valid objection to this deed that while it professed to assign all the debtor's effects to the trustee, it at the same time provided for the debtor remaining in possession of his property and dealing with it as he liked. For the 7th condition of the 192nd section does not mean that the debtor's property must be given up; but that if there is property to be given up, it must be given up according to the deed in order that the non-assenting creditors may be bound.

Held, also, that the deed was not bad for not reserving the claims against sureties, as it did not appear that there were sureties; or for the release being in consideration of the debtor's covenant only; and that as the release was absolute, a plea setting up the deed was not bad for not averring a tender of the composition.

Declaration on the common *indebitatus* counts.

The plea, by way of equitable defence, set out a deed made, after the commencement of the action, between the defendant of the first part, Edward Wilson Genever, on behalf of and with the assent of the creditors of the defendant parties thereto, of the second part, and the several persons, companies and firms who were creditors of the defendant of the third part, whereby, after reciting that the defendant had proposed to pay to all his creditors, as well as those who should assent as those who should not assent to or execute the deed, a composition of 5s. in the pound, in satisfaction and discharge of their several debts, by two equal instalments of 2s. 6d. in the pound, in manner following, that is to say, 2s. 6d. in the pound upon or immediately after the date of the registration of the deed, and the remaining 2s. 6d. in the pound in three calendar months after the date of the said registration, the last of such said instalments to be secured by the promissory note of the defendant and of Henry Barratt, bearing date on the day of the registration as aforesaid, and also by the covenant and assignment of the defendant thereafter contained; *it was witnessed* that the defendant thereby, for himself, his executors and administrators, covenanted with the said Edward Wilson Genever, and to and with all his said creditors, and their and each of their executors, administrators and assigns, that he, the defendant, his executors and administrators, should and would pay to all his said creditors, as well as those who should assent as those who should not assent to or execute the deed, a composition of 5s. in the pound upon their several and respective debts, in the proportions, times and in manner thereafter mentioned, that is to say; 2s. 6d. in the pound upon or immediately after the day of the date of the registration of the deed, and the remaining 2s. 6d. in the pound at the expiration of three calendar months from the time of such registration; the last of such said instalments to be secured by the promissory note of the defendant and of the said Henry Barratt, bearing date and to be delivered to the said creditors on the day of the registration; and *it was further witnessed* that, for the further and better securing the payment of the said composition of 5s. in the pound as aforesaid, he, the defendant, thereby conveyed and assigned all his estate and effects, both real and personal, of whatsoever nature or kind and wheresoever situate, which then were or thereafter during the continuance of the said deed might come into his possession or to which he might become entitled, whether in possession or reversion, remainder or expectancy, unto the said Edward Wilson Genever absolutely; *provided, nevertheless, that until default should be made in payment of the said composition or either of the instalments, in pursuance of the covenant of the defendant hereinbefore contained, it should be lawful for the defendant, his executors, administrators and assigns to hold and peaceably enjoy the real and personal estate and effects*

thereby conveyed and assigned, or intended so to be, and to use and deal with the same and also to carry on his trade as a tailor and draper without any interruption or disturbance of or from the said E. W. Genever, or by any of his creditors; and it was also agreed and declared that an inventory of all the estate and effects of which the defendant might be possessed at the time of the execution of the deed should be taken by the said E. W. Genever and kept by him, and that the said E. W. Genever should at any time during the continuance of the deed be at liberty to enter into and upon the dwelling-house and premises of the defendant, wherein the said estate and effects might be or be found, to view and compare the same with the said inventory, and to ascertain the decrease or otherwise of such estate and effects, and to report thereon to the creditors, notwithstanding defaults may not have been made in payment of either of the said instalments; but in case default should be made in payment of the said composition or either of the said instalments to either or any of his said creditors, according to the covenant of the defendant, it should be lawful for the said E. W. Genever, his executors, administrators and assigns, to apply and administer all the said estate and effects of the defendant for the benefit of the creditors in like manner as if the defendant had been duly adjudged bankrupt; and it was also witnessed, that in consideration of the said covenant and assignment, the said several and respective creditors of the defendant, by themselves, or by their agents or attornies, thereby for themselves severally and respectively, and for their several and respective heirs, executors and administrators, and their several and respective partner and partners, and not one of them for the acts and deeds of the other or others of them, but each of them for his own acts and his heirs, executors and administrators only, and for the acts and deeds of his partner or partners only, *acquitted, released and discharged the defendant*, his heirs, executors and administrators, from all debts due to the said creditors respectively, and from all actions and judgments, executions, claims and demands whatsoever in respect thereof.

The plea contained an averment of performance of all the conditions required by the 192nd section of the Bankruptcy Act, 1861, and alleged that the plaintiff was a creditor of the defendant in respect of the claim pleaded to within the meaning of the Bankruptcy Act, 1861, and that all conditions having been performed, and all things having happened necessary in in that behalf, the plaintiff became and was bound by the said deed as if he had been a party thereto and had duly executed the same. And that the defendant had always been ready and willing to pay the first instalment of 2s. 6d. in the pound on the amount of the plaintiff's debt and to give the plaintiff the promissory note of himself and the said Henry Barratt for the amount of the second of the said instalments, bearing date the day of the said registration and payable to the plaintiff three months after date, and that he now brought into court the sum of 5l. 18s. 6d., being the full amount of the said instalment, ready to be paid to the plaintiff; and before pleading this plea he tendered to the plaintiff the amount of the said instalment and the said promissory note:

Demurrer and joinder.

Macnamara, in support of the demurrer.—The deed is bad on several grounds. First, it is unreasonable, because it is altogether illusory, inasmuch as, while it purports to be an immediate assignment of all the debtor's property, it provides for the debtor remaining in possession of property until default in payment of the instalments (so that the security of the assignment comes practically to nothing), which is contrary to the 7th condition¹ in the 192nd section of the Bankruptcy Act, 1861. No doubt it may be said that no *cessio bonorum* is necessary—*Clapham v. Atkinson* (34 Law J. Rep. (N.S.) Q.B. 49); but that was the case of a mere deed of composition, and there was there no

(1) This condition is as follows: "Immediately on the execution of the deed by the debtor, possession of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees."

property comprised in the deed. If the debtor was to have such a power as this deed gives him over his goods, the deed should have been one of inspection, or a mere composition-deed; but when, as here, the deed comprises property, and is a deed of assignment as well as of composition, the trustees cannot evade the statute, which means that *bonâ fide* and real possession and control are to be given up by the debtor. A colourable possession is no compliance with the statute. *Secondly*, the deed contains an absolute release without any reservation as against sureties, and it need not appear that there are sureties—*Balden v. Pell* (33 Ibid. 200) and *Woods v. Foote* (32 Ibid. Exch. 199). In *Keyes v. Elkins* (34 Ibid. Q.B. 25), where the deed contained a proviso that the release should not prevent any creditor suing any person other than the debtor, liable to the payment of any security, Crompton, J. said, "It is almost necessary that a deed of this kind must contain a clause reserving the rights against sureties;" and Mellor, J. said, that "if the remedies against sureties be not preserved, I cannot see how, with any degree of fairness, the majority who have claims on the debtor alone, could bind the minority who have also claims against the sureties." *Thirdly*, the release is in consideration merely of the debtor's covenant; and it is unreasonable that a creditor should release absolutely, without anything in return but a covenant by the debtor to pay, his trustees not entering into any agreement. In deeds hitherto before the Court (as in *Fessard v. Mugnier* (33 Ibid. C.P. 125),) the release was conditional on the payment of the instalments. Either, therefore, the release here is unreasonable as being absolute, or it must be construed so as not to dispense with the obligation on the part of the debtor to tender the composition; and in the latter case there is a *fourth* objection to the plea, viz. that the composition has not been tendered according to the deed. There should have been an allegation that it was duly tendered on the day, instead of the averment that the defendant was always ready and willing, &c.—*Hazard v. Mare* (6 Hurl. & N. 434; s. c. 30 Law J. Rep. (N.S.) Exch. 97) and *Fessard v. Mugnier* (33 Ibid. C.P. 125). It makes no difference that the plea is pleaded as an equitable one, because relief would only be granted in equity on certain terms, and the plea must therefore be regarded as a legal plea.

Henry James, in support of the plea.—No *cessio bonorum* is necessary, and notwithstanding the 7th condition in the 192nd section of the act, the deed need not give up anything at all—*Clapham v. Atkinson* (34 Law J. Rep. (N.S.) Q.B. 49), so that the 7th condition is satisfied either without the deed at all in terms creating an assignment, or, if there be an assignment, by its being made in accordance with the deed. In either view the defendant is safe, because of his averment that everything has been done, &c. to render the deed binding on the plaintiff. In all these cases the reasonableness of the deed depends altogether on the absence of inequality between the assenting and the non-assenting creditors; and there is no inequality here. When once the debtor has assigned his property to the trustees, why should they not give it up to him if they think proper to do so? And if they may do so without any special provision in the deed to that effect, *à fortiori* they may do it when the creditors specially agree to it. Again, if the assignment be illusory on the face of the deed, treat it as a nullity, and then *Clapham v. Atkinson* (34 Law J. Rep. (N.S.) Q.B. 49) applies.—[He was not called upon to argue the other points.]

Macnamara, in reply.

BRAMWELL, B.—We are agreed on all but the first point, that our judgment should be for the defendant. As to there being no reservation as against sureties, it does not appear that there are any sureties; if there are, it should appear that such is the case. As to the release being unreasonable because absolute, it is for the creditors to determine that for themselves; there may be cases where such a release is advisable. The Court cannot say it is unreasonable in point of law. As to the point made on the absence of an allegation of

tender of the composition, the answer is, that the release is absolute, so that we are not concerned with the question.

CHANNELL, B.—We cannot supply facts to make the deed appear unreasonable—*e. g.* that there are sureties against whom no remedies are reserved. There is no inequality shewn here such as makes it unreasonable. Again, the release here is absolute, so that the point as to tender does not arise as it did in *Garrod v. Simpson* (34 Law J. Rep. (N.S.) Exch. 70), where there was no actual release in terms in the deed.

PIGOTT, B.—A deed may be unreasonable because it contains imprudent conditions; that is a matter for the creditors themselves to look to; or it may be unreasonable in point of law. In the latter sense I see nothing unreasonable in this deed; and the question as to the tender cannot arise, unless the release is conditional.

POLLOCK, C.B.—I concur with the rest of the Court in the opinion expressed on the points on which they have given judgment.

On the first point—*Cur. adv. vult.*

BRAMWELL, B. (Dec. 5) delivered the judgment of the Court on the remaining point.—The objection taken to the deed by the plaintiff (as to which we reserved our judgment) was, that although it assigned all the debtor's property and effects to a trustee, yet by the terms of the deed it permitted the debtor to continue in possession of the property until he made a default in payment of the stipulated composition of 5s. in the pound; and it was said this was in direct violation of the 7th condition of the 192nd section of the act, which requires that all the debtor's property should be given up to the trustee. We have come to the conclusion, that the deed is a good one, notwithstanding this objection. It manifestly must be so when it is remembered that there is no occasion to make an assignment of the debtor's property at all. Then, if the debtor's property need not be assigned, the consequence is that none need be given up; and it cannot be that the deed is bad, simply because it gives the creditors a benefit they would not have had if there had been no assignment at all. Therefore, we think the reasonable meaning of the 7th condition of the 192nd section of the act is, that if property is to be given up, then, to make the deed binding upon the non-assenting creditors, it shall be given up in the manner directed; in other words, the debtor shall, in order to have the benefit of the arrangement he has made, keep to that arrangement. Therefore, it seems to us that the objection to this deed is not a good one, and consequently our judgment is for the defendant.

Judgment for the defendant.

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Exchequer.)

July 10, 1865.

SUTTON v. THE GREAT WESTERN RAILWAY COMPANY; AND
SUTTON v. THE SOUTH-EASTERN RAILWAY COMPANY.*

35 L. J. Ch. 18; 3 H. & C. 800; 13 L. T. 221; 13 W. R. 1091; 11 Jur. N.S. 879:
affirmed, [1869] E. R. A.; 38 L. J. Ex. 177; L. R. 4 H.L. 226;
18 W. R. 92 (H.L.).

Carriers by Railway—Packed Parcels—Charging different Persons different Rates for Carriage—Action—Evidence.

CARRIERS.—*The plaintiff, a carrier, was in the habit of collecting small*

* *Coram* Cockburn, C.J., Erle, C.J., Blackburn, J., Byles, J., Keating, J., Mellor, J. and Shee, J.

parcels, putting them together in one large package, and sending them by the defendants' railway, declaring them to be packed parcels. The defendants charged different rates of carriage for different classes of goods, and charged highest for "packed parcels." The company made the plaintiff pay the packed parcel rate of charge. The plaintiff, finding that some other persons who sent packed parcels were charged for them at a less rate, sued the company, in an action for money received to his use, to recover the alleged excess. On the trial, after giving the above general evidence, the plaintiff proved that on a particular day he sent a specific parcel, for which he was charged the packed parcel rate. He also, gave evidence that certain firms were in the habit of sending packed parcels to a very large extent, and that they were not charged at the packed parcel rate, but at a lower rate for the carriage; and he shewed by a person conversant with the business of carriers, that the practice of sending packed parcels had been so general as to be notorious among carriers; and also that on the reference of an action against the company in 1849, evidence of the generality of the practice of sending packed parcels was given in the presence of the company's then solicitor and their traffic manager. The plaintiff further proved that the company required a declaration from him as to the description of his parcels; but asked for no such declaration, and received no such declaration from other firms:—Held, by the Court of Exchequer (Erle, C.J. dissentiente), on a bill of exceptions, that such evidence was admissible; and that there was evidence on which the jury might find that parcels had been carried by the defendants for other persons containing goods of a like description, and under like circumstances, at a less rate than such goods were carried by them for the plaintiff, and also on which they might find that the defendants knowingly and purposely charged the plaintiff at a higher rate than other persons.

Held, also, that as no exception had been taken to the form of the action, the jury, if they believed that the defendants had knowingly and purposely charged the plaintiff at a higher rate than other persons upon a packed parcel of goods, ought to find a verdict for him.

SUTTON v. THE GREAT WESTERN RAILWAY COMPANY.

In this case error was brought by the defendants, the railway company, on a bill of exceptions, to reverse the judgment of the Court of Exchequer in favour of the plaintiff.

The action was for money received by the defendants to the use of the plaintiff, and on accounts stated.

The plea, except as to 50l., was Never indebted. On this the issue was joined.

The 50l. were paid into court, and accepted by the plaintiff in satisfaction of so much of his claim.

The case was tried, before Martin, B., in London, on the 16th of July, 1864. The plaintiff proved that he was a carrier; that his principal place of business was in Aldersgate Street; that he also had places of business at Bath, Gloucester, Bristol, and other places in the west of England, at all of which he had agents; that his principal business was to collect parcels from the wholesale houses, and to pack them together in one package, box or hamper; that he addressed the package to his country agents, and sent it, containing the parcels so packed, to be conveyed by the defendants' railway to his agents; that his agents, upon receiving such package so packed, took the same to their offices, and unpacked and distributed the several inclosed parcels to the various individuals to whom they were addressed; that the defendants did not know, and had nothing to do with the parties by whom, or to whom the inclosed parcels were addressed; that the plaintiff always did the carriage of the goods to the station; that the defendants had nothing to do with the receipt of the parcels in London, or their delivery at their places of consignment, but merely received the package, box, or hamper from the plaintiff at their station in London, and

delivered the same entire to his agent to whom it was addressed; and that the plaintiff always paid the defendants for the carriage of the packages, and that his packages were sent by the luggage trains.

The plaintiff further proved that the defendants supplied him with printed forms of declaration for the description of the package and contents of the goods sent, with other particulars. On this form was the following notice:

"All parcels of goods and packages, the contents of which are not properly declared by the senders, will be charged with the highest class; and all such parcels of goods and packages, not exceeding 500 lb. in weight, will be considered as each containing different kinds of articles, and each such parcel of goods and package will accordingly be subject to the regulations relating to 'smalls,' and charged for accordingly."

The plaintiff further proved that when he sent any package containing several parcels of different kinds of goods, he entered the description of it in the declaration as "packed"; that his carman always took such form of declaration as to the nature of the goods so filled up, together with the goods, to the defendants' station, and left it with the defendants, who inserted the weight of the package and the amount to be paid.

The plaintiff further proved that the defendants were in the habit of charging for the carriage of goods according to the nature and description of the goods as classified in the tariff set out below.

Rates from London on Goods and Parcels above 1 cwt., and under 500 lb., by Luggage Trains.

	1.	2.	3.	4.	5.	Class—Packed Parcels.
	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>
Bath	21 8	26 8	32 6	37 6	42 6	42 6 and 50 per cent.
Bristol	22 6	27 6	35 0	40 0	45 0	45 0 and 50 per cent.
Exeter	30 0	35 0	40 0	50 0	70 0	70 0 and 50 per cent.
Swansea	33 4	36 8	46 8	51 8	86 8	86 8 and 50 per cent.

Rates from London on Goods and Parcels under 1 cwt.

	28	56	112
	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>
Bath	1 0	1 0	1 8
Bristol	—	1 3	2 6
Exeter	—	1 0	1 3
Swansea	1 6	2 0	2 6

Packed Parcels the above and 50 per cent.

The plaintiff further proved that, in the course of the business above described, on the 21st of December, 1861, he sent a hamper, containing various parcels, by the defendants' railway, from London to Bath, which was declared to be packed, and weighed 4 cwt. 1 qr. 20 lb.; that the defendant charged the plaintiff, and that he paid the sum of 14*s.* 2*d.* for the carriage of the above-mentioned hamper, being at the rate expressed in the tariff on packed parcels, viz., 42*s.* 6*d.* per ton and 50 per cent. added, and that the contents of the hamper were drapery and books. The plaintiff further proved that the other parcels sent by him by the defendants' railway to the places mentioned in the

tariff, were charged in like manner at the rates set down for packed parcels in the tariff, and such charges were paid by the plaintiff under protest.

The plaintiff did not know the actual contents of any of the packages which he received; but from the business carried on by the parties who delivered them to him, and from the appearance of the packages themselves, he inferred, and the fact was, that the greater part of the goods were drapery goods. It was the plaintiff's habit to put indifferently into one packed parcel all or any of the packages which he received which were addressed to the same town and were of a suitable weight.

The plaintiff, to maintain the affirmation of the issue, called one Gailbard, who proved that he had for many years been manager in the service of a firm, Messrs. Morley & Co., of Wood Street, London, wholesale hosiers and general warehousemen; and the plaintiff then proposed to put to the witness the question,—“Have Messrs. Morley been in the habit of packing or inclosing packages of various descriptions of goods in one large package or hamper?” Whereupon the counsel for the defendants interposed and insisted that the question was inadmissible and irrelevant; but it was held admissible and relevant, and thereupon exception was made to that ruling. The witness then answered the question in the affirmative, and stated that he knew that such packages were made up and sent to Bath and all the large towns; that Messrs. Morley not only sent in one package parcels of various consignees in their due course of business, but also parcels from other tradesmen in London for the same consignees, and occasionally for more than one consignee in the same town; that Messrs. Morley also received inclosures for other tradesmen in London packed in the same way and distributed there; that Messrs. Morley were not paid for inclosing or distributing the parcels, and that the defendants' charges for carriage were the same whether there were inclosures in the parcel or not.

The witness stated, in cross-examination, that Messrs. Morley did not declare the contents of their packages on delivering them to the defendants, and that the defendants never asked the contents; that it was impossible to tell, from the outside of the package, whether they were packed or not; that Messrs. Morley daily sent in their own packages parcels belonging to other houses, sometimes a hundred a day, and produced a book in which they daily entered such parcels sent by them containing many thousands of such entries.

The plaintiff further called as a witness J. Copeland, who, subject to a similar exception, proved that he was in the habit of taking packages of the Messrs. Morley to the defendants' receiving offices in London; that the defendants' clerk then used to ask him what they contained; that he used to declare all goods belonging to Messrs. Morley as drapery; that drapery was the name for those parcels that were packed; that no other question was asked; that there was nothing on the outside by which it could be discovered whether a parcel was packed or not; that Messrs. Morley were always charged for their packages at the fourth-class rate, being the rate appropriated to drapery goods, and never the extra rate of 50 per cent. on any packed parcels; that the defendants were perfectly aware of the practice of Messrs. Morley's house as to packed parcels, and had been so for a long time; that they never charged him the packed parcel rate in his life, and that the plaintiff's packed parcels were exactly similar in appearance to the packages sent by the Messrs. Morley, and were packed alike, and that they sent many parcels by the plaintiff.

The plaintiff then called one Hill, superintendent of packages for Messrs. Copestake & Moore, drapers, in London. He stated that he had lived with them thirty years; that they were constantly in the habit of forwarding goods to the extent of 150 to 200 parcels daily; that they received parcels from different houses in the drapery and book trades; that if any one sent them a parcel they took it in; that the defendants sent their cart two or three times a day for the parcels; that this had been the practice ever since he had been in Messrs. Copestake's establishment; that the defendants had never complained of it;

that they did it now more than ever; that Messrs. Copestake put most of their parcels into boxes; that the defendants made no inquiries as to whose inclosures were in the boxes, and never complained of having to send inclosures in Messrs. Copestake's boxes. The witness produced vouchers from the defendants, from which it appeared that Messrs. Copestake were charged for their boxes of packed parcels from London to Bath 37s. 6d., being the fourth class in the tariff set forth above, and that the fourth-class rate was also charged them for their packed parcels to the other towns mentioned in the tariff.

The witness further proved that Messrs. Copestake received parcels from their customers in the country containing parcels from different individuals, and that the defendants made no difference in their charges whether the parcels were packed or not. On cross-examination, the witness stated that they also sent out packages not packed, and also received such packages; that the defendants could not tell from the outside whether a package was packed or not; that they sent out from 700 to 1000 packages a day, and that from 50 to 100 of them were packed parcels.

The plaintiff also called one Stanley, who stated that he was in the employ of Messrs. Pawson & Co., of St. Paul's Churchyard, wholesale warehousemen, and had been in their house twenty-five years, and twenty years their manager; that they received parcels hourly to send into the country, 500 to 600 a week; that their practice was the same as had been stated by the previous witnesses, and that they sent all and everything that came, except glass or combustibles, and that they were never charged extra rates for packed parcels. On cross-examination, he stated that no one looking at the packages would know whether they were packed parcels or not.

The plaintiff further called one Goodfellow, who stated that he had been in the employ of Messrs. Morrison, Dillon & Co., of Fore Street, in their packing department, for twenty-eight years, and ever since he had been with them they had sent packed parcels by the defendants' railway a thousand a month.

The plaintiff then tendered evidence that in 1849 certain witnesses gave, in the presence of the then solicitor of the defendants, and of their traffic manager, similar evidence to that above mentioned, of the practice of houses in London packing parcels and sending them by the defendants' railway. After objection by the defendants' counsel that this evidence was inadmissible, it was held that it was good and admissible, and exceptions were made to that ruling.

Thereupon the plaintiff called a witness who proved, that on an arbitration of an action by one Parker, a carrier, against the defendants, evidence of many witnesses was given of similar sending of packed parcels by the defendants' railway, and that no extra charges were made for such packages by the defendants.

The plaintiff then called one Lavington, who had been a carrier and carrier's agent for forty years, and counsel proposed to put to him the question—"Has the practice of packing parcels been notorious during the whole time of your being in business?" After objection by the defendants' counsel that this question was inadmissible, and that it should not be put or answered, it was held and ruled that the question was admissible and the same was allowed to be put; and the said witness then proved that the practice of packing parcels had been for the last forty years notorious among carriers, and the counsel for the defendants then excepted to the said evidence as inadmissible and irrelevant.

The defendants offered no evidence.

The learned Judge (Martin, B.) thereupon directed the jury that the several matters so produced and given in evidence on the part of the plaintiff were evidence upon which they might find that parcels had been carried by the defendants for other persons containing goods of a like description, and under like circumstances, at a less rate than such goods were carried by them for the plaintiff, and also upon which they might find that the defendants knowingly and purposely charged the plaintiff more than other persons; and that if the

jury believed that the defendants knowingly and purposely charged the plaintiff more than other persons upon a packed parcel of goods they ought to find a verdict for the plaintiff on the issue aforesaid. Whereupon the counsel for the defendants made their exceptions to the said direction, and further contended that the learned Judge ought to have directed the jury that there was no evidence that parcels were carried by the defendants for other persons containing goods of a like description, and under like circumstances, at a less rate than such goods were carried by them for the plaintiff, and that there was no evidence of the specific contents of any of the plaintiff's parcels from which the jury ought to infer a specific inequality upon any parcels between the rate charged to the plaintiff and to other persons; and that there was no evidence that the defendants knowingly or wilfully charged the plaintiffs more than other persons; and that the learned Judge ought also to have directed the jury that the defendants were at liberty to demand for parcels not exceeding 500 lb. in weight any prices they might think fit, and that there was no sufficient evidence before the jury on which they could find a verdict for the plaintiff. But the learned Judge then refused to alter his said ruling and direction so given as aforesaid, and with the direction aforesaid left the case to the jury; whereupon the jury found their verdict for the plaintiff on the circumstances aforesaid.

The case was argued (May 17 and 18)—

Karslake (*Field and Raymond* with him), for the plaintiffs in error, the defendants below.—The ruling and direction of the learned Judge are wrong and cannot be supported. The facts of this case are different from those in *Bazendale v. the Great Western Railway Company*¹ which were pressed against the company. By the statute, 5 & 6 Will. 4. c. vii. ss. 167, 175, the defendants were empowered to make reasonable charges for the carriage of goods and passengers, and by section 171. to fix such sums to be charged in respect of small parcels not exceeding 500 lb. weight as to them should seem proper. Section 175. provides for charging the same rate per ton per mile equally, and prohibits raising or reducing the charge in favour of or against any particular person. The statute, 2 Vict. c. xxvii. contains a similar enactment respecting equality of charges. The most important statute is the 7 & 8 Vict. c. iii. s. 50, which provides that the company, when acting as carriers, may charge such sum (not exceeding the sums, if any, limited by the recited acts), and that either per ton, or per mile, or by bulk, measure, number or admeasurement, or by fixed charges, as they shall think expedient, "provided always, that in whatever way the said charges are made, they shall be made equally to all passengers and to all persons in respect of all animals and of all goods, wares, merchandise, articles, matters and things of a like description and quantity, and conveyed in or propelled by a like carriage or engine, passing only over the same portion of and over the same distance along the said railways, or either of them, and under the like circumstances, and no reduction or advance in any of such charges shall be made partially, either directly or indirectly, in favour of or against any particular company or person." The statute, 10 & 11 Vict. c. cxxvi. s. 53, enacts, that "for the carriage of small parcels (that is to say, parcels not exceeding 500 lb. weight each), the company may demand any sum which they think fit, provided always, that articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal and the like, shall not be deemed small parcels; but such terms shall apply only to single parcels in separate packages." Under this last enactment the company are empowered to charge what sum they please for the carriage of small parcels, unless they are affected by the equality clause of the statute 7 & 8 Vict. c. iii. s. 50, which prohibits the company from charging the plaintiff more than other persons for the carriage of goods of a like description and quantity under the like circumstances. There is no evidence whatever in the case that the company have so acted. There is no proof offered that

⁽¹⁾ 11 Com. B. Rep. N.S. 1; s. c. 32 Law J. Rep. (N.S.) C.P. 225: affirmed in error, 16 Com. B. Rep. N.S. 137; s. c. 33 Law J. Rep. (N.S.) C.P. 197.

any parcel of the plaintiff's, for which the packet parcel price was charged, was of a like description with any parcel of any other person for which a less price was charged. Certainly, the goods were not sent under the like circumstances; the plaintiff invariably declared his to be packed parcels, the drapers either declared theirs as drapery or made no declaration at all. Again, there is no proof that the company knowingly made a different charge on the plaintiff from that imposed on other persons. The company would probably have charged all persons as for packed parcels had they been able to prove the fact; but they had no means of ascertaining whether the parcels sent by the great drapers' houses were packed parcels, though they might suspect it. The evidence of the course pursued by the drapers was therefore inadmissible. The company could not refuse to accept a parcel. Further, the evidence of the proceedings in 1849 was inadmissible. It has no bearing on the course of things nearly twenty years afterwards. Even if the plaintiff has been charged less in proportion than some two or three other persons, that would give him no right of action. It may be, as far as the case finds, that all the public but three or four persons are charged as the plaintiff is charged—*Crouch v. the Great Northern Railway Company*.² *Garton v. the Bristol and Exeter Railway Company* (1 Best & S. 113; s. c. 30 Law J. Rep. (N.S.) Q.B. 273) shews that no action for money had and received will lie in such a case as the present.

J. Brown (*Marshall Griffith* with him), for the defendant in error, the plaintiff below.—The ruling and direction is perfectly right on all the points. The case of *Bazendale v. the Great Western Railway Company*¹ decides the principle that the equality clause applies to the charging of small parcels. The question is in all cases whether the carrier has been charged more than others. If he has, an action lies; and as was stated in *Parker v. the Great Western Railway Company* (7 M. & G. 243; s. c. 13 Law J. Rep. (N.S.) C.P. 105: see another action, 11 Com. B. Rep. 545; s. c. 21 Law J. Rep. (N.S.) C.P. 57), and in *Piddington v. the South-Eastern Railway Company* (5 Com. B. Rep. N.S. 111; s. c. 27 Law J. Rep. (N.S.) C.P. 295), he may recover the exaction in an action for money had and received. Even if a doubt can exist as to the proper form of action, there is no exception touching that point. The equality clause of statute 7 & 8 Vict. applies here. The plaintiff's parcels for which the larger charge has been imposed are of the like description with those of the drapers' houses for which a lower rate of carriage is asked. Both classes of parcels are of the like description as packed parcels; both are delivered under the like circumstances—*Edwards v. the Great Western Railway Company* (11 Com. B. Rep. 588; s. c. 21 Law J. Rep. (N.S.) C.P. 72). The facts of this case are similar to those in *Garton v. the Bristol and Exeter Railway Company* (4 Hurl. & N. 33; s. c. 28 Law J. Rep. (N.S.) Exch. 169). In order to shew that the defendants made these different charges knowingly and wilfully, it was necessary to prove the practice of sending packed parcels, and that it was notorious that it was actually done to an immense extent; and that the company asked no questions and took no steps to prevent it, and made no charge as for packed parcels, except in the case of the carriers whose profit they wanted to obtain for themselves. The proof of the proceeding in 1849 was admissible in order to shew directly that the company knew of the practice, and as they have since taken no steps to prevent it, the inference may fairly be drawn that they knowingly permit it, in the case of all persons, except carriers.

Karslake replied.

[SUTTON v. THE SOUTH-EASTERN RAILWAY COMPANY.]

This was a writ of error by the railway company, on a bill of exceptions, in a similar action by the same plaintiff, raising similar points to those in the case of *Sutton v. the Great Western Railway Company*.

(2) 9 Exch. Rep. 556; s. c. 23 Law J. Rep. (N.S.) Exch. 148: see another action, 11 Exch. Rep. 742; s. c. 25 Law J. Rep. (N.S.) Exch. 137.

It was stated by counsel that the only difference between the two cases was that in this case the plaintiff had not declared his parcels to be packed parcels.

Field and *F. M. White* were for the plaintiffs in error, the railway company, the defendants below.

J. Brown and *Marshall Griffith*, for the defendant in error, the plaintiff below.

The case was not argued, for it was agreed that it should abide the decision of the case against the Great Western Railway.]

Cur adv. vult.

On the 10th of July the following judgment was delivered by—

ERLE, C.J.—I have the judgment of the Court on the one side and my judgment on the other, and I will read my own first.—In these two cases it appears by the record that the plaintiff employed the defendants as carrying carriers to carry for him on their respective railways packed parcels—a term which is hereafter explained. For each parcel he had been charged the price for the parcel and 50 per cent. extra on that price by the Great Western, and at the rate of 1*d.* per lb. by the South-Eastern, for packing. As between himself and the defendants, these charges were lawful and right; the plaintiff hired the service and had the benefit of it, and paid for it according to contract; but he brought his actions to recover back all that he had paid extra for packing, and he contended that those extra charges were rendered unlawful because the defendants had carried for other persons parcels containing inclosures which, as he alleged, were of like description, and delivered under like circumstances with his packed parcels, and had knowingly and purposely omitted to charge to those persons the extra charge for packing, and had so knowingly and purposely charged to the plaintiff a higher rate than they charged to other persons for goods of the like description and delivered under the like circumstances with his packed parcels.

The learned Judge ruled that the evidence adduced by the plaintiff in support of his affirmation was admissible, and was sufficient to authorize the jury to give their verdict for him, which was done. The defendants made the exceptions to these rulings which appear on the record, and which raise the question whether the verdict can stand according to law.

I am of opinion that it cannot for the following reasons: First, because the charge of 50 per cent. extra for packing is a parcel charge, under section 53. of the 10 & 11 Vict. c. cxxvi., authorizing charges for parcels at discretion, and is not within the operation of the 7 & 8 Vict. c. iii. s. 50, requiring equality of charge under certain conditions in respect of the charges authorized by that section, and therefore is not rendered unlawful by reason of the alleged inequality. Secondly, because there is no evidence that the defendants ever knowingly and purposely charged the plaintiff at a higher rate for any specific parcel than they charged to some other person for some parcel of a like description and quantity delivered under like circumstances; and if there is no evidence that they ever did so in any specific instance, there is no evidence that they did so in a number of instances. Thirdly, because, if the charge for packing is assumed to be within the operation of the 7 & 8 Vict. c. iii. s. 50, there is no evidence that the conditions under which that section is made to operate have been fulfilled; that is to say, there is no evidence that a charge on the goods of the plaintiff of the like description and quantity with the goods of some other person was unequal to the charge on such goods of that other person in respect of the same carriage. Fourthly, because, if the same assumption be made as lastly mentioned, there is no evidence that such conditions have been fulfilled, that is to say, there is no evidence that the goods of the plaintiff were delivered under like circumstances with the goods of any of the other persons referred to for comparison by the witnesses. Fifthly, because no action lies to recover back part of a charge for carriage lawful in itself, by reason that the same

service of carriage has been done for some other person at a lower charge. Sixthly, because inadmissible evidence was admitted, and there was a misdirection thereon.

Before considering these several reasons in their order, with the statutes and evidence relative to them, I would premise some observations on the nature of railway receipts, and in particular, of receipts on account of the carriage of parcels. The law relating to this matter has been so administered as to take away a large portion of their earnings from the companies who earned them, and to grant it to others. The notion that railway companies have a monopoly, and that the evil of this supposed monopoly is mitigated by taking away their earnings and granting them to carriers who had used, or might have used, horse-power, seems to me to underlie this administration. The portion of earnings which has been the main subject of this litigation has been that derived from the carriage of parcels; and the question now before this Court practically is, whether the railway companies shall be allowed by law to keep any share of that portion.

I assume, as a general principle, that the earnings of labour and capital belong to the capitalists and labourers who earn them. The earnings of railway companies depend on demand and supply. Demand for locomotion by steam superseded horses, and induced capitalists to subscribe capital and supply steam. It has been the demand of the public, not the supply of the companies, which is the cause of the transfer of carriage from horses to railways. The competition, which was at first limited by the amount of capital required, and by the necessity of resorting to parliament for a bill, has now become intense; and if this be not admitted, a question of fact is raised, which cannot be answered judicially. The series of cases resting on the imputation of monopoly were reviewed by me in the case of *Baxendale v. the Great Western Railway Company*,¹ to which case I refer for more detail.

As the amount at stake in the packed parcels question is large, and as the relation of the contending parties does not appear to have been quite understood, I repeat here a part of the remarks which I offered in *Baxendale v. the Great Western Railway Company*¹: "The nature of the business connected with the carriage of parcels may be described as follows: The company, as carriers, have to make the outlay required for the purpose of receiving, carrying and delivering all that may be consigned for each train; and this outlay includes interest on capital, and all the expense by which a train is moved. Profit begins only when the receipts exceed the outlay; and receipts are obtained by supplying the accommodation that is in demand. Receipts for tonnage rates depend on the weight of things classed as tonnage goods. Receipts for parcels depend mainly on the number of consignors, and very slightly on the weight of consignments. The tariff set out in *Branley v. the South-Eastern Railway Company* (12 Com. B. Rep. N.S. 63; s. c. 31 Law J. Rep. (N.S.) C.P. 286) exemplifies my meaning. The tariff for parcels there was: under 7 lb., 1s. 6d.; under 14 lb., 2s.; under 28 lb., 2s. 6d.; under 56 lb., 3s.; under 112 lb., 3s. 6d.; packed parcels, double the above amounts. Under this tariff, if two consignors of two parcels, each under 7 lb., consign at the company's office, the company receives 3s.; if they consign at the plaintiff's office, he receives 3s.; and if he ties the two together into one parcel, and consigns it to the company he pays 1s. 6d. to the company, and keeps 1s. 6d. for himself. If the parcels are of the same value, the interceptors will have had added double to the weight and the risk, and taken away half of the pay due to the company according to the tariff. By skilful aggregation, they may increase the weight and the risk to a very great extent, and diminish the pay to the company to a proportionate extent, and keep for themselves the difference between what the company so receives and what is due according to the tariff."

The facts now before the Court confirm the suggestions which were so offered. It appears by them that the plaintiff offers to carry parcels at a lower rate than the companies charge, and when his prices are known, according

to ordinary principles, he will intercept all the parcels in respect of which his prices are lower than those of the company. The outlay of the Great Western before a train can start may be measured by millions of pounds for fixed capital, by hundreds of thousands for rolling stock, and by thousands per diem for expenses. There must be receipts enough to indemnify the expense before profit begins. The whole of the service for which the consignor, consigning through the plaintiff, pays money to him, namely, the transport of his parcel from station to station, is done by the Great Western; and although it is confessedly the most lucrative part of their business, yet the gain which they are entitled to under their tariff is taken away from them and given to the intercepting carrier, who has not moved the parcel on the rail one inch, and who may not have invested more capital than the price of a cart, in which he may receive parcels for interception.

Moreover, the railway companies are met by constant checks if they endeavour to get consignments to themselves direct; whereas the interceptors are at perfect liberty either to undersell the companies, or to give favours to consignors, or to obtain custom by any means that rivalry can suggest.

The companies have made various attempts to save some portion of this profit to themselves. In *Pickford v. the Grand Junction Railway Company* (10 Mee. & W. 399) the attempt was to charge the carrier the parcel price for each parcel in the package; but as the law did not allow the package to be opened for examination, nor compel an answer to questions, this attempt failed. Another attempt of the Grand Junction Railway Company was to charge 1d. per pound, which was there held unreasonable, but seems to be clearly reasonable, and is now adopted by the South-Eastern, as appears on this record, and is perhaps the best redress now practicable. Another attempt was, to charge 50 per cent. on the packed parcel, in addition to the price of a common parcel, which is the course pursued by the Great Western Railway Company now under judgment. This redress they were held to be deprived of in *Parker's case* (11 Com. B. Rep. 545; s. c. 21 Law J. Rep. (N.S.) C.P. 57), because they had not done something which it was supposed they ought to have done, whereby they might detect the parcels which have inclosures, and might make the proprietors of such inclosures, when detected, pay the extra price on packed parcels. The attempt of the present defendants so to keep a share of the parcel profit by charging for packed parcels extra is now resisted, on the ground last above mentioned. This is the matter for adjudication, in relation to which these exceptions raise, for the first time, as matter of law, the questions arising on these records.

I come now to the construction of the statutes on which the trial proceeded. The legal right to charge either 50 per cent. extra, or 1d. per pound, not being now in dispute, the objection is, that the right is subject to the condition contained in what has been called the "equality clause," in the 7 & 8 Vict. c. iii. s. 50, and that the condition of equality imposed thereby has not been fulfilled. This objection makes the understanding of that statute necessary; and I proceed to inquire what is the true construction of it.

The 7 & 8 Vict. c. iii. s. 48. repeals the sections of two former acts, under which a power of making charges was given, subject to equality clauses, namely, the 5 & 6 Will. 4. c. cvii. s. 175, which commanded equality of charge, provided the articles were of a like *description*, and forbade any reduction or advance partially upon any *kind* of article (thus raising a doubt whether "description" and "kind" had the same meaning—see *Parker v. the Great Western Railway Company* (11 Com. B. Rep. 545; s. c. 21 Law J. Rep. (N.S.) C.P. 57), and also the 2 Vict. c. xxvii. s. 24, which commanded equality of charge, provided the articles were of a like description.

The 7 & 8 Vict. c. iii. s. 50. gives the power of charging for carriage of goods other than parcel goods, under which the company now acts. It enacts that it shall be lawful for the company, acting as carriers of goods or things, to charge for carriage either per ton or per mile, or by bulk, number or

admeasurement, or by fixed charges, as they shall think expedient. This is the enacting clause; and it is made subject to a proviso for equality, which proviso has no other effect than that of restraining this enacting clause. The words are, " Provided always, that in whatever way the said charges are made, that is, whether per ton or per mile, or by bulk, number or admeasurement, or by fixed charges, they shall be made equally to all persons: first, in respect of all goods and things of a like description and quantity; secondly, conveyed by a like carriage; thirdly, passing along the same distance; and, fourthly, delivered under like circumstances, and no reduction or advance of any of such charges shall be made partially, either directly or indirectly, in favour of or against any particular person." The 7 & 8 Vict. c. iii. s. 50. thus commands equality of charges provided, *inter alia*, the articles of a like description and quantity. The addition of " quantity " and " description " in the amended clause throws light on the construction of " description." The facts relied on to establish that there has been the inequality forbidden by the statute must shew that the goods in the two consignments are not only of a like description, but also of a like quantity. The effect of the section, then, is this: When the company use the power created thereby for charging for the carriage of goods, they break the condition on which that power is granted, if it is proved, first, that they have carried two consignments of goods from two persons respectively; secondly, that the goods consigned by each were of like description and quantity; thirdly, that they were carried the same distance, by a like engine; and, fourthly, that they were delivered under like circumstances. The case, at the trial, and the exceptions, relate only to the second and fourth conditions, and I pass by the part of the section relating to reduction and advance made partially, because it is irrelevant to these exceptions.

In construing this section, with reference to this case, I have to say what is the meaning of the word " description." When are the goods in two consignments of like description? when are they delivered under like circumstances? In my opinion the word " description " means a quantity of matter inherent in the goods to be ascertained by the senses, according to which the consignment is to be placed in a class, such as the mineral, the provision, or the drapery class. The quantity means number, weight or measure, also to be ascertained by the senses. Where the charge depends on description and quantity at the tonnage rate, ownership of goods is no element of charge. But carriers have always had two rates of charge: the tonnage rate and the parcel rate, as above explained. The legislature intended that railway companies should also have the same two rates of charges, and has constantly enacted that the company should have a discretionary power in charging for parcels; and, notably, as regards the Great Western, the 10 & 11 Vict. c. cxxvi. s. 53. enacted, that the company may demand any sum they may think fit for packages not exceeding 5 cwt. notwithstanding the rates for other articles.

As ownership of the goods is not cognizable by the senses of any examiner of the goods themselves, the right of the company to enforce payment on account of separate ownership has been constantly evaded, by two or more consignors combining for that purpose; and if they willed to deceive, detection was difficult. It was for this, among other reasons, that the legislature gave discretionary power to the company to charge for parcels as they should think fit. In the exercise of this discretion, I do not say that they would be justified in reducing or advancing charges partially in favour of or against any particular person. No such point arises here. When that shall be the alleged cause of action, and the evidence shall raise the question of the motive for the unequal charge, whether it was done out of partiality to a customer, or in the lawful protection of their own rights, the decision will turn on different considerations than those which are to govern in deciding on the exceptions now before us, relating first to likeness of description and quantity, and, secondly, to likeness of circumstances of delivery.

Upon this bill of exceptions it is very material to distinguish charges under

the 50th section of the 7 & 8 Vict. c. iii, subject to a condition, from parcel charges, under the 10 & 11 Vict. c. ccxxvi. s. 58, whereby alone the extra charge for packing is made lawful, and which extra charge is not within that section authorizing charges to be made per ton or per mile, or by bulk, number, measure or fixed charge, and cannot be brought within the condition for equality of charge, in the 50th section, in respect of goods of like description and quantity. The parcel charge is in part, and may be entirely, irrespective both of the description of the goods and of their quantity.

The tariffs of all the railway companies charge for parcels under 1 cwt., without any reference whatever to the description of the goods contained in the parcel, and with very small reference to the weight of it. Above 1 cwt. and under 5 cwt. the parcel charge of the Great Western Railway on the first four classes of goods is compounded of separate ownership, description and quantity. Still, though the charge between 1 and 5 cwt. is thus compounded, it is clearly made under the 10 & 11 Vict. c. ccxxvi. for parcels, and not under the 7 & 8 Vict. c. iii. for tonnage. It is certain that the company have the same discretional power in respect of parcels over 1 cwt. as over parcels under 1 cwt., and might fix the charge either entirely on separate ownership, or on a compound of that with other elements of charge.

The charge on goods placed in the fifth class by reason of defect in the declaration made by the consignor, and the charge on goods called "packed parcels" by the Great Western, and "parcels tied together" or "packed in lump" by the South-Eastern, depend on the act of the consignor, either in omitting to declare, or in packing the goods. This charge depends in no degree on the charging per ton, or per mile, or in bulk, &c., nor on the description and quantity of the goods themselves.

The tariff making a charge either for packing or for improper declaration of description, cannot truly be said to create a "description" of goods to which the proviso in the 50th section (for equality) can be applied, both because the proviso only limits the charge authorized by that enactment, and the charge for parcels is not authorized thereby, and because the proviso against inequality can only be applied where the two consignments compared for inequality have all the four conditions above explained; and the notion that every parcel charged for packing becomes of a like description with every other parcel so charged is not sound; but the notion that it also becomes of like quantity for that reason, though one parcel may be 4 cwt. and the other 40 lb., is still more unfounded. The 50th section, limiting the power of charging by the proviso for equality, was intended to be so worded as to protect the company from vexation on account of vague suggestions of equality, and it has, therefore, defined the four conditions under which alone any apparent inequality in amount can be truly said to be an inequality contrary to the proviso.

The intention of the railway company to secure a portion of the parcel profit would be effected if the tariff was thus expressed: "Consignors who pack or lump parcels together, contrary to the regulations relating to parcels, will be charged either for the number of parcels combined, at the parcel rate for each, or, if the number is not known, then at either 1d. per pound or at 50 per cent. extra on the price of a single parcel at the option of the company."

These three forms of charging have existed as above mentioned. It seems to me wrong to say that such a tariff creates a description of goods, in respect of which description the company is bound to charge equally for goods of the like description and quantity. There may be two packages containing the same description and quantity of goods, say 2 cwt. of drapery parcels, and yet the charge may be unequal lawfully, if the consignor of one should not make and the other should make a proper declaration, or if the consignor of one should and the other should not pack smaller parcels of drapery, belonging to different owners, in one great parcel.

This mode of charging extra is in truth an attempted remedy against the evasion of the payment of the lawful charge for each separate consignment.

It is a remedy which the legislature intended to place at the discretion of the company when it granted to them discretionary power to charge for parcels, and this remedy they ought to be allowed to use at their discretion for the *bona fide* protection of their lawful interest.

The intention of the legislature to secure this remedy to the companies is further apparent in the 50th section, which does not command equality of charge unless the goods be delivered under the like circumstances. The likeness of the set of circumstances attending on two deliveries of two parcels depends on the circumstances of the conduct of the consignor in delivering, material for the interest of the carrier. If one consignor does not declare properly or makes inclosures to evade payment, and another consignor delivers without either of these circumstances, the two consignors have not delivered under like circumstances.

These considerations are entitled to more weight, if the vast difference to the interest of the company between a packed parcel of a professional interceptor, containing, perhaps, a hundred smaller parcels of all descriptions of goods, and a package with one inclosure for a neighbour, is considered. If it be a principle of law that goods in all inclosing parcels are necessarily of a like description and quantity with the goods in all packed parcels, and delivered under like circumstances, this principle must be carried out without respect of persons, and it is wrong to say that an inclosing parcel from a wholesale house carries with it any different legal incidents from the inclosing parcel of a single individual; and yet to me it seems unreasonable to hold that the packed parcel of the carriers and the package inclosing things for two neighbours are of like description and delivered under like circumstances in relation to the carrier's interest, within the statute, and that the railway company forfeit their right to charge extra for the packed parcel, unless they charge also for the inclosure. I think that it would be wrong so to hold.

Furthermore, as to two such deliveries being under like circumstances, I say that the company are to be the sole Judges whether the circumstances materially differ in their effect on their interest as carriers; and if they judge *bona fide* that the circumstances differ, and there is reason for that judgment, the circumstances are not like. The railway company ought not to be compelled to detect and notice the package of things of a trifling nature and charge a few pence extra, upon pain, in case of failure so to do, to forfeit parcel profits, amounting, it may be, to thousands of pounds, to intercepting carriers who do as they like in this respect.

In this discussion of the effect of the two statutes, 7 & 8 Vict. c. iii, and 10 & 11 Vict. c. ccxxvi, I have brought forward all the arguments on which I rely to maintain my first point, namely, that the charge of 50 per cent. extra for packing is lawful under the 10 & 11 Vict. c. ccxxvi. s. 53, authorizing a discretionary charge for parcels, and is not within the 7 & 8 Vict. c. iii. s. 50, requiring equality of charge under certain conditions relating to the charges authorized by that section, and is not rendered unlawful by reason of the alleged inequality. If this point is good, there was no evidence of any cause of action, and the exception to the direction of the Judge must prevail.

The second question is, was there any evidence that the defendants ever in any specific instance knowingly and intentionally charged the plaintiff at a higher rate for his parcel than they charged to any other person for a parcel of a like description delivered under like circumstances? My answer is in the negative; and if it is assumed, while discussing this question, that the parcels of the wholesale houses containing inclosures are of the same description, and delivered under the like circumstances with the packed parcels of the plaintiff,—which I think I shall disprove,—still I say there was no evidence to support the verdict that the defendants knowingly and purposely made unequal charges contrary to the statute. The whole of the evidence consists of a general description of a course and practice of business running over many years, without a single instance of a comparison between a parcel of the

plaintiff with a parcel of any other person shewing an overcharge to have been made. There is no evidence that the defendants knew or had the means of knowing, in respect of any specific parcel, that it had an inclosure, and so was liable to extra charge. The plaintiff's demand against the Great Western was said to be 1,000*l.* paid for the extra charge for packing. The only specific instance in evidence is, on the 21st of December, 1861, of 14*s.* 2*d.* on a hamper, whereof about 2*s.* appeared to be charged for packing; and taking that for an average sample the plaintiff would have sent 10,000 packed parcels between that day and the commencement of the action to make up his 1,000*l.* I gather from the record that not one of these consignments was from the plaintiff of his own goods; but all were from consignors consigning through him to the railway for carriage thereon small parcels, which the plaintiff made into aggregates by hampers and the like, without knowing anything of their contents. Upon each of these parcels he calls on the defendants to refund the extra charge, though he knew their terms, and declared the packing, and had the service performed which he contracted for.

Then, what is the evidence that the defendants knowingly charged any other customer less than the plaintiff for a packed parcel?

Witnesses stated that the wholesale houses in general, and Morley's, Copestake's, Morrison's and Pawson's in particular, are in the habit of saving carriage for each other, and for other persons, by inclosing packages, when any two or more of them are sending from London to the same station. These firms are said to be of the highest respectability, and I therefore limit my language to saying that this is a wrong to the railway companies. The railway company charges for separate ownership, as above explained, that is, for the accommodation offered to each owner to carry his parcel for him at the time he requires; and the combination of two customers to represent a parcel as belonging to one owner, which really belongs to many, and so to get service without paying for it at the stipulated price, would be thought unfair, at least towards anybody but the railway companies. Against them it is done, and deposed to, and boasted of, seemingly, as a great accommodation.

The evidence shews that the parcels from Messrs. Morley's must be counted by hundreds of thousands per annum. Of these, some had inclosures, but in what proportion did not appear. The company, it was said, were aware of the practice and made no charge. But there is no evidence that the company ever were enabled to distinguish a parcel with inclosures from one without it. The assumption that the company had any knowledge within the meaning of the direction to the jury is unfounded. Also, the assumption that the company omitted inquiry which they lawfully might or, by law, ought to have made is, as I read the evidence, unfounded. I am aware that one of the witnesses from Morley's (Gaillard) said the company never asked a question; but the other (Copeland) said the clerk at the railway always asked what the goods were, and that he always declared them "drapery." No other witnesses that I notice speaks of inquiry either affirmatively or negatively; but the declaration must have been made either expressly or impliedly, because the charge of class must be according to declaration. The rest of the evidence is of the same description, except that the witness from Copestake's gave the important addition of stating the proportion of parcels with inclosures from other owners to parcels containing their own goods simply. He stated that the number of their parcels per diem was between 700 and 1,000, and that of these the proportion of parcels with inclosures was from 50 to 100. He also said that the company could not tell from the outside whether a parcel had an inclosure or not.

Each of these four houses appear to have sent from 50,000 to 100,000 consignments in a year; countless parcels were also proved to have been sent from other houses, of which some contained inclosures. The railway company knew of the practice, and there was no instance of their demanding payment for it. I think this is no evidence that the defendants ever knowingly charged

more for any specific parcel of the plaintiff's than for any specific parcel for any other person having an inclosure, because it was impossible to distinguish the parcels with inclosures from those that were without any; and the defendants are not allowed by law to take any effective steps for ascertaining which have inclosures and which have none. They may not open any package, and they have no right to compel an answer beyond requiring a declaration. It cannot be laid down, as matter of law, that they have a duty to inquire after inclosures or any other source of loss. If it is proposed, as a matter of prudence, that they should inquire, it seems to me to be not well founded. If they attempted to inquire, are they to make inquiries of the porters of all wholesale houses that offer parcels? If so, why not of other houses, and of everybody? Is the carman of the collecting clerk to inquire of the porter who delivers the parcels, or are the companies to search out witnesses to betray the packing carried on by their employers? None of these courses are, in my opinion, consistent with prudence, none are a practicable remedy; some would bring censure, each would cause loss.

The wholesale houses and the other witnesses avow, without compunction or misgiving, that they get as much carriage for as little money as can be managed. It may be that there are no means in the law to prevent this practice; but it is wrong to say that the companies knowingly charged less to Messrs. Morley and the three other houses than to the plaintiff, because, out of hundreds of thousands of parcels conveyed by them in a year, the company did not, by some unknown intuitive process, detect the 10,000 or 20,000 which had inclosures and make an extra charge thereon. No one has suggested any method by which the charge could have been put on any specific parcel. If the company stopped them, all their business would be ruined, and they would fail in numberless actions; and if they stopped some parcels by hazard, it would be culpable imprudence; and the omission to resort to such attempts is no evidence of what may be called the *scienter* in the overcharge.

The importance of requiring evidence of inequality in respect of specific parcels, and the danger of deception from relying on general evidence of habit and practice, is, to my mind, made more apparent from the direction to the jury. The direction was that there was evidence for the jury that parcels had been carried by the defendants for *other persons* containing goods of a like description and under like circumstances at a less rate than such goods were carried by them for the plaintiff, and that the defendants knowingly and purposely charged the plaintiff more than other persons, and, if they knowingly and purposely charged the plaintiff at a higher rate than *other persons* upon a *packed parcel* of goods, they should find for the plaintiff. I say that the liability to deception from dealing in generals is exemplified in this direction. The defendants know of the increasing prevalence of the practice of inclosing and packing, and that in every goods train there probably are hundreds of parcels with inclosures for which they have not made an extra charge, and that they have made an extra charge for all the packed parcels which were declared. In this way they have knowingly charged the plaintiff more than *other persons* for packed parcels. But, though they knowingly did this, they never knowingly made an unequal charge in respect of any specific parcels when they had the means of knowing which were packed. The parcels of the plaintiff are declared; the parcels of *others* are, some packed and some not; and the distinction is purposely concealed. The company cannot distinguish which are liable, and charge none, though they know that some ought to be charged if they found them out.

The jury, in answer to that direction, might take the parcels of the plaintiff to be parcels of one person, and the parcels of other persons, as a class, to be the parcels of another person, and might find that the defendants knew that among the parcels of the other persons some were packed and not charged. But in so doing, they do not find that the defendants knew of any specific parcel on which they could make the charge. Upon this examination of the evidence, I am of opinion that there was no evidence that the defendants know-

ingly made an unequal charge in respect of any specific parcels, and that the knowledge of the inequality in the general way, without knowledge of the specific parcels, was no knowledge of an unequal charge, and that the direction founded on that evidence was wrong.

The third question is, was there any evidence that a charge on goods of the plaintiff of a like description and quantity with the goods of some other person was unequal to the charge on such goods of that other person, in respect of the same carriage? My answer is in the negative. There is no attempt to shew a comparison between the description and quantity of the goods in the plaintiff's parcels, and of the goods in the parcels of the other persons referred to, further than a loose general suggestion that the prevailing commodity in the parcels of the wholesale houses was drapery, and that a majority of the parcels sent to the plaintiff by unknown persons, containing unknown goods, did contain a large proportion of drapery. The evidence of quantity is vague in the same degree. It is perhaps true that each party had to pay for weight according to the tariff, and that, if no extra charge had been made for packing, the charges would have been on an equal scale. In my opinion, the 7 & 8 Vict. c. iii. was intended, as above suggested, to protect the railway companies from liability in respect of vague suggestions of inequality of charge, and it therefore required that the party complaining should prove two specific packages of comparison, and should shew likeness of description of the goods in each, and in the quantity of goods, and that the charges were unequal. No such evidence was given. That which was given does not relate to the description or quantity of the goods, but shews that a charge was made for packing to the plaintiff, and was not made for inclosing to the other persons; and that the packing process is imagined to have a similarity to the inclosing process, and that imaginary similarity between the two processes is laid down to be evidence that the goods were of like description and quantity; it would not be more contrary to the statute to hold, that all goods covered with the same material for wrapper were therefore of a like description and quantity. I think, further, that there was evidence to shew that the extra charge which created the supposed inequality was a charge on the act of the consignor in packing, and was a charge entirely irrespective of the description and quantity of the goods packed, and was a charge which was lawful by the statute authorizing charge on parcels as above explained. If the construction of the statute above set forth is correct, the defendants had a right to charge for packing or lumping together, and were not bound to charge for inclosing provided that, in the exercise of a fair discretion for the purpose of protecting their lawful rights, they chose not to do so. I further say, that the question of partiality is not raised on this trial, but that the case proceeded on the allegation that the goods of the two parties were of like description and quantity, and that the charge for the same service was unequal.

The learned Judge assumed in his summing up, that every parcel with an inclosure is, by law, of a like description with a packed parcel. He assumed it to be law, that if two parcels have this quality in common, that each contained an inclosure, they were of like description. Probably he relied on the decision to that effect in the case of *Parker v. the Great Western Railway Company* (11 Com. B. Rep. 545; s. c. 21 Law J. Rep. (N.S.) C.P. 57). It was there decided that the intercepting carrier was not liable to the charge of 50 per cent. on account of packing; the case stating that the general practice of sending inclosures was known to the defendants, and that they had not taken any measures to prevent it or discover individual instances of it. The ground of the decision is given by Mr. Justice Maule, at page 571. "It seems," says that learned Judge, "unreasonable to say, that, if a man sends in one parcel goods belonging to A, B. and C, the company shall be permitted to charge more for the carriage than if the whole were carried for one person. The real object, no doubt, was, to overcharge the carrier, in order to absorb all the carrying business to themselves. They had no right to do this. They

are bound to do the same work at the same price for carriers as for other people." The reasoning so put forward has been adopted in subsequent cases in Courts of co-ordinate jurisdiction. In a Court of Error I am at liberty to deny its soundness, in so far as it is founded on the notion either that the company cannot lawfully charge more than a sum proportioned to the weight of the article and their labour in carrying it, or that they cannot charge more for many separate parcels than for one aggregate, the weights of the many and the one parcel being the same. Upon this point I have already fully explained my meaning.

The other reason assigned by the learned Judge for deciding against the company, namely, the imputation of a purpose to absorb all the carrying business to themselves, by overcharging carriers, seems to me equally unsatisfactory. It is, in a manner, certain, and the companies must do all the carrying, and, in that sense, must absorb all the carriage. But the carriage is not their object, unless they are to be paid for it. If truth were spoken, ought it not to have been said that the real object of the intercepting carrier is, to absorb so much of the earnings for carriage as he can intercept; and that the contest is, whether the companies should be allowed to keep the small portion of those earnings denoted by a charge of 50 per cent. on packed parcels?

The decisions adverted to were all pronounced when railway companies were a new institution, and their nature was not understood, and when they were regarded with much jealousy. They are now absolutely subjected to the control of the law more than any other company investing capital in trade for profit. If they kept their own earnings, their profits would go, first, in increasing accommodation, because in so doing they would probably increase their own profits; then in increasing dividends for themselves; and, lastly, in reducing fares. Such use would be better for the community than giving to others what is earned by the railways.

The decision in *Parker's case* (11 Com. B. Rep. 545; s. c. 21 Law J. Rep. (N.S.) C.P. 57) turned upon the particular facts stated in the special case, and did not relate to the meaning of "description" and "quantity" in the equality clause; and in this Court, I submit, it ought not to be followed.

For these reasons I am of opinion that there was no evidence that the parcels charged unequally contained goods of "a like description," and certainly none that the goods were of "like quantity," which is quite as material, if the statute has the meaning above attributed to it; and that the exception to the ruling on this point ought to prevail.

The fourth question is, whether there is any evidence that either of the parcels of the plaintiff was delivered under like circumstances with either of the parcels of the other persons referred to by the witnesses, and supposed by them to be overcharged? I think not. The circumstances must be like for carrying purposes. The difference of the circumstances of the two deliveries is, that the plaintiff's parcels were always declared to be packed; the parcels of the other consignors were never declared to be so. The plaintiff admits his liability to the charge. The other consignors intend to evade the charge, and do not disclose which of their parcels have inclosures and which have not. In the one case the charge of 2s. is offered; in the other case an attempt to enforce payment of it would probably lead to the loss of hundreds of pounds in litigation, and drive away consignments to the rival railways, or to the interceptors.

The question whether a delivery of a packed parcel by an intercepting carrier was under the "like circumstances" with a delivery of a parcel with inclosures, was before the Court of Common Pleas in *Edwards v. the Great Western Railway Company* (11 Com. B. Rep. 588; s. c. 21 Law J. Rep. (N.S.) C.P. 72), and decided in the affirmative; but it was decided by reference to the interest of the carrier in respect of the scale-bills there in evidence. The point whether the delivery of a parcel, with a declaration of its being packed, is not, under circumstances differing in a very important degree for carrying parcels from the delivery without any such declaration, was not before the Court, and was not there considered.

The remarks upon *Parker's case* (11 Com. B. Rep. 545; s. c. 21 Law J. Rep. (N.S.) C.P. 57), last above mentioned, are applicable to *The case of Edwards* (11 Com. B. Rep. 588; s. c. 21 Law J. Rep. (N.S.) C.P. 72), the assignee in his bankruptcy; and I refer to them, instead of repeating them. For these reasons, I submit, that there is no evidence for the jury that the circumstances of the delivery of any two parcels were like, within the statute; and none which authorized the direction to the jury thereon which was excepted to.

I think no action lies to recover back part of a charge for carriage lawful in itself, by reason that the same service of carriage has been done for some other person at a lower charge. If the plaintiff has received the service he contracted for, and has paid the contract price, and no more, he has no cause of action in respect of his contract, either in form *ex contractu* or *ex delicto*,—not on the contract, for it has been performed on both sides; not for the breach of duty towards himself, for every such duty has been fulfilled. If the plaintiff pays no more than is right, I cannot see how he is damnified because some stranger has paid less than was the right of the defendants, according to law. If the company chose to carry for nothing goods going to or from a national exhibition—as in 1851—other customers sending goods for their own purposes do not thereby acquire a right to have their goods carried for nothing. If the company chose to carry free all reporters going to a horse-race, as in *Harrison v. the Great Northern Railway Company* (10 Exch. Rep. 376; s. c. 23 Law J. Rep. (N.S.) Exch. 308), none of the passengers going by the same train would thereby acquire a right to the return of their fares, in whole or in part, by reason of this exemption of the reporters.

Before deciding that undercharge is an actionable wrong towards those who have paid the fair charge, the Court should be able to define when it occurs, in respect of what train, under what circumstances, and what is the form of action which is supposed to lie. It seems to me clear, that no action for money had and received could lie. The plaintiff has had the consideration according to contract. It is not money unlawfully exacted; for, at the time, it was lawfully demanded.

The decision in *Baxendale v. the Great Western Railway Company*¹ was on a different ground. There, the action was adjudged to lie for money paid for cartage, which the Court decided had not been performed for the plaintiff; it was, therefore, money paid on a consideration which had failed. This action is for an alleged breach of duty, in charging less to some other persons than to the plaintiff for services supposed to be rendered under the four conditions in the equality clause (7 & 8 Vict. c. iii. s. 50). It seems to me to have no analogy to a claim for money to be returned because the consideration has failed. It seems to me that there is no cause for action at all, without making allegations for which there is no foundation, such as an obstruction of the plaintiff's rights; and the Court, assuming to make an amendment in the pleadings, cannot assume any facts not in evidence, to create a cause of action to which the summing-up did not apply. The opinion of Mr. Justice Hill, Mr. Justice Crompton and Lord Chief Justice Cockburn, in *Garton v. the Bristol and Exeter Railway Company* (4 Hurl. & N. 33; s. c. 28 Law J. Rep. (N.S.) Exch. 169), is sound in law and in point to prove that no action will lie merely because some other customer has had the same service as the plaintiff, at a less price. The plaintiff is not overcharged because some stranger is undercharged; and this opinion is not overruled in *Baxendale v. the Great Western Railway Company*,¹ which is not relevant to the point, for the reason above mentioned. I think that evidence was admitted which was not admissible, assuming that the proper question was, whether the defendants had knowingly and purposely charged more to the plaintiff in respect of any of the parcels comprised within his complaint than they had charged to some other person for a parcel of like description and quantity, under like circumstances. The general practice of others, and knowledge of such general practice, was no evidence of knowledge in respect of any specific parcels, for the reasons before alleged. The reception of such evidence was the ground of exception; and I think that the evidence ought to

have been rejected, or that the jury ought to have been told that it was not sufficient for them to found their verdict on. Still less was the evidence of the practice in 1849, and also evidence of the notoriety of the practice among carriers, admissible, to shew knowledge in 1863 and 1864.

It is probably certain from the evidence that carriers have been deprived of their lawful charges, by packing, inclosing, and other such contrivances, as far back as carriers' memory can go, universally by the unscrupulous: but that is no evidence that they have charged unequally in any specific instance; and, unless there was evidence of an actionable overcharge in one instance, there was none to prove many. For these reasons, my judgment is for the appellants in each case.

It now devolves upon me to read the judgment of the rest of my Brethren. This is the judgment of my Brothers Blackburn, Byles, Keating, Mellor and Shee. The Lord Chief Justice has not signed it; but as it was sent to him, I take it he concurs in it.

In this case the questions we have to determine are raised on a bill of exceptions. The exceptions are four. The three first are exceptions to the reception of evidence; the last is an exception to the Judge's direction that there was evidence on which the jury might find "that parcels had been carried by the defendants for other persons, containing goods of a like description and under like circumstances, at a less rate than such goods were carried by them for the plaintiff; and also on which they find that the defendants knowingly and purposely charged the plaintiff more than other persons; and that if the jury believed that the defendants knowingly and purposely charged the plaintiff at a higher rate than other persons upon a packed parcel of goods they ought to find a verdict for the plaintiff on the issue aforesaid." The first part of this direction tells the jury what facts they might reasonably find from the evidence before them; the second part was a direction, in point of law, as to what their verdict should be if they found these facts.

The exception to the direction raises two questions; it being contended by the defendants' counsel, first, that the Judge ought to have directed the jury that there was no evidence on which they could reasonably find these facts; and, secondly, that he should have directed them, even if they found these facts proved, not to find for the plaintiff.

It will be convenient to consider the first branch of this exception, viz. that relating to the effect of the evidence admitted along with the specific exceptions to the reception of evidence, before considering the last branch of the exception, and for this purpose it is necessary to see what is the evidence appearing on the bill of exceptions. The plaintiff proved that he was a person pursuing the trade of collecting small parcels for the same place, putting them together in one large parcel, and sending that packed parcel containing inclosures by the railway. He also proved that the defendants published a tariff, which, so far as is material to the present case, is set out in the bill of exceptions. By this tariff parcels between 1 cwt. and 5 cwt. were divided into five classes, according to the kinds of goods which they contained, and charged at five different rates; but packed parcels were, according to this tariff, to be charged at the highest rate and 50 per cent. additional. It is to be observed that, according to this tariff, the charge on packed parcels is always to be the same, whatever be the nature of the contents of the inclosures; so that if a packed parcel contains several packages all of one kind which would be comprised in the first or lowest class, nevertheless the highest charge and 50 per cent. more is to be charged, and if it contains packages all of the fifth or highest class the charge is to be no more. The company hold forth to the public that they make one uniform charge on all packed parcels, that is to say, on all parcels the contents of which come within the description of inclosures. This is, in our view of the case, material in considering whether the evidence was such as to justify the Judge's direction as to what the jury might find. The plaintiff then proceeded to prove that his packed parcels were always charged according to the

profession of the company, as packed parcels at the highest rate with 50 per cent. added, and without any reference to the contents of the inclosures, which were generally unknown both to him and to the company, though their contents might be guessed at. The plaintiff then called witnesses for the purpose of proving that other persons sent packed parcels which were not charged at the same rate. The first exception is to the reception of this class of evidence; but the plaintiff could not prove what he alleged to be his cause of action in any other way, so that this exception to the reception of the evidence is merely a premature attempt to raise the objection that the facts, if proved, afforded no cause of action, which is afterwards properly raised by the last exception; the evidence of this class was, therefore, properly received. It amounted in effect to this: that four wholesale houses, Morley & Company, Copestake & Moore, Pawson, and Morrison & Dillon, who were in the habit of sending large quantities of their own goods by the defendants' railway, also habitually received inclosures for others, which they sent in packed parcels; that they did this daily and on a great scale, and without any disguise on their part; and that they were never charged according to the company's tariff as for packed parcels. No evidence was given that the company were ever directly informed that any one specific parcel was a packed parcel; but the evidence was, that no questions were ever asked by the company. No attempt was made by cross-examination or otherwise to shew that these wholesale houses deceived the company as to the contents of those packed parcels; indeed, one of the witnesses in the employment of Morley & Co. gave evidence "that the defendants were perfectly aware of the practice of Messrs. Morley's house as to packed parcels, and had been so for a long time, and that they had never charged him the packed parcels rate, and that the plaintiff's packed parcels were exactly similar in appearance to the packages sent by Messrs. Morley, and were packed alike;" and this evidence was not contradicted or explained away, but passed without cross-examination as an unqualified statement.

The next piece of evidence offered was to the effect, that at a reference in 1849 evidence was given, in the presence of the then solicitor and the then traffic-manager of the company, of the practice of wholesale houses in London to pack parcels in the way the witnesses proved that these four houses still did. It seems to us that this evidence was admissible for the purpose of proving notice to the company of the practice, and thus strengthening the inference, which the plaintiff asked the jury to draw, that the company abstained from asking questions of those four houses, not in ignorance that they sent packed parcels, but because they wished not to charge them at the same rate as the plaintiff. The traffic manager was the authorized agent of the company in all matters relating to the traffic, and his knowledge was that of the company. The facts were, it is true, brought to his notice in 1849, and the lapse of time diminished the weight of this evidence, but does not affect its admissibility. It seems to us that this evidence could not be rejected unless we were prepared to say that, supposing the wholesale houses and the defendants to pursue the same course since this trial that they did before, the proceedings in this trial would not be evidence tending to prove notice to the company subsequent to 1864, a proposition to which we cannot assent. We think, therefore, that this exception cannot be maintained.

The third exception is to the reception of evidence by a person conversant with the business of carriers, that the practice of sending packed parcels in the way described, had for many years, been so general as to be notorious amongst carriers. No objection is taken to the form of the question asked, which could easily have been altered; but it is contended that the substance of the answer is inadmissible. We do not think much weight ought to be given to such evidence, but we cannot agree that it is inadmissible: the fact that the practice had for many years been general and without disguise might properly be taken into account by the jury when considering whether from the absence of inquiry on the part of the company as to whether the parcels were packed, they would draw the plaintiff's inference that the company abstained from making inquiry

because they wished not to be affected with express notice, or the defendants' view that they really did not know. We think therefore this exception also cannot prevail.

Then comes the question whether the Judge was right in telling the jury that, taking the whole evidence together, it was such that they might find that parcels had been carried for other persons "containing goods of a like description and under like circumstances," at a less rate than that for the plaintiff; in other words, whether there was evidence that the defendants had, with respect to the plaintiff, acted contrary to the proviso in section 50. of the 7 & 8 Vict. c. iii. The objection stated on the record, and relied on in the argument, was, that there was no evidence of the specific nature of the contents of any of the plaintiff's packed parcels, and that in the absence of such evidence it could not be proved that they were of a like description and quantity with the contents of the packed parcels carried for the wholesale houses.

We quite agree that a case may exist in which the contents of the inclosures in packed parcels may be so different in their description as to justify a different rate of charge; but we do not think that any such case arose on the evidence in this case. The company by their tariff profess to charge all packed parcels at the same rate, whatever be the nature of their contents, that being the highest rate they charged, and the evidence shewed that they charged this rate on every packed parcel of the plaintiff's without inquiry as to its contents, and that they carried every packed parcel belonging to the wholesale houses at a rate lower than they professed to charge on all packed parcels, and also without any inquiry as to their contents. In brief, they state as one description of goods contained in a parcel "inclosures," without any reference to what the inclosures contain. Had there been anything in the specific nature of the contents occasioning this difference of charge, it might have been shewn by evidence. In the absence of such evidence, we think the jury might reasonably conclude that the difference in the charge was not on account of any difference in the description of the goods or their quantity, or the circumstances under which they were carried, but on account of a difference in the persons charged; in short, that it was within the meaning of the last lines of sect. 50. of the 7 & 8 Vict. c. iii, a reduction made directly or indirectly in favour of the wholesale houses and against the plaintiff who carries on a trade not favoured by railway companies. We think, therefore, that the Judge was right in saying that on the evidence the jury might find the facts as they did. The only remaining question is that raised by the second branch of the last exception, viz., whether the Judge was right in directing the jury, if they did so find the facts, to find the verdict for the plaintiff.

It is necessary here to observe what the exception is. It has always been required on a bill of exceptions that the exceptions should be tendered before the verdict is found, so that the Judge may have an opportunity to alter his direction, if he has inadvertently made a mistake, or the opposite party to supply any defect in the evidence, if they have overlooked something which they can supply on the defect being pointed out; and, therefore, on the argument in a Court of error, the Court is confined to the exception actually taken. The issue joined here is never indebted to a count for money had and received. Now, it was quite open to the defendants at the trial to submit that the form of the action was misconceived; but that objection, if taken and thought well founded, could have been cured by an amendment. It was not taken, as we learn, for that very reason; and it is not now open, on this record, to raise any objection, not actually taken, especially not one which could have been cured by an amendment. It was urged that there was a substantial difference between an action for money had and received and any special count that might have been framed, inasmuch as the rule as to the measure of the damages would not be identical; and though the jury might, and probably would, give the overcharge as the damages, that was not done; but the same answer applies. If any objection had been made at the trial as to the measure of the damages, a proper direction might have been given to the jury. No such objection appears on this bill of exceptions; and, indeed, we are left in complete ignorance, not

only as to what direction was given as to the damages, but as to what damages were assessed. The only point open on this exception is, whether, if the jury believed that the defendants knowingly and purposely charged the plaintiff at a higher rate than other persons upon a packed parcel, there was a cause of action established.

This is a question of considerable importance; but we cannot think it open in the Court of Exchequer Chamber.

There is nothing either illegal or immoral in the trade which the plaintiff pursues, though it necessarily makes him compete with the railway companies in one of the most lucrative branches of their business; neither is there anything either illegal or immoral in the railway companies desiring to obtain the whole of this lucrative business for themselves, so long as they do not infringe any law in the attempt to do so. And if the defendants were correct in their contention, that the legislature has given them unqualified power to charge what they pleased for parcels under 500 lb. weight, they might lawfully make use of that power for the purpose. But it has been decided by this Court in *Baxendale v. the Great Western Railway Company*¹ that their power to do so is subject to the equality clause; and it has been decided in the same case that if the equality clauses are infringed to the prejudice of a person pursuing the trade of this plaintiff, he may maintain an action for this infringement. The defendants, if so advised, may in the House of Lords question that case, and those on the authority of which it was decided. We, in the Exchequer Chamber, are bound by it; and, as we think, for the reasons already given, that the jury were justified in finding, as they have done, that the equality clause was infringed as against this plaintiff, we think that the verdict was properly directed to be for the plaintiff.

For these reasons, we think that the judgment ought to be affirmed.

[In *Sutton v. the South-Eastern Railway Company* it was admitted that, in substance, the case was the same as *Sutton v. the Great Western Railway Company*; and it was agreed that the judgment should, without argument, follow that in the other cases.]

In this case also, therefore, we think that the judgment should be affirmed.]

Judgment affirmed.

[IN THE COURT OF EXCHEQUER.]

Nov. 21, 1865.

SUTTON v. THE SOUTH-EASTERN RAILWAY COMPANY.

35 L. J. Ex. 38; L. R. 1 Ex. 32; 4 H. & C. 325; 13 L. T. 498; 14 W. R. 130;
11 Jur. N.S. 935.

Referred to, *London Association of Shipowners v. London and India Docks Committee*, [1893] E. R. A.; 62 L. J. Ch. 294; [1892] 3 Ch. 242; 67 L. T. 238 (C. A.).

Section 79 of the Common Law Procedure, Act 17 & 18 Vict. c. 125, was repealed by 46 & 47 Vict. c. 49. s. 3.

Carriers by Railway—Packed Parcels—Equality Clauses—Injunction—Repetition of Injury—17 & 18 Vict. c. 125. s. 79.

PRACTICE.—*The plaintiff was a carrier, and was in the habit of sending packed parcels by the defendants' railway. The defendants charged him for the carriage at a packed-parcels rate, which was considerably higher than the ordinary rate for parcels which were not packed. They carried packed parcels for*

other persons—who were not common carriers but were in the habit of making up packed parcels of their own goods and those of other persons, intended for the same places—at the ordinary or lower rate of charge, although it was notorious that such parcels were, in fact, packed, and although the practice had been brought to the defendants' knowledge. The plaintiff thereupon brought an action against the defendants to recover the overcharge which he had paid, and he succeeded in the action; and the ruling of the Judge at the trial that he was entitled to recover was upheld in the Exchequer Chamber. The defendants made no change in their system of charges, and the plaintiff commenced another action against the defendants, indorsing the writ with notice that he should apply for a writ of injunction. He accordingly moved for an injunction to restrain the defendants from charging him for the carriage of his goods otherwise than equally with all other persons, and at the same rate as all other goods of like description under the like circumstances:—Held, that as the plaintiff had an adequate remedy by action, and as there would be no appeal from the decision of the Court if an injunction were granted, and as an injunction might be applied for in a Court of Equity, or under the 17 & 18 Vict. c. 31. (the Railway and Canal Traffic Act), in the Court of Common Pleas, this Court would not grant the injunction, even if it had the power to do so.

And, *semble*, that the grievance complained of by the plaintiff was not a "repetition or continuance of a breach of contract or other injury," within the meaning of section 79. of the Common Law Procedure Act, 1854.

The plaintiff in this action was a carrier, and the same person who was plaintiff in the like actions of *Sutton v. the Great Western Railway Company* and *Sutton v. the South Eastern Railway Company*, a report of the argument and judgment on the bills of exception in which cases has already been given (35 L. J. Ex. 18).

It will sufficient to state here that the plaintiff was in the habit in the course of his business of sending packed parcels by those and other railways for the carriage of which he was charged, at the packed-parcel rate, considerably in excess of the rate charged for parcels which were not packed. Many wholesale houses in the drapery and other trades were notoriously in the habit of making up parcels of their own goods and those of any other persons who chose to send them, and sending the parcels so packed by rail to places in the country, declaring them as drapery, and paying the ordinary or lower rate. The plaintiff was aggrieved at this, and claimed to have his parcels carried at the lower rate. He accordingly brought the above-mentioned actions against the Great Western Railway Company and the South-Eastern Railway Company, to recover the overcharge as money had and received by those companies to his use. Bills of exception were tendered to the ruling of Martin, B. at the trials; and the evidence adduced, and the statutes governing the cases were stated in the judgments of the majority of the Court of Exchequer Chamber and the separate judgment of Erle, C.J.¹ The judgment of that Court was in favour of the plaintiff, but the defendants and other railway companies made no change in their practice, continuing to charge the plaintiff at the packed-parcel rate and the wholesale houses at the lower rate. The plaintiff thereupon commenced the present action to recover the overcharge in respect of certain goods sent by him on the defendants' railway, subsequently to the judgment in his favour; and he indorsed the writ with notice that he should apply for a writ of injunction under the Common Law Procedure Act, 1854.

Section 79. of that act is as follows: "In all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may, in like case and in like manner as hereinbefore provided with regard to *mandamus*, claim a writ of injunction against the repetition or continuance of such breach of contract, or other injury of a like kind

(1) The equality clauses of the defendants' acts are 2 Vict. c. xlii. s. 17. and 6 & 7 Vict. c. lii. s. 30.

arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages or other redress."

A rule *nisi* for an injunction was accordingly moved for and obtained on behalf of the plaintiff, and it was drawn up in the form of an injunction "to restrain the defendants from charging the plaintiff for the carriage of his goods otherwise than equally with all other persons, and at the same rate as all other goods of the like description, under the like circumstances."

Field, Phear and F. M. White shewed cause.—This application is made under section 79. of the Common Law Procedure Act, 1854, but the case does not fall within it. There is no "repetition or continuance" of a "breach of contract or other injury" within the meaning of that section. It is a repetition not of the same injury, but of the same kind of injury. The plaintiff does not even claim to have his parcels carried at a fixed rate, but he claims that those of other persons shall not be carried at a less rate. It is the same, in effect, as if he were asking the Court to issue a *mandamus* to the company to carry the parcels of the other persons at the higher rate. As to the words in the statute, "breach of contract or injury of a like kind," they are restricted to breaches and injuries arising out of the same contract. The grievances complained of by Mr. Sutton in this and the former action do not arise out of the same contract.

POLLOCK, C.B.—With respect to this matter being a breach of contract on the defendants' part, it is true that the Court of Common Pleas decided in effect that an action for money had and received would lie in these cases, but that portion of their judgment has been a good deal questioned. If instead of a breach of contract there was here a breach of duty on the part of the railway company, they have been guilty of a repetition of the breach of duty. Your argument is that the statute does not apply to a repetition of a breach of duty. An injunction may be obtained in equity in respect of repeated trespasses to the same property, or where trespasses are committed time after time by a person in support of a claim to property, but you cannot get an injunction where there is a succession of trespasses of a different character.]

Besides, the case is provided for by the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, s. 3, under which an injunction might have been obtained from the Court of Common Pleas. The Common Law Procedure Act conferred the power of granting an injunction on the common law Courts for the purpose of assimilating the powers of giving redress possessed by the Courts of equity and common law. Now a Court of equity grants an injunction in three different cases: first, where there is a breach of trust or confidence; secondly, where there is a breach of contract; and, thirdly, where there has been an infringement of a legal right. This case does not fall under either of the two first heads, nor under the third, for the legal right must be an existing and also a continuing right.

[POLLOCK, C.B.—It is not certain that there ever will be another packed parcel sent.]

The nature of the private legal rights, in respect of which a Court of equity will interfere by injunction, was elaborately considered in the case of *The Emperor of Austria v. Day* (3 De Gex, F. & J. 217; s. c. 30 Law J. Rep. Chanc. 690). It is clearly laid down there that a Court of equity will not interfere simply because there has been an infringement of a legal right, but there must be a legal right of property.

[BRAMWELL, B.—But an injunction lies to restrain the use of a trade-mark.]

The right to a trade-mark is a legal right of property—*Hall v. Barrows* (32 Law J. Rep. (N.S.) Chanc. 548; on appeal, 33 Law J. Rep. (N.S.) Chanc. 204), *The Leather Cloth Company v. the American Leather Cloth Company* (1 Hem. & M. 271; s. c. 32 Law J. Rep. (N.S.) Chanc. 721; on appeal, 33 Law J. Rep. (N.S.) Chanc. 199, and in the House of Lords, 35 Law J. Rep. (N.S.) Chanc. 58). Finally, the Court will only interfere where the redress obtained in a Court of

law is inadequate—*The Attorney General v. the Sheffield Gas Consumers' Company* (3 De Gex, M. & G. 304; s. c. 22 Law J. Rep. (N.S.) Chanc. 811).

J. Brown (Philbrick, with him), in support of the rule.—It will be a great misfortune if the objections raised to this rule prevail. The law has been settled, but the railway companies refuse to obey it, and the plaintiff is driven to litigation, which lasts for years, during which the money which has been overpaid is kept from him, and repaid to him eventually without any interest—*Crouch v. the Great Northern Railway Company* (11 Exch. Rep. 742; s. c. 25 Law J. Rep. (N.S.) Exch. 137).

[POLLOCK, C.B.—If, instead of suing for money had and received, you declared against the defendants for refusing to deliver you your goods until you paid money which ought not to have been charged to you, the jury could give you damages for the detention of your money.]

The first case of the kind, *Pickford v. the Grand Junction Railway Company* (10 Mee. & W. 399), was an action on the case. That was in the year 1841. The next case, of *Parker v. the Great Western Railway Company* (11 Com. B. Rep. 545; s. c. 21 Law J. Rep. (N.S.) C.P. 57), in 1844, was the first case of an action for money had and received. From that time to the present there has been a succession of cases in all the Courts, invariably in the plaintiff's favour, and yet the companies refuse to submit. The plaintiff in this case now comes to the Court and says, that if he has not an effectual remedy at law, he is driven to seek a remedy in equity.

[BRAMWELL, B.—I take it that if you prove that a Court of equity would grant an injunction, we should grant you one. POLLOCK, C.B.—But how does it appear that the defendants will continue the same mode of conducting their business? There may never be another packed parcel sent. There is nothing on which an injunction can be founded.]

There is as much ground for interference here as in the case of an infringement of a trade-mark or the continuance of an offensive trade. It might be said in those cases that the defendant might desist from his conduct. As to the objection made to the form of the injunction, it follows the form settled by the Court of Common Pleas under the Railway Traffic Act—*Bazendale v. the Great Western Railway Company* (5 Com. B. Rep. N.S. 309, 356; s. c. 28 Law J. Rep. (N.S.) C.P. 69, 81).

[POLLOCK, C.B.—This Court is not within the provisions of that act, which gives the Court of Common Pleas an exclusive power of regulating railway traffic.]

But that act expressly enacts that no remedies already possessed by individuals shall be affected by it.

[CHANNELL, B.—On the other hand, the fact that such an act was found necessary after the passing of the Common Law Procedure Act, 1854, goes to shew that relief could not be had under the latter.]

The Railway Traffic Act contains manifold provisions as to accommodation, &c., which were new. However, this case comes within the Common Law Procedure Act, for it is a case of a tort, and not merely of a breach of contract. It is a common law right, qualified by statute. We are claiming to prevent a repetition of the injury complained of, or one of like kind. The case falls within the principle on which Courts of equity have granted injunctions. They have expressly decided that it is politic and expedient to keep these great railway companies within bounds—*Hodges on Railways*, p. 757, 3rd edit. (see 4th edit. part 3, c. 3).

[POLLOCK, C.B.—There is a vast difference between asking for an injunction to prevent a company from exceeding its powers, and asking for an injunction to prevent it from violating the law. Can you find any case where a Court of equity or a Court of common law, under its statutory power, has granted an injunction where there has not been a continuing contract or property of a permanent character which has been injured and is likely to be injured again?]

The case of *The River Dun Navigation Company v. the North Midland Railway Company* (1 Rail. Cas. 135) is cited in *Hodges on Railways*, and the observations of Lord Cottenham are in the plaintiff's favour, although the injunction was refused.

[CHANNELL, B.—The authorities referred to in *Hodges on Railways* do not seem to bear out the statement of the text.]

POLLOCK, C.B.—I am very clearly of opinion that this rule ought to be discharged. I think we ought to be extremely cautious how we deal with a power, which, it is alleged, has been given to us, in a case where there is no appeal; and where it is said that if we do not grant the injunction, it may be sought elsewhere. No case can be instanced in which the Court has interfered under circumstances similar to the present. The opinion of the learned Chief Justice of the Cape of Good Hope has been given to us, but in the variety of cases which have been cited the injunction has been invariably refused. We are asked to make a precedent; but where there is no appeal from our decision, and where the matter is one of some novelty, we ought to take care to act clearly within the limits of our jurisdiction, for we are not here to administer what we think ought to be the law, but what we find upon the authorities to be the law. Looking at this case upon the merits presented to us, it is not true that the plaintiff has no other remedy; he has a remedy which will give him back all the money which he has overpaid, with interest from the time of its being detained. The inconvenience would be very considerable if we were to interfere, and there would in reality be no advantage to the plaintiff; for if this Court were asked to issue an attachment for a breach of the injunction, we should have affidavits, on the one side, and on the other, shewing that the injunction had or had not been disobeyed. Such a question could not be decided on affidavits, nor properly referred to the Master, and the Court would be bound to direct an issue to be tried by a jury. It is far better, in my judgment, that the plaintiff should bring his action directly, complaining of a breach of the law, than that we should send an issue to a jury to decide whether the law had or had not been violated.

BRAMWELL, B.—I am entirely of the same opinion. Supposing that all the other difficulties were got over, it seems to me that the rule ought to be discharged, on the ground adverted to, namely, that we are asked to affirm, in the first place, a doubtful proposition in law, in saying that this is a case in which an injunction could issue; and, in the next place, a doubtful proposition of fact, in saying that the facts bring this case within any rule by which an injunction is granted; and that from those two decisions of ours there is no appeal. It would be much better, if there is any reasonable doubt about it, that the application should be made to the Court whose decisions could be appealed from.

CHANNELL, B.—I also am of opinion that the rule ought to be discharged. The application made to the Court is founded upon the 79th section of the Common Law Procedure Act, 1854. I do not doubt that that section was intended to give this Court jurisdiction to grant an injunction in a great variety of cases, in order to save the delay and expense of applying to the Court of Chancery, and I, for one, am not at all disposed to restrain or restrict, by any decision of this Court, the power of the Courts to act under that section. But I am very clearly of opinion that it does not give us such a power as will enable us to comply with the plaintiff's application on this occasion. It appears to me that it was intended to provide for quite a different class of cases from that which has been brought under our consideration to-day, and I am the more unwilling to place a construction upon this section, which I am not satisfied is the right one, from the inconvenience that would arise on an application to the Court to enforce the injunction by attachment, and from the fact that it may be that the Court of Common Pleas, under the Railway Traffic Act, may have a larger power of giving relief than we have;

and that, if the plaintiff's argument be well founded, there is ground for an application to the Court of Chancery, so as to bring the question under the consideration of the House of Lords.

PIGOTT, B.—I am of the same opinion. I do not think that the language of this section of the act of parliament clearly applies to this case. It seems to me rather to point to other matters. If the plaintiff's argument is well founded, there is a remedy in the Court of Common Pleas in this matter; and if we were to exercise the jurisdiction which we are asked to do, we might be doing great injustice, and there might be no means of relief. We should certainly very much embarrass the defendants' trade, and I think that we ought to be very careful in putting the construction wished for by the plaintiff upon this act of parliament.

Rule discharged.

Nov. 8, 1865.

FINNEY v. FORWARD AND ANOTHER.

35 L. J. Ex. 42; L. R. 1 Ex. 6; 4 H. & C. 33; 13 L. T. 296; 13 W. R. 85; 11 Jur. N.S. 877.

Facts distinguished but principle applied, *Derby Commercial Bank v. Lumsden*, [1870] E. R. A.; 39 L. J. C.P. 72; L. R. 5 C.P. 107; 21 L. T. 673; 18 W. R. 526 (C.P.). Referred to, *Wallen v. Forrest*, [1872] E. R. A.; 41 L. J. Q.B. 96; L. R. 7 Q.B. 239; 26 L. T. 290 (Bail Court).

Practice—Interrogatories—Trover—17 & 18 Vict. c. 125. s. 51.

DISCOVERY.—*The defendant, in an action of trover, will not be allowed to deliver interrogatories to the plaintiff respecting the grounds of his claim, unless some prima facie foundation for the application is laid by him, admitting the plaintiff's original title, or connecting him in some way with the person from whom the defendant received the goods; and the practice in cases of ejectment, according to which persons in possession of land have been allowed to deliver interrogatories to persons seeking to disturb them, will not be extended to actions of trover brought against persons in possession of goods.*

In this case Martin, B., had refused to allow interrogatories to be delivered by the defendants to the plaintiff, and the present application was for a rule to shew cause why the defendants should not be at liberty to deliver them to the plaintiff. The action was for the conversion of 133 bales of cotton, and for money had and received. The defendants pleaded the general issue, and that the goods were not the plaintiff's.

The affidavit of the defendants, on which the application was based, stated as follows:

1. That this action is brought to recover the value of 133 bales of cotton, or the entire proceeds thereof, less any proper charges thereon, and that the plaintiff's claim, as stated in the declaration, is 5,000*l.*

2. That in the month of March, 1865, Messrs. Saunders & Son, of Nassau, consigned to us 133 bales of cotton, accompanying the same with their draft on William Frederick De La Rue, of London, for 2,488*l.* 17*s.* 5*d.*, payable at thirty days after sight.

3. That on receipt of such draft we caused the same to be presented to the said W. F. De La Rue & Co. for acceptance, who refused to accept the same. That we also caused the said draft to be presented for payment at maturity to the said W. F. De La Rue & Co.; but they also refused to pay it,

and thereupon we caused the said cotton to be sold in the usual way for the best prices that could be obtained for the same.

4. That it was not until some time after the said cotton had been sold as aforesaid that we had any knowledge whatever that the present plaintiff claimed to have any interest in the same, and that we are now in entire ignorance in what way or manner he has any right or title thereto, his name not having been used or referred to by Messrs. Saunders & Son on the occasion of their consigning the cotton as before stated.

There were further affidavits by the defendants and their attorney that they believed that there was a good defence on the merits, that the application was not for the purpose of delay, and that they believed that the defendants would derive material advantage from the discovery.

The interrogatories were in the following form:

1. How and when did you become possessed of or entitled to the cotton, the subject of this action, and where and in whose hands was the said cotton when you first became possessed of it?

2. When did you part with the possession of the said cotton, and for what purpose, and under what circumstances, and to whom? Into whose possession did the said cotton come after you parted with it? Did you sell or pledge or otherwise deal with the said cotton, and if so, to whom and how?

3. Do you know William Frederick De La Rue? What is he, and what is his business, and how and where carried on? Have you not had dealings with him, and if so, of what kind? Was not the said cotton in his possession, or in the possession of some persons there on his behalf, at Nassau, in March, 1865, or about that time? How and when did it get into his or their possession, and for what purpose and with what object? Was it not intrusted to him by you, or by some person who acted by your authority or derived or claimed title to it from or through you, in order that it might be sent to Liverpool, or to some other port for sale?

4. Has the said William Frederick De La Rue, or any other and what person or persons, advanced you money upon the security of the said cotton? Were you indebted to him or them, whilst the said cotton was in his or their possession, for the money so advanced, or for any other money in respect of which he or they claimed to hold the said cotton?

5. If your dealings above referred to were with the house of Frederick De La Rue & Co., or with some member of that firm, or with some person of the name of De La Rue & Co., other than the said William Frederick De La Rue, answer the above questions with respect to him or them.

6. Do you know B. F. Fecklin? Has he any, and, if so, what interest in or title to the said cotton, the subject of this action?

Crompton Hutton, in support of the application.—This is the first case of trover in which leave to administer interrogatories to the plaintiff has been applied for. The object is to discover under what circumstances the plaintiff parted with the goods.

[POLLOCK, C.B.—That would be reasonable enough if you admitted the plaintiff's original title to the goods. You do not lay a foundation for your application by connecting the plaintiff in any way with Saunders, from whom you received the cotton. If you admitted the plaintiff's title, you might interrogate him as to the authority which he gave to Saunders to deal with the goods; but you are now in effect simply seeking to interrogate the plaintiff as to his title, which, according to the ordinary rule of discovery, you cannot do.]

Interrogatories are allowed in cases of ejectment, as appears by two recent cases in the Common Pleas.¹

[MARTIN, B.—No doubt claimants in ejectment have been forced to

(1) "These would seem to be *Stoate v. Rew*, 14 Com. B. Rep. N.S. 209; s. c. 32 Law J. Rep. (N.S.) 160; and *Pearson v. Turner*, 16 Com. B. Rep. N.S. 157; s. c. 33 Law J. Rep. (N.S.) C.P. 224."

answer interrogatories respecting the pedigree of persons under whom they claimed, but the practice has always been considered an anomaly.]

What difference can there be in principle between the case of a man who has been for some years in quiet possession of lands which are suddenly claimed by a perfect stranger, and the case of a man who has been for some months in quiet possession of goods which are suddenly claimed by a perfect stranger? In *Flitcroft v. Fletcher* (11 Exch. Rep. 543; s. c. 25 Law J. Rep. (N.S.) Exch. 94) this Court said that where a person seeks to disturb the quiet possession of another, he may be required to say by what right he does so. The defendants have been in possession of the cotton since March, 1865, and a possession of goods for months gives as good a title as a possession of land for years.

[POLLOCK, C.B.—My Brother Martin has pointed out the distinction between the cases. The proceedings in ejectment are anomalous. The answer of the Court will be, that we do not think it necessary to extend the rule in ejectment to other actions.]

[PIGOTT, B.—The ground of my decision is, that the affidavit on which this application is made is insufficient. There is nothing stated in it which shews that interrogatories ought to be delivered.]

Per Curiam (Pollock, C.B., Martin, B., Channell, B., and Pigott, B.).—There will be no rule.

Rule refused.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Exchequer.)

Nov. 30, 1865.

WHITTAKER AND ANOTHER v. LOWE.*

35 L. J. Ex. 44; 4 H. & C. 109; L. R. 1 Ex. 74; 13 L. T. 469; 14 W. R. 197;
12 Jur. N.S. 375.

Followed, *In re Stark*, [1866] E. R. A.; 35 L. J. Bkcy. 15; L. R. 1 Ch. 150;
13 L. T. 573; 12 Jur. N.S. 40; 14 W. R. 255 (L.C.).

Debtor and Creditor—Bankruptcy Act, 1861, section 192, Condition 1, "Three-fourths of the Creditors in Number and Value"—Secured Creditors.

BANKRUPTCY.—*In estimating the majority in value of creditors who are required under the 192nd section of the Bankruptcy Act, 1861, to assent to a deed made between a debtor and his creditors, the debts of creditors holding security are to be taken into account.*

Turquand v. Moss (33 Law J. Rep. (N.S.) C.P. 355; s. c. 17 Com. B. Rep. N.S. 15) followed.

This was an appeal from a decision of the Court of Exchequer.

This action was brought to recover the sum of 346l. 19s., the balance due from the defendant in respect of work done as millwrights by the plaintiffs. The only defence relied upon by the defendant was, that after action brought a deed of arrangement, such as is provided for by the 192nd section of the

* *Coram*, Willes, J., Blackburn, J., Mellor, J., Montague Smith, J. and Lush, J.

Bankruptcy Act, 1861, had been entered into between the defendant and his creditors. This deed was not executed or assented to by the plaintiffs, and it was denied by them that three-fourths in value of the creditors had assented; but it was proved at the trial that, if the amounts for which certain assenting creditors were secured, ought by law not to be deducted from the gross amount of the debts in estimating the required majority in value, a number representing three-fourths in value had executed the deed or assented in writing to its provisions.

Mellor, J., who tried the case, ruled, on the authority of *Turquand v. Moss* (33 Law J. Rep. (N.S.) C.P. 355; s. c. 17 Com. B. Rep. N.S. 15), that the value of the securities held by creditors was not to be deducted in order to arrive at the value of their debts, and directed the jury to find a verdict for the defendant, reserving leave, however, to the plaintiffs to move to enter a verdict for them for 346l. 19s.

The Court of Exchequer, in Easter Term, 1865, granted a rule *nisi* on the ground that the value of securities held by secured creditors should have been deducted in estimating the value of their debts. This rule was afterwards discharged, the Court intimating that they did so solely on the ground that they deemed themselves bound by the authority of *Turquand v. Moss* (33 Law J. Rep. (N.S.) C.P. 355; s. c. 17 Com. B. Rep. N.S. 15).

The question for the Court of Appeal was, whether, in estimating the value of debts of creditors who under the 192nd section of the Bankruptcy Act, 1861, are required to assent to a deed made between a debtor and his creditors, the value of the securities held by such creditors ought to be deducted.

Holker, for the plaintiffs, the appellants.—As to the cases on which the defendant relies: in *Ex parte Godden* (1 De Gex, J. & S. 260; s. c. 32 Law J. Rep. (N.S.) Bankr. 37) this point was not necessary for the decision, because, as Turner, L.J., said, the deed was bad according to the rule in *Ex parte Rawlings* (32 Law J. Rep. (N.S.) Bankr. 27). The question was rather, whether secured creditors were to be reckoned at all.

[BLACKBURN, J., referred to the words of Knight Bruce, L.J., who said that perfectly or imperfectly secured creditors must all be reckoned alike.]

That is to say, in reckoning the *number* of the creditors, but not the *value* of their debts. The value of the securities must be ascertained as it would be before a Commissioner in Bankruptcy. The words in the 97th section,¹ "after deducting the value" of the security, shew that this must be a question of fact, just as in any other case. In *Turquand v. Moss* (33 Law J. Rep. (N.S.) C.P. 355; s. c. 17 Com. B. Rep. N.S. 15) Byles, J., said that he merely followed *Ex parte Godden* (1 De Gex, J. & S. 260; s. c. 32 Law J. Rep. (N.S.) Bankr. 37).

[MONTAGUE SMITH, J.—In the judgment there, Erle, C.J., seems to rely on the act of 1861 not containing any proviso similar to the 224th section of the Bankrupt Law Consolidation Act, 1849.²]

The new act is clear without it. In *Ex parte Spyer* (32 Law J. Rep.

(1) The section defining what shall be reckoned as debts for the purposes of a *petition* under the act.

(2) Section 224. enacts, "That every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six-sevenths in number and value of those creditors whose debts amount to 10l. and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding-up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior or subsequent act of bankruptcy: Provided always, that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him."

(N.S.) Bankr. 62, 64) the Lord Chancellor said *obiter* that "secured creditors rank under a deed of trust for the amount remaining, after deducting the value of their securities"; and *Ex parte Smith re Smith* (10 Law Times, 803) is also in the plaintiff's favour, although it was not decided expressly on this point. The matter is still *res integra*. The object of the legislature clearly was to give creditors a control over the estate proportioned to their respective stakes therein; otherwise, it would be in the power of the secured creditors, who are the parties least interested, to dictate to the unsecured, and to hold them completely at their mercy. "Value" is not merely "amount." The 97th section shews the real meaning of its value; and the 197th points out that it is to be estimated "according to the law and practice in Bankruptcy."

[MELLOR, J.—"Such deed" in that section implies a *valid* deed. WILLES, J.—Section 116.³ seems to contemplate the realization of the security before proof. "Value" must mean "amount" in that section.]

In that particular case there can be no question. In other cases, the act points out the means of ascertaining the value by referring to the "law and practice in Bankruptcy." A creditor may prove before he can ascertain the value of his security.

[LUSH, J.—The creditor has no *locus standi* till his debt is proved. The Court takes no notice of him till then.]

For this purpose it does. Proof is only essential for the purpose of ascertaining the amount of the dividend. Applying the law and practice of bankruptcy, a man is not a creditor till the value of his security is deducted. If "creditors" means "creditors who have proved," that is sufficient for the plaintiffs; if not, the 197th section governs the case.

R. G. Williams appeared for the defendant, but was not called upon to argue.

WILLES, J.—We are all of opinion that this judgment should be affirmed. The question turns upon the true construction of the first condition of the 192nd section of the Bankruptcy Act, 1861, the words of which are, "a majority in number, representing three-fourths in value, of the creditors of such debtor, whose debts shall respectively amount to 10l. and upwards, shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument."

The question is, whether, in estimating the "three-fourths in value of the creditors of such debtor," securities held by creditors are to be taken into account.

Three answers may be suggested. First of all, that we must apply the same test in estimating the majority in number as in estimating the three-fourths in value; and that in both cases we are to exclude the fully-secured creditors and their debts.

Secondly, it is said that because it is impossible that a person holding security for his debt is thereby rendered *not* a creditor; therefore as we cannot exclude him from the majority in *number*, so this section (dealing with the same class of persons for both purposes) must mean that he should also be reckoned in respect of the debt presently due to him in estimating the three-fourths in *value*. This was the answer given, by the Lords Justices, in *Ex parte Godden* (1 De Gex, J. & S. 260; s. c. 32 Law J. Rep. (N.S.) Bankr. 37), and by the Court of Common Pleas, in *Turquand v. Moss* (33 Law J. Rep. (N.S.) C.P. 355; s. c. 17 Com. B. Rep. N.S. 15), upon which case this appeal is virtually brought. In *Turquand v. Moss* (33 Law J. Rep. (N.S.) C.P. 355; s. c. 17 Com. B. Rep. N.S. 15) my Brother Byles appears to have considered

(3) Sect. 116. enacts, "At the first meeting of creditors, or any adjournment thereof, it shall be competent to the majority in value of creditors who have proved debts to choose an assignee or assignees of the bankrupt's estate and effects, and to be called the creditors' assignee; provided that the Court shall have power to reject any person so chosen who shall appear to such Court unfit to be such assignee, and upon such rejection a new choice of creditors' assignee shall be made."

that, but for the decision in *Ex parte Godden* (1 De Gex, J. & S. 260; 32 Law J. Rep. (N.S.) Bankr. 37), the question might have admitted of a different answer; but he did not suggest that different methods should be applied in ascertaining the majority in *number* and the three-fourths in *value*. It appears to have occurred to him, that, as it might be unjust to count the secured debts, so persons whose debts were *entirely* secured, ought to be excluded altogether.

The third answer is that suggested by the Lord Chancellor, in *Ex parte Smith* (10 Law Times, 803), viz. that a person who has security for his debt is nevertheless a creditor, even though it may appear that it is possible (and after all it is but a possibility) that upon a sale of the security an amount equal to the debt would be realized; but, that, inasmuch as his debt is practically reduced to nothing, in the peculiar case of his being at no risk, it is not to be taken into account at its full amount in determining whether three-fourths in *value* of the creditors have assented. That is to say, the Lord Chancellor suggested that different methods ought to be applied in estimating the majority in *number*, and the three-fourths in *value*.

It is quite obvious that the question turns upon the construction to be put on the word "value." The weight of authority, and one would think of reasoning, seems to be upon the side of reckoning as a creditor a person whose debt is fully secured, so that he must be included in the majority in *number*. Then with regard to taking the securities into account in determining the three-fourths in *value* great difficulty arises, because one cannot think it likely that the legislature would have left it to the sense of policy or convenience existing in the mind of the Court to decide whether a person whose debt is secured is to be treated as a creditor in *value* to the whole amount of his debt, or only to the extent of the possible or probable balance of his debt, which will remain due when the security is realized. A man of business and good sense might fairly say, "My security may never be realized, it may be lost, it may fall or rise in value. I do not choose to realize at present, because I might have to answer to my debtor for having unfairly dealt with property in which he had an interest to the extent of what might remain, after satisfying my debt." He might think that, where there is no judicial person to determine for the time what the value should be taken to be, it would be better at once to let all the creditors come in in respect of their entire debts, by reason of the difficulties arising as to the test of *value*. Another man might not think much of these difficulties, and might consider it sufficient if the probable value of the secured creditor's debt was ascertained at the time of signing the deed. Arguments may be advanced on both sides of the question, but we have nothing to do but to adhere to the language of the act.

The real question, therefore, is, what does this "value" mean, taken with its context in the first condition? "The value of the creditors" is of course a loose expression, or rather a figure of speech for "the value of the debts owing to the creditors of such debtor." The sense contended for by the plaintiffs is, the value of the debts in money's worth after the securities are realized; and another meaning might be suggested, of the value which the debts would fetch in the market. *Primâ facie*, taking debts all round, and finding that they are dealt with here as a *genus*, I should have thought that "the value" was the amount of the debt itself; and I find that that is adopted by the legislature in the 116th section, relating to the choice of assignees: "At the first meeting of creditors, or any adjournment thereof, it shall be competent to the majority in value of the creditors who have proved debts to choose an assignee or assignees of the bankrupt's estate and effects." "Value" there clearly means "amount," because it is only the creditors who have proved that are dealt with. I find a confirmation of that being the true construction of the statute in the 97th section, which deals with the petition and the petitioning creditor's debt, and it expressly provides

"In the computation of debts for the purposes of any petition under this act there shall be reckoned as debts, viz., sums due to creditors holding mortgages or other available securities or liens, after deducting the value of the property comprised in such mortgages, securities or liens." We have here the express provision that persons are creditors though they hold mortgages or other available securities, and, secondly, the express enactment, that, for the purposes of any petition under this act (which is not this case), the debts are to be reckoned or computed after deducting the value of the property comprised in such mortgages, &c.; so where an uncertainty exists as to the real value, we have a provision for it. Then there is another provision in the 97th section, which appears to be very material: "such interest and costs as shall be due in respect of any of the debts" are to be reckoned as debts; there is, therefore, an intention expressed in the 97th section to provide expressly for the mode of ascertaining the amount of certain particular debts, and a special provision introduced with respect to the question of value in a class of cases different from this.

But there is not only the rule *expressio unius est exclusio alterius* to be applied to the construction of the several sections, but there is another act to be considered which is *in pari materia*, and forms part of the history of the new act,—the 12 & 13 Vict. c. 106, and which in dealing with the subject-matter, expressly introduced the provision which it is said we ought to introduce in the present act. That provision is to be found at the end of the 224th section of the 12 & 13 Vict. c. 106, one of the sections repealed by the act of 1861; and the 192nd section of the new act, amongst others, has been substituted for the repealed section. The 224th section of the old act provides that "every creditor shall be accounted a creditor in respect of *such* amount only as upon an account fairly stated, after allowing the value of the mortgage property and other such available securities or liens from such trader, shall appear to be the balance due to him." The omission of the word "*such*" from the 97th section of the new act (which is in terms limited to the case of a petition), in my opinion makes no difference. It would seem as if those who framed the 224th section of the 12 & 13 Vict. c. 106. felt this very difficulty as to who is to settle what is the amount due after deducting the value of the mortgage or securities, and met it by introducing the words "upon an account fairly stated."

The whole proviso is omitted from the 192nd section of the new act. I feel almost inclined to say, that the legislature by the express language of the act to which I have referred has, as it were, ostentatiously shewn an intention that the proviso so repealed should not be reintroduced, except in part, and in that part should be made applicable only to a particular subject-matter, differing from this. Putting the best construction one can upon the language of the act, and putting aside all reasons of mere policy or convenience, which ought not to sway us here, it would seem that the just conclusion is that at which the Court of Exchequer has arrived.

BLACKBURN, J.—The question entirely depends upon the construction of the statute. It is plain that a creditor who has got security for his debt is nevertheless a creditor—he may sue and recover judgment in every respect as long as bankruptcy does not intervene. He only differs from other creditors in that he has the means of making available the property for which he has security, but till that security is realized, he is a creditor for the amount due, so that under the bankrupt law he still remains a petitioning creditor. So stood the law in 1849, and when the Bankrupt Act of 1849 was passed, the law was left untouched as to the rights of a petitioning creditor. Then, in the 224th section of that act, for the first time was introduced this power of making deeds of arrangement. Without the proviso at the end of that section, I think the plain meaning of the previous words would have been, "the number and value of those creditors whose debts amount to 10*l.* and upwards." I think that is the fair grammatical construction, and the proviso

shews clearly that those who drew the section thought it was so, and put in the proviso pointedly, saying, "notwithstanding what has previously been said, in reckoning the value you shall deduct the fair value of the securities." It seems to me, that if we find the legislature deliberately repealing an enactment, we certainly ought to understand that the legislature did not mean that to continue in force which they had formerly said, but that they mean that only which they now say.

The weight of authorities is also, in my opinion, strongly in favour of this construction, but in a Court of error we are not bound by the authorities below. I entirely agree with my Brother Willes in thinking that the judgment of the Court of Exchequer ought to be affirmed.

MELLOR, J., MONTAGUE SMITH, J. and LUSH, J. concurred.

Judgment affirmed.

[IN THE COURT OF EXCHEQUER.]

Nov. 13, 1865.

STANGER AND ANOTHER v. MILLER.

35 L. J. Ex. 49; L. R. 1 Ex. 58; 4 H. & C. 1; 13 L. T. 831.

Debtor and Creditor—Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192. —Mutual Credit—Set-off of Rent accruing due after Execution but before Registration of Deed.

BANKRUPTCY.—*In an action by trustees under a deed executed in accordance with the Bankruptcy Act, 1861, the defendant may set off rent accruing due to him from the assigning debtor after the execution and before the registration of the deed; the registration, and not the execution, being the dividing line between the title of the trustees and that of the debtor.*

Declaration by the trustees of John Bowles, a debtor, under a deed executed in accordance with the Bankruptcy Act, 1861.

In the fifth count the plaintiffs sued, as such trustees, for money payable to the said John Bowles *at the time of executing* the deed, for goods bargained and sold, &c.

The defendant pleaded, *inter alia*, as a defence, on equitable grounds, to parcel of the money claimed in the fifth count, that by an indenture, dated the 25th of March, 1861, the defendant and one George Edward Miller respectively demised and leased to the said John Bowles their respective undivided moieties of a certain messuage, to hold from the 25th of March, 1861, for the term of twenty-one years, at the yearly rent of 150*l.*, payable by equal quarterly payments upon the usual quarterly days of payment; and that the said John Bowles did thereby covenant with his lessors to pay the said yearly rent of 150*l.* upon the several days and in the manner before mentioned; "by virtue of which demise the said John Bowles entered into and upon the demised premises, &c.; and afterwards, during the continuance of the said term, G. E. Miller died, having devised his reversion to the defendant; and after the death of G. E. Miller, and during the continuance of the said term, the sum of 37*l.* 10*s.*, for one quarter's rent of the said demised premises for the quarter of a year ending on the 24th of December, 1864, became and was due and payable by the said John Bowles to the defendant, who then was entitled to the reversions as aforesaid; and the defendant further says, that the said John Bowles, *before and at the time of the registration* of the said deed in the declaration mentioned, and *before the defendant had any notice of the*

said deed, or of any act of bankruptcy committed by the said John Bowles, and until and at the commencement of this suit, was and still is indebted to the defendant in an amount equal to that part of the plaintiffs' claim to which this plea is pleaded for the rent which became due and payable as aforesaid on the said 24th of December, 1864, which amount the defendant is willing to set off," &c.

Demurrer to this plea, and joinder in demurrer.

Putchett, in support of the demurrer.—Upon the execution of the deed the rights of Bowles, as against his debtors, passed to the trustees—*Symons v. George*,¹ per Crompton, J.; and they might have a cause of action against the debtors before registration. Now it does not appear on the face of the plea how the debt attempted to be set off became due in any other way than that it was for the rent due before registration. It might have been that the assignees did not think the lease of value, or that some arrangement had been made by virtue of which Bowles continued in possession, and liable to his landlord for the rent, notwithstanding the transfer of the estate to the trustees. The set-off is for a new debt personal to Bowles, and cannot be the subject of a set-off in an action by trustees under a deed executed before the new debt arose. It is not a mutual debt between the plaintiffs and the defendant within the meaning of the Statutes of Set-off—*Isberg v. Bowden* (8 Exch. Rep. 852, 858; s. c. 22 Law J. Rep. (N.S.) Exch. 322), per Martin, B. Notwithstanding the Bankruptcy Act, the landlord might distrain if the bankrupt were in possession up to the time of the rent being due.

[CHANNELL, B.—If the plaintiffs had been assignees under a bankruptcy, would not this have been a good mutual credit—a credit terminating in a debt? and does not the 197th section put the assignees here on the same footing as after an adjudication?]

Rent payable quarterly by the terms of a demise is not within the 171st section of the Bankrupt Law Consolidation Act, 1849. If it were a mutual credit within that section, the 150th section² of the act of 1861 would not have been required. There is no credit between landlord and tenant.

[CHANNELL, B.—The landlord credits the bankrupt to the use and occupation of the house.—His Lordship referred to the notes to *Rose v. Hart* (2 Smith's Lead. Cas. (5th edit.) 251).

No portion of the rent made available in the plea was due or payable before the execution of the deed, and the 194th section³ shews that the execution is the dividing line, and not the registration.

Keane, in support of the plea.—Registration, and not execution, is the dividing line. This appears from the form of deed given by schedule D, and also from the 200th section of the act. Until the registration the title of the trustees was incomplete. "The day and hour" mentioned in the 196th section would not be important if the registration were the turning-point. The 199th section⁴ gives still greater efficacy to the registration. The execution is the debtor's own act, and there is no such official notice given of it as of the registration. If the plaintiffs had been assignees in bankruptcy, the defendant might have set off mutual debts or credits. The 197th section of

(1) 34 Law J. Rep. (N.S.) Exch. 187. See page 189 for the *dictum* referred to.

(2) The 150th section is as follows: "In all cases in which the bankrupt is liable to pay any rent or other payment falling due at fixed or stated periods, and the adjudication of bankruptcy shall happen at any time other than one of such fixed or stated periods, it shall be lawful for the person entitled to such rent or other payment to prove for a proportionate part thereof up to the day of the adjudication of bankruptcy, in such manner as if the said rent or payment grew due from day to day, and not at such fixed or stated periods as aforesaid."

(3) This section enacts that every such deed shall, within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the Court in London shall allow, be registered in the Court of Bankruptcy; and in default thereof shall not be received in evidence.

(4) This section enacts, that in case any petition for an adjudication after the execution and pending the time allowed for the registration of the deed, all proceedings may be stayed if the Court think fit; and in case the deed be duly registered the petition shall be dismissed.

the act makes registration equivalent to adjudication; and the right to sue, taken under this section, is therefore subject to the defendant's right of set-off, just as in bankruptcy. Again, from *Buck v. Lee* (1 Ad. & E. 804; s. c. 3 Law J. Rep. (N.S.) K.B. 206) it would appear that what would enable a plaintiff who had assigned to reply that he sued as trustee for the assignee, would be *that he had given notice* of the assignment. The plea here shews that no such notice was given before this set-off accrued. If the debtor had assigned at common law, and notice was given, no debt being then due, it would have been a perfectly good replication to say that the deed was executed and the defendant had notice thereof. [He also cited *Gibson v. Bell*,⁵ per Tindal, C.J., and *Ex parte Harrison* (26 Law J. Rep. (N.S.) Bankr. 30), per Turner, L.J.]

Patchett, in reply.—The registration is only for the purpose of giving the assignees rights against the non-assenting creditors. It is immediately after execution that possession of the debtor's property is to be given up (according to the 7th condition of the 192nd section) to the trustees. They might commence an action for debt before registration. Such an action appears to have been contemplated in section 194. Transactions between execution and registration are not within the deed, and the estate is not liable for debts incurred in respect of such transactions. In what position is the assigning debtor during the twenty-eight days' interval? By the act, he has assigned, and therefore the assignees must sue; but if registration be the test, then for twenty-eight days the power of suing lapses altogether! The inference is, that the time of execution, and not of registration, is the real dividing line.

POLLOCK, C.B.—We are all of opinion that the plea is good. The title of the assignees here to claim this debt does not arise by virtue of the execution of the deed, nor does the right to sue pass to them till the registration of the deed, when powers similar to those that exist in Bankruptcy are created by the express provision in the act of 1861. The rent, under the demise, may not have accrued till after the execution; but the 150th section has provided that, in a case of this kind, the person entitled may prove as if the rent or payment grew due from day to day, and therefore the landlord is entitled to prove up to the very moment when the adjudication takes place. Now, the registration of the deed appears to me, for the purposes of this argument, to be assimilated (by virtue of the 197th section) to an adjudication in bankruptcy, and therefore the plea appears to be a good plea, for it says that, before the registration of the deed some rent had accrued under the demise, and that the defendant is ready to set off the amount against the plaintiff's claim. Upon these grounds, I think the defendant entitled to judgment.

BRAMWELL, B.—I also think the plea is good. In the first place, I think it would have been a good plea of mutual credit under the old Bankrupt Act. It is well known that, under the 171st section of the old act, (as a general rule) what could be proved could be made the subject of a set-off; and I think that this rent might have been provable as a liability upon a contingency, under the 178th section of the old act; and being a good mutual credit, it would be the subject of a set-off in bankruptcy. And if that be so, it is clear to my mind it must be the subject of a set-off under the new statute, whether execution or registration be the dividing line, for I cannot for a moment think that these trustees have got a better title than they would have had if they had been assignees in bankruptcy.

Secondly, I think the plea is good, on the ground that we must look to the registration as the date with reference to which everything is to be considered. Section 194, which applies to all deeds of arrangement, says that they are to be registered within twenty-eight days after execution by the debtor, without reference to any of the provisions of the 192nd section; and we must therefore take the 194th section to be applicable to deeds which are

(5) 1 Bing. N.C. 753; s. c. 4 Law J. Rep. (N.S.) C.P. 242. See also 2 Smith's Lead. Cas. (5th edit.) 266.

binding only upon the parties to them, as well as to deeds which are binding on creditors not parties to them. The deed may be registered "within such further time as the Court shall allow"; so that it might not be registered for six months afterwards. It is not conceivable that a deed which may be kept a month in the debtor's pocket shall have an operation while in that condition, and before it is announced to the world by public registration. It only becomes what one may call an official document affecting the rights of others when the official sanction is given to it by registration. I cannot help thinking, therefore, that the date of the registration must be the time we are to consider; and if that be so, this debt was due at the time, and consequently the defendant is entitled to judgment.

CHANNELL, B.—I am also of opinion that the plea is good. It is pleaded as an equitable plea; and upon the facts disclosed I conceive that the trustees under the deed must be taken to be in the same position as assignees under a bankruptcy; and it appears to me that the rent having become due before registration entitles the defendant to rely upon his set-off. If any portion of the rent under the terms of the demise was payable at the *execution* of the deed, it was only payable by virtue of the 150th section of the act of 1861, which gives the right to prove as if the rent accrued *de die in diem*; but the whole of the rent which was sought to be set off was not only due by contract, but payable in point of time *before the registration* of the deed. The plaintiffs being thus in the same position as assignees in bankruptcy, whether we look at it as a case of mutual debt or mutual credit, the plea discloses a good answer to the action. For as the plea is pleaded as an equitable defence, it would have been quite sufficient that there was a mutual credit. But the rent was actually due so as to constitute a mutual debt before the date of the registration, which, I conceive, is the dividing line in point of time.

The plaintiffs contend, that the 7th condition in the 192nd section interferes with this view, and goes to shew that the date of execution is to be taken to be the time. But the statute has made a marked distinction between execution and registration of a deed. It is the registration which is to give effect to the deed, and to place the proceedings to be taken on the footing of proceedings in Bankruptcy. It is said again, that, though the deed might not be perfect and complete till registration, it would have for some purposes an inchoate operation upon its execution. It does not appear to me that the concluding words in the 194th section, "that the deed shall not be received in evidence without registration," can support this contention. In a great variety of cases the deed would have to be given in evidence in order to support the rights which the trustees would acquire under the deed; and it is provided that it shall not be given in evidence so as to be read as a valid deed until registration has taken place. Upon these grounds it is tolerably clear that the defendant is entitled to judgment.

PIGOTT, B. concurred.

Judgment for the defendant.

[IN THE COURT OF EXCHEQUER.]

Nov. 15, 1865.

SAVIN v. THE HOYLAKÉ RAILWAY COMPANY.

35 L. J. Ex. 52; L. R. 1 Ex. 9; 4 H. & C. 67; 13 L. T. 374; 14 W. R. 109;
11 Jur. N.S. 934.

Principle applied, *Burden v. River Fergus Navigation Co.*, 1868, I. R. 2 C.P. 13 (C.P.). Distinguished, *In re Brampton and Longtown Railway*, [1875] E. R. A.; 44 L. J. Ch. 670; L. R. 10 Ch. 177; 33 L. T. 5; 23 W. R. 813 (L.C. & L. J.). Observations approved, *Corbett v. S.E. and Chatham Railway* [1905] E. R. A.; 74 L. J. Ch. 659; [1905] 2 Ch. 280; 93 L. T. 41 (Ch. D.): affirmed, [1906] E. R. A.; 75 L. J. Ch. 489; [1906] 2 Ch. 12; 94 L. T. 748 (C. A.).

Contract—Expenses of obtaining Private Act of Parliament—Agreement with Promoters of Railway Company—Clause in Act for Payment of Expenses—Pleading.

COMPANY.—*The usual clause in a private act of parliament, directing the charges incident to procuring the act to be paid by the company incorporated by the act, does not render the company liable to pay for work done under an agreement made for good consideration between the plaintiff and the promoters, by which it was agreed that he should pay all the costs, &c., and that the company should not be liable to pay him any of the expenses incident to obtaining the act.*

Declaration—That before the passing of a certain act of parliament of the 26 & 27 Vict., intituled 'An Act for making and maintaining Railways from Birkenhead and Poulton-cum-Leacombe to Hoylake, in the county of Chester,' the plaintiff bestowed his work and labour of great value, to wit, of the value of 5,000*l.*, and expended divers sums of money amounting in the whole to 3,000*l.*, in and about the applying for, and obtaining and passing of the said act, and in and about divers other matters and things and expenses preparatory and relating thereto; and it was in the said act provided that all the costs and charges and expenses of and incident to the obtaining and passing of the said act, or otherwise in relation thereto, should be paid by the defendants. And the plaintiff says that all things have been done, &c., to entitle him to be paid the said costs, charges and expenses by the defendants, but the defendants have not paid the same.

Second plea—on equitable grounds—that the plaintiff, before the passing of the said act, was desirous of obtaining the passing of the said act and of constructing the railway thereby authorized and empowered to be made, in order that certain other railways, in which the plaintiff was then interested, might be connected with the Birkenhead Docks, which said connexion would be effected by the passing of the said act and the construction of the said railway. And the defendants further say that the plaintiff, before the application to parliament for the said act, and before any part of the plaintiff's claim was incurred, induced certain other persons to become the promoters of the company by the said act incorporated, and to co-operate with the plaintiff in the applying for and obtaining the passing of the said act, upon the faith of an express agreement between the plaintiff and the said persons, that he the plaintiff would bear and pay all the costs, charges and expenses of applying for, and obtaining and passing the said act and in relation thereto, and that neither the said persons, nor the said company when incorporated, nor any other persons, should be liable to the plaintiff for the payment to him of the same or any part thereof.

Replications to this plea—First, that after the alleged agreement, and before any breach thereof, and before the passing of the said act, the said

persons exonerated and discharged the plaintiff from his said agreement and from the performance thereof; secondly, that after the said alleged agreement, and *before any breach thereof*, and before the passing of the said act, it was agreed by and between the plaintiff and the said persons that the said contract should be rescinded, and they then rescinded the same accordingly.

Demurrer to the plea, and joinder in demurrer.

Demurrer to the replications, and joinder in demurrer.

Littler, in support of the demurrer to the plea.—The defendants cannot be allowed after the passing of the act to say that there was a prior agreement existing, to which they were not parties, by virtue of which they are to disobey the act. No guarantee could be enforced by the company which was given when there was no company in existence.

[POLLOCK, C.B.—That is, when the consideration is impeached on the ground of public policy. You should have replied that the consideration for this agreement was bad.]

The very passing of the act to which the company were parties prevents them from setting up this defence. They cannot say the clause crept in by mistake. It was submitted to the legislature by the very persons who are now trying to evade it.

[PIGOTT, B.—The clause amounts to nothing more than an authority to lay out part of the funds of the company in paying the preliminary expenses. It is contained in almost every act.]

In 4 *Cruise's Dig.* tit. 33, 'Private Act,' it is said that a private act was formerly considered an assurance of so high a nature that, although it had been obtained by fraud, it could not be relieved against by any Court of law or equity. Besides, the plea does not shew that the company comprises the promoters. It is really an irregular plea of *never indebted*.

[POLLOCK, C.B.—If the plaintiff had agreed to do all that was necessary for 1,000*l.*, he could not have sued for more, merely by virtue of the clause in the act. The act does not create a debt where there was no debt before.]

There was express knowledge on the part of the persons who allowed the clause to be inserted; and the clause can mean nothing if the plaintiff's contention be wrong.

[POLLOCK, C.B.—The words in the act are "costs and charges, &c." The plaintiff has no right to be paid any costs and charges.]

He has paid everybody.

[PIGOTT, B.—Then, according to your contention, everybody would have a right to be paid over again.]

Wyatt v. the Metropolitan Board of Works (31 Law J. Rep. (N.S.) C.P. 217) shews that the company can only be sued for the charges once for all.

[*The Earl of Oxford's case* (2 White & Tudor's Lead. Cases in Equity, 504, 2nd edit.) and *Preston v. the Company of Proprietors of the Liverpool, Manchester and Newcastle-upon-Tyne Junction Railway* (5 H.L. Cas. 605; s. c. 25 Law J. Rep. (N.S.) Chanc. 421) were also cited.]

R. E. Turner was not called upon to argue in support of the plea.¹

Per Curiam.²—The plea is a good one.

Judgment for the defendants on the demurrer to the plea.

(1) The argument on the demurrer to the replications resulted in the plaintiff obtaining leave to amend the replications, so as to shew exoneration and rescission, *before the work was done or the charges, &c. incurred*.

(2) Pollock, C.B., Bramwell, B. and Pigott, B.

[IN THE COURT OF EXCHEQUER.]

Nov. 22, 1865.

PARKER, *devisee of BARROW, deceased, v. TOOTAL.*

35 L. J. Ex. 53; L. R. 1 Ex. 41; 13 L. T. 378; 14 W. R. 183.

Error—24 & 25 Vict. c. 134. ss. 137, 148, 163.—Suggestion of Death of Plaintiff after Error brought—Liability of Devisee to Costs.

COSTS.—*The plaintiff in an action of ejectment died after bringing error. His devisee entered a suggestion of the death under section 163. of the Common Law Procedure Act, 1852, and continued the proceedings in error. The judgment of the Court below was subsequently affirmed by the Court of Exchequer Chamber and the House of Lords:—Held, that the devisee was not liable to any costs incurred prior to the entry of the suggestion,—the Common Law Procedure Act, 1852, being intended only to simplify proceedings in error, and not to impose any liability to costs where it did not previously exist.*

Barrow v. Tootal was an action of ejectment tried at the Liverpool Summer Assizes, 1859, when a verdict was found for the defendant, subject to a special case. The special case was argued in this court in May, 1860, when judgment was given "that the verdict found for the defendant shall stand, &c., and that the defendant do recover against the claimant 400*l.* for his costs of defence."

On the 24th of July, 1860, the plaintiff Barrow entered a suggestion of error upon the roll, and in November, 1861, died, having devised and bequeathed all his real and personal estate to the present plaintiff Parker (and two others who renounced).

On the 30th of November, 1861, Parker entered a suggestion of Barrow's death, announcing that he was the "legal representative" of the deceased, and as such entitled to continue the proceedings in error.

The Court of Exchequer Chamber, in February, 1862, gave judgment that the decision of the Court below should be affirmed, and "that the said defendant do recover against the said now claimant 400*l.* for his costs of defence in this behalf by the Court of error now here adjudged to the said defendant," &c.

The case was subsequently taken up to the House of Lords, who, in 1864, affirmed the previous decisions, and dismissed the appeal with costs.

The defendant's attorney then delivered a bill of costs to the plaintiff Parker, commencing with the original instructions to defend in 1858. On the parties appearing before him, the Master taxed the costs *pro formâ* at 400*l.*, in order that an application might be made for an order to review the taxation; and Martin, B. having heard the matter at chambers referred it to the Court.

The following are the sections of the Common Law Procedure Act, 1852, bearing on the case:

Section 137. "In case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of such plaintiff may, by leave of the Court or a Judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed; and if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of deceased plaintiff, and such judgment shall follow upon the verdict in favour of or against the person making such suggestion, as if such person were originally the plaintiff."

Section 148. "A writ of error shall not be necessary or used in any cause, and the proceeding to error shall be a step in the cause, and shall be taken in manner hereinafter mentioned; but nothing in this act contained shall invalidate any proceedings already taken or to be taken by reason of any writ of error issued before the commencement of this act."

Section 163. "In case of the death of a sole plaintiff, or of several plaintiffs in error, the legal representative of such plaintiff, or of the surviving plaintiff, may, by leave of the Court or a Judge, enter a suggestion of the death, and that he is such legal representative, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the proceedings may thereupon be continued at the suit of, and against such legal representative as the plaintiff in error; and if no such suggestion shall be made, the defendant in error may proceed to an affirmance of the judgment according to the practice of the Court, or take such other proceedings thereupon as he may be entitled to."

Gray now moved for a rule calling on the defendant to shew cause why the Master should not review his taxation.—Barrow's executors are liable to the costs in the Court below, and Parker, who was no party to the judgment there, is not to pay more than his own costs. There is no statute giving costs against a devisee. The 8 & 9 Will. 3. c. 11. s. 2. gives costs against a plaintiff or demandant;¹ but Parker is neither plaintiff nor demandant.

[*Pigott, B.*—The question arises only by virtue of the Common Law Procedure Act, 1852.]

That statute does not impose any liability to pay costs which did not exist before; it merely renders unnecessary certain proceedings which were requisite before the passing of the act. *Fisher v. Bridges* (4 El. & B. 666; s. c. 24 Law J. Rep. (N.S.) Q.B. 165) and *Marshall v. Jackson* (Ibid. 669, note; Ibid. 166, note) shew that the 148th section of the Common Law Procedure Act, making error a step in the cause, does not affect the costs, but that it merely alters the form of proceeding in error, without touching its effect. Besides, the cause was at an end by reason of the judgment below.—[He also cited *James v. Cochrane* (9 Exch. Rep. 552; s. c. 23 Law J. Rep. (N.S.) Exch. 126), which was decided on the 151st section.]

Cleasby shewed cause in the first instance.—In both the cases cited for the plaintiff, the judgment of the Court below was reversed, and the ground of the decisions was that costs in error should be taxed as costs in the cause, and that there was nothing in the 148th section of the Common Law Procedure Act to do away with the practice. If the devisee suggests the death of the original plaintiff under this act, he stands in his place; and it is clear from section 137. that, if he had done so at any stage in the Court below, he would have made himself liable to all the costs. The proceedings cannot be divided at the moment when Parker suggested the death of the original plaintiff. In *Benge v. Swaine* (15 Com. B. Rep. 784; s. c. 23 Law J. Rep. (N.S.) C.P. 182) it was held, that the 138th section put the administratrix of a defendant, who died after issue joined, in the same position as the original defendant, and ordered the plaintiff to pay her full costs on discontinuing the action.

[*Pollock, C.B.*—That is a very different matter; if a man discontinue his suit, he should of course pay all costs.]

Then, again, the fact of the suit being in error makes no difference. The successful party might be compelled to account to the executors of the deceased for the costs; but still he would have been entitled to recover them all.

[*Channell, B.*—To make out your case the words in the 163rd section should be as strong as those in the 137th.]

The effect of the 137th, 148th and 163rd sections taken together is, that the person continuing the action becomes a party, and stands exactly in the same position as the original plaintiff.—[He also referred to *Chitty's Archbold*,

(1) This section enacts, that if any person or persons shall commence or prosecute in any court of record any action, plaint or suit, whereon, upon any demurrer either by plaintiff or defendant, demandant or tenant, judgment shall be given by the Court against such plaintiff or defendant, or if at any time after judgment given for the defendant in any such action, plaint or suit, the plaintiff or demandant shall sue any writ or writs of error to annul the said judgment, and the said judgment shall be afterwards affirmed to be good, or the said writ of error shall be discontinued, or the plaintiff shall be nonsuit therein, the defendant or tenant in every such action, plaint, suit or writ of error, shall have judgment to recover his costs against every such plaintiff or plaintiffs, demandant or demandants, and have execution for the same by *ca. sa., ff. ja. or elegit.*

11th edit. 577, and the forms of judgment in error in *Chitty's Forms*, 9th edit. 282 et seqq.]

Gray, in support of the rule, was stopped by the Court.

POLLOCK, C.B.—The Common Law Procedure Act does not expressly give the costs, and if the devisee were to pay these costs, I do not see how he could recover them from the executors. He would certainly have no legal claim, though he might have a good equitable or moral claim. The devisee made himself a party to the writ of error after the writ of error had been allowed; he had nothing to do with taking the step, but joined in the writ of error after the step was taken; and he is therefore not liable to any costs before the suggestion. I therefore think the rule should be made absolute.

CHANNELL, B.—I am of opinion, with the Lord Chief Baron, that the rule should be absolute, calling upon the Master to review his taxation. It seems to me important to bear in mind that costs can only be claimed by a litigant party pursuant to some statute, either that of Gloucester or some other act passed since. How, then, would the case have stood before the Common Law Procedure Act? The authorities are collected in *Wms. Saund.*²; and it is quite clear that the defendant, who succeeded in the Court below, would not have been deprived of his costs on the death of the plaintiff, but he must have got them from the executors by a *scire facias quare executionem non*.³ Therefore the defendant had a right to his costs on the judgment of the Court below being preserved, but he must have got them from the executors.

Now, the Common Law Procedure Act was intended to simplify the proceedings in error, and thereby to diminish the costs and expenses in error; and it permits a party to come in, not only before verdict, but to come in after verdict and judgment, and pending the writ of error.

I take it to be clear by the 137th section that if, before verdict, Parker had come in and made himself, by suggestion, a party to the suit, then the cause would have gone on as if Parker had been originally the plaintiff; and, in point of law, as regards the question of costs, we should have taken no notice of the substitution of one name for another. But here Parker has not been from the very beginning the plaintiff.

Now, it being conceded that the defendant's right to the costs must be one given by the statute, this question turns upon the 163rd section, the language of which differs remarkably from that of the 137th. The words are, not that the proceedings in error are to be carried on as the action in the other case,—“as if such person had been originally the plaintiff”; but “the proceedings may thereupon be continued at the suit of and against such legal representative as the plaintiff in error”; that is, to prevent the suit abating, and to permit its continuance, but not pointing to any liability as regards the costs of the action below.

And it has been decided in *Fisher v. Bridges* (4 El. & B. 666; s. c. 24 Law J. Rep. (N.S.) Q.B. 165), which appears to be very much in point,—and in another case, which, though not directly in point, appears to have a strong bearing upon the subject,—that the object of the act was to render unnecessary certain proceedings that were requisite before, and, with relation to those proceedings, to reduce the amount of costs; but it does not entail any new liability that did not exist before; so that, where a party was not liable to costs in error before, he is not liable by the act. So, in *James v. Cochrane* (9 Exch. Rep. 552; s. c. 23 Law J. Rep. (N.S.) Exch. 126), it was held that where a party was not before liable to give bail, he is not now liable to give bail. Now, by way of accounting for the omission of the words found in the 137th section from the 163rd, we are told that when the act provided that the allowance of a writ of error should be “a step in the cause,” it had the effect of preventing error being, as it were, a new proceeding, and bound it up and

(2) In vol. 2, part 1, notes to *Jaques v. Cesar*.

(3) See Tidd's Practice, 9th edit. 1163.

blended it with the old proceedings. I am, however, unable to adopt this view, and for the reasons which I have already given.

PIGOTT, B.—The case is not a very satisfactory one, for there is some difficulty in determining exactly the meaning of the words used by the legislature. The defendant argues from the 148th section that, inasmuch as error is to be “a step in the cause,” it is to be a step in the cause for all purposes, including the question of costs.

Now, in the case of *Fisher v. Bridges* (4 El. & B. 666; s. c. 24 Law J. Rep. (N.S.) Q.B. 165), the Court of Queen’s Bench determined that the 148th section really had no operation as regards liability to costs. It is true in that case there was a reversal; whereas in the present case the judgment of the Court below was affirmed; but, in the result, I agree with my Brother Channell in the conclusion he has drawn from the several sections, and I think that we cannot infer from the 148th section that a new liability is to attach to a person becoming a party by suggestion of a death, as in the present case. If the legislature had intended to alter the law in reference to costs in that respect, they would have said so, and not have left it to be found out by drawing inferences from several other sections. I therefore think that the taxation must be reviewed.⁴

Rule absolute to review the taxation by disallowing the defendant’s costs of the action and of the proceedings in error prior to the entry of the suggestion of the death of the deceased claimant.

[IN THE COURT OF EXCHEQUER.]

Nov. 25, 1865.

BOOTH, BART. v. TAYLOR.

35 L. J. Ex. 56; 4 H. & C. 70; 13 L. T. 408; 14 W. R. 131; 11 Jur. N.S. 981.

Practice—Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. ss. 79, 81.—*Declaration claiming Writ of Injunction—Pleading.*

PRACTICE.—A defendant cannot plead to so much of a declaration as claims a writ of injunction,—the claim being in the nature of a notice only that the plaintiff intends subsequently to ask for the writ.

The declaration was for obstructing the light and air from entering a warehouse, of which the plaintiff was the reversioner, and concluded with a claim for a writ of injunction to restrain the defendant from the continuance and repetition of the injuries complained of, and the committal of other injuries of a like kind relating to the same right.

The defendant pleaded, *inter alia*, a plea upon equitable grounds to the claim for a writ of injunction (except so far as the same referred to the committal of other injuries of a like kind relating to the same right),—“that the said alleged obstruction of light and air was originally caused by the erection, by the defendant, of certain buildings upon certain lands next adjoining the said warehouse; and that after the defendant had so erected the said buildings, and before any complaint had been made by the plaintiff in respect thereof, the defendant lawfully demised certain portions of the said buildings to certain persons, for certain terms therein respectively, which

(4) Martin, B. entered the court during the argument, and intimated that his opinion was in favour of the plaintiff’s contention.

said demises respectively had not, nor had any or either of them respectively, expired or been otherwise determined at the commencement of this suit, or from thence hitherto; and that by reason of the premises, the defendant is, and from the commencement of this action always has been, unable to prevent a continuance and repetition of the said injuries, and will be unable to obey the said writ of injunction so far as relates to the alleged obstruction caused by the portions of the said buildings so demised as aforesaid, without being guilty of a trespass against his tenants respectively in so doing; and the defendant further says, that he has already put an end to the said obstruction caused by the residue of the said buildings other than the portions so demised as aforesaid."

Martin, B. refused to strike out this plea at chambers; and the plaintiff thereupon appealed from his decision to the Court.

The following sections of the Common Law Procedure Act, 1854, refer to the claim:

Section 79. "In all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may, in like case and manner as hereinbefore provided with respect to *mandamus*, claim a writ of injunction against the repetition or continuance of such breach of contract, or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages or other redress."

Section 81.—"The proceedings in such action shall be the same, as nearly as may be, and subject to the like control, as the proceedings in an action to obtain a *mandamus* under the provisions hereinbefore contained; and, in such action, judgment may be given that the writ of injunction do or do not issue, as justice may require; and, in case of disobedience, such writ of injunction may be enforced by attachment by the Court, or, when such Courts shall not be sitting, by a Judge."

T. I. Barstow having obtained a rule, calling on the defendant to shew cause why the plea should not be struck out,

Kemplay shewed cause accordingly, contending that there was no reason why a demand for an injunction should not be pleaded to. In *Bilke v. the London, Chatham and Dover Railway* (3 H. & C. 95; s. c. 33 Law J. Rep. (N.S.) Exch. 206) a demurrer to a claim for an injunction was not allowed, but it is to be implied from the judgment that a case might occur in which such a claim would be properly dealt with by a demurrer; and if so, why not also by plea? There must exist cases which would require facts to be brought before the Court, and under which, therefore, a plea would be the proper mode of treating the claim. If the defendant can state facts shewing that there should be no judgment for a writ of injunction, then the plea would be open to a demurrer according to the opinion of Mr. Baron Bramwell in *Bilke's* case (3 H. & C. 95; s. c. 33 Law J. Rep. (N.S.) Exch. 206).

[POLLOCK, C.B.—How can the question whether the writ should issue or not be the subject of pleading?]

If it cannot be, it may be asked, what is the meaning of the 81st section? The 69th and 70th sections¹ shew that, in the case of a *mandamus*, there may be pleadings. If the question may be raised by demurrer, why may it not be raised by plea? If the case were to go to trial without this plea, the plaintiff would get his injunction at once; the 81st section shews this.

Barstow was not called upon to support his rule.

POLLOCK, C.B.—The plea must be struck out. The plaintiff's claim for

(1) The 70th section enacts: that "The pleadings and other proceedings in any action in which a writ of *mandamus* is claimed, shall be the same in all respects, as nearly as may be, and costs shall be recoverable by either party, as in an ordinary action for the recovery of damages."

the writ of injunction is merely preliminary to his asking for it; it is in the nature of a notice, and does not call for a plea at all.

BRAMWELL, B.—I am of the same opinion. I do not think that anything said by me in *Bilke's case* (3 H. & C. 95; s. c. 33 Law J. Rep. (N.S.) Exch. 206) supports the defendant's view of the case.

CHANNELL, B.—This plea must not be allowed. The matter is not ripe for pleading at its present stage. The statute was intended to enable the plaintiff to entitle himself to an injunction after the trial of the issues. To be in a position to ask for his injunction, the plaintiff must give notice of his intention to do so in his declaration. But the two proceedings are quite distinct and divisible from each other.

PIGOTT, B.—The plea might raise an expensive and useless issue, which need not be disposed of till the injunction is actually asked for.

Rule absolute.

[IN THE COURT OF EXCHEQUER.]

Nov. 20, 1865.

BOULNOIS AND ANOTHER v. MANN.

35 L. J. Ex. 58; 4 H. & C. 9; L. R. 1 Ex. 28; 13 L. T. 531; 14 W. R. 181; 11 Jur. N.S. 1006.

Debtor and Creditor—Composition Deed—Bankruptcy Act, 1861, 24 & 25 Vict. c. 134.—Unreasonable Clause—Certificate of Trustee as to Statutory Majority of Creditors.

BANKRUPTCY.—*A provision in a composition deed that the debtor shall pay the composition agreed on "as soon as the trustee shall certify that the deed has been executed or assented to by the statutory majority of the creditors," is unreasonable, as it renders necessary for the acquirement of the non-assenting creditor's rights under the deed another condition, in addition to those on which his obligations arise under the statute.*

Declaration on the common *indebitatus* counts, and on a bill of exchange accepted by the defendant.

The first plea—which was pleaded to the count on the bill, and to so much of the other causes of action as accrued up to the 15th of August, 1863—set out a deed of composition under the Bankruptcy Act, 1861, dated on the 15th of August, 1863, and made between the defendant of the first part, a surety of the second part, a trustee of the third part, and the several persons who had assented thereto, or whose names and seals were thereunto subscribed and affixed, being respectively creditors, either in their own right or in co-partnership, or attornies or agents of creditors of the defendant, of the fourth part. The clauses material to this case were as follows:

Clause 4. "As soon as the trustee shall, in writing, under his hand and seal, certify that these presents have been executed, or in writing assented to, or approved of by a majority in number representing three-fourths in value of the now existing creditors of the debtor whose debts respectively amount to 10*l.* and upwards, the debtor shall pay to each of his now existing creditors such a sum or composition dividend as shall be equal to the amount of 5*s.* in the pound upon the whole debt now due to such creditors respectively."

Clause 10. "Unless and until these presents shall become void under the proviso hereinafter contained, the creditors of the debtor who shall have executed, or otherwise acceded to, or become bound by these presents, shall

not, nor shall any of them, nor shall their respective heirs, executors, or administrators, or partners, or assignees, at any time (except so far as may be necessary in order to enforce any mortgage, lien, or security, or any rights or remedies against any persons other than the debtor) commence or prosecute any action or suit at law or in equity, or other proceeding, or obtain, or endeavour to obtain, any adjudication of bankruptcy against the debtor or his heirs, &c., or make or sue out any attachment or sequestration of or upon him or them, or his or their property, credits or effects, for or on account of all or any part of the debts now due from the debtor to the said creditors who shall have executed or otherwise acceded to or be bound by these presents, or any of them, or for or on account of any claim of such creditor, provable under these presents; and if any of the last-mentioned creditors or their heirs, executors, administrators, partners or assigns shall, in any respect, fail to observe this agreement, then, and in every such case, this present agreement shall operate and enure, and may be pleaded in bar as an effectual release of such debts or claims, and all demands in respect thereof."

Clause 12. "In case, and as soon as, the trustee shall, at any time hereafter, certify by writing, under his hand, that a sufficient proportion, in his judgment, in number and value of the creditors of the debtor has not executed, or in writing assented to, or approved of these presents, or the provisions hereof, or in case the debtor shall fail to pay the amounts hereinbefore covenanted to be paid by him, or any, or any one of them, or any part thereof, to the creditors or creditor to whom the same are or is respectively due upon the same being demanded by such creditors or creditor, then and in either of such cases, these presents and everything herein contained shall, except as to any acts or things heretofore done in pursuance hereof, and without prejudice to any right of action theretofore accrued hereunder, cease and be void."

The plea averred that all the conditions required by the statute had been complied with, and that, therefore, the plaintiff was bound by the deed.

Demurrer and joinder in demurrer.

Holl, in support of the demurrer.—The 4th clause, taken in connexion with the 12th, is unreasonable. The debtor is to pay, not upon the event of the requisite number of creditors having assented, but on the trustee certifying to that effect. By the 10th clause the creditors are precluded from suing until the deed is void under the 12th clause by reason of the trustee certifying that the deed has not been executed by a sufficient number of the creditors, or till default in payment by the debtor. The two clauses together shew that the debtor can make no default until the trustee has certified. The trustee has an absolute discretion in the matter; he may wait for years, or may die, and never certify that the requisite number have assented. Even if this were reasonable with respect to the assenting creditors, it cannot be so as to the non-assenting. The right of action is barred before it is known whether the deed will be operative or not; and there is no provision against the contingency of the trustee making a wrong decision. Again, the plea contains no allegation that the trustee has certified, nor that the composition has been paid or tendered.

Harington, contra.—As to the 4th clause it is not to be assumed that the trustee, who is appointed for the protection of the creditors, will act negligently. If he do so act, they have a remedy against him in equity. His intervention only supplies a convenient machinery for ascertaining when the composition should be paid. It would be hard upon the debtor if he were to pay too soon. When once the deed has been signed by the required majority, the clause is not unreasonable. The 12th clause must refer to assenting creditors only; as if a sufficient number have not executed the deed, the dissentients would never be bound, whether the trustee certified or not. Some such provision was necessary for the executing or assenting creditors. If the trustee had certified, the plaintiff should have replied to that effect, and so have shewn the deed to be void.

[BRAMWELL, B.—Where is the right of action between the time of execution by the requisite number of creditors and the granting of the trustee's certificate,—*in gremio legis* or *in nubibus*?]

It is as if there were a covenant to pay the composition on a fixed day—a day to be fixed by the trustee.

HOLL, in reply.—Though the 12th clause *per se* may not affect the validity of the deed, yet, taken with the 4th clause, on which the question turns, it is unreasonable. As a matter of fact, trustees are generally creditors chosen as being favourable to the debtor. Payment ought not to be dependent on anything but the event which makes the deed binding on the dissentient creditors.

POLLOCK, C.B.—I am of opinion that the plaintiff is entitled to our judgment. One rule we have to go by is, that a deed of this sort is not valid if it contain any unreasonable condition, or if it do not put all creditors upon the same footing. Perhaps in this case they would all be on the same footing if the deed were valid; but it contains the provision, that the money is not to be paid till a certain person appointed by the deed has certified that it has been assented to by the requisite number of creditors. This seems to me to be a perfectly novel condition, and wholly unwarranted by the act of parliament. Those who contract in these matters have no right to put in a clause of that sort. It is quite obvious it may create great difficulty; for if the certificate be not obtained, the estate is not to be administered. I think that the legislature intended that when once the requisite number of creditors had assented, then the deed should be valid, and that its validity should not depend on something more being done than the statute requires. I think, therefore, that this deed is not within the act so as to be binding on the creditors who have not assented to it.

BRAMWELL, B.—I think that this 4th clause is unreasonable in point of law, as well as inexpedient in point of policy. It is very nearly a violation of the rule that the power and authority given to one person cannot be delegated by him to another. According to the act, the non-assenting creditor is not bound till a certain event has happened; when that event has happened, he is bound. If that be so, why should anything further have to be done in the way of ascertaining that fact before his rights are given to him under the deed, when his liabilities are already forced upon him? If it had been that nobody should be bound if the certificate were not given, that would have been more reasonable. But here the dissentient creditor is to be bound, and yet is to have no rights. Upon that ground, therefore, and not on the supposition that the trustee might not do his duty, my judgment is for the plaintiff.

CHANNELL, B.—I agree that the judgment of the Court should be for the plaintiff. It is not necessary to hold that this requisition is inexpedient, or to assume that the trustee might not do his duty; but, taking it for granted that the provision would be fairly and properly worked out, still the deed does not disclose a legal answer to the action. I must take it upon this plea that the deed itself has been executed by the requisite number of creditors; and therefore the question is, what is its operation as against the plaintiffs? If the 4th clause were struck out altogether, it seems it would be impossible to contend that this is a good plea. I take it that, if the 4th clause provided for the payment of composition on execution of the deed by three-fourths of the creditors, that would have been a good contract for composition; but the introductory words in that clause make the composition payable only in the event of the trustee giving a certificate, and there is no other time specified for payment. I do not think that that is a reasonable condition. If it be struck out or disregarded, there is nothing in the deed to bar the plaintiff's right of action; and I think when the statute has provided that a deed executed by three-fourths in number and value shall be a good deed, provided certain other conditions be complied with, one of which is, that an affidavit shall be

filed stating that the requisite number in writing have assented, I see no reason for resorting to any other mode of ascertaining the fact that it is so.

PIGOTT, B. concurred.

Judgment for the plaintiff.

[IN THE COURT OF EXCHEQUER.]

Nov. 25, 1865.

In the matter of THE SHEFFIELD WATERWORKS ACT, 1864, and in the claims of GEORGE WRAITHBY AND GEORGE COLLISS.

35 L. J. Ex. 60; L. R. 1 Ex. 54; 13 L. T. 440; 14 W. R. 143; 4 H. & C. 74; 11 Jur. N.S. 954.

Observed upon, *Owen v. London and North Western Railway*, [1868] E. R. A.; 37 L. J. Q.B. 35; L. R. 3 Q.B. 54; 17 L. T. 210; 16 W. R. 125 (Q.B.).

Local Act—Taxation by Master of Superior Court of Costs under the Sheffield Waterworks Act, 1864—Review of Taxation by the Court.

COSTS.—*The 67th section of the Sheffield Waterworks Act, 1864, provided for the costs, payable in respect of claims under the act, being taxed and settled by a Master of a superior Court of law at Westminster, on the principles and according to the rules and on payment of the fees observed and paid on the taxation and settlement of costs in actions at law. The Court refused to review the taxation of these costs by one of its Masters, on the ground that the costs were in no sense given by an award of the Court, and that the Master did not tax the costs in his capacity of officer of the Court, but merely as one of a class of persons named in the act of parliament.*

The Sheffield Waterworks Act, 1864 (27 & 28 Vict. c. cccxxiv.), was passed for the purposes of facilitating and expediting the settlement of the amounts to be paid in respect of damages incurred by reason of the bursting of the reservoir of the Sheffield Waterworks Company, on the night of the 11th of March, 1864.

For the purpose of assessing and settling the amounts to be paid in respect of such damages, three Commissioners were appointed under the act, styled the Sheffield Inundation Commissioners. The assessment of damages was completed within the time prescribed by the act, being nine months after the passing thereof; and the Commissioners granted their certificate under the act on the 26th of May, 1865, the total number of claims being 4,589; and the total amount of damages 276,909*l.* 17*s.* 7*d.*

The 66th section of the act contained rules to be observed as to the burden of costs being borne according to the result of the claim. Then the 67th section provided that "all such costs as aforesaid shall be due and payable from and by the company and any claimant respectively, at the expiration of six months after the making of the general certificate: provided, that all such costs shall, in case of difference, be taxed and settled, on production of a certificate of the Commissioners, by a Master of a superior Court of law at Westminster on the principles, and according to the rules, and on payment of the fees observed and paid on the taxation and settlement of costs in actions at law, if application for such taxation and settlement is made by either party within the last-mentioned period of six months; but in case of difference, any such costs shall not be payable at any time unless they are so taxed and settled."

The 68th section provided that, "if any costs payable under this act

by the company or a claimant are not paid within twenty-eight days after demand in writing, the certificate of the Commissioners respecting such costs shall have the effect as against the company or claimant of a judgment recovered for the amount of such costs against the company or the claimant in one of the superior Courts of law at Westminster, as on the day of the date of the general certificate, and afterwards duly registered; but payment of such amount shall have the effect of satisfaction duly entered upon such judgment: provided, that all mortgages, terminable annuities and debenture stock, granted or created by the company under this act or any former act, and all stock and shares created by the company under this act or any former act, for the redemption or in lieu of mortgage or bond debt, shall have priority over all monies payable by the company in respect of costs under this act."

The bills of costs of the claimants Wraithby and Colliss were, among several hundred others, taxed by a Master of the Court of Exchequer, with whose taxation the company were dissatisfied for several reasons.

Pickering accordingly obtained a rule to shew cause why the taxation should not be reviewed, and

Manisty (*Shepherd* with him) now appeared to shew cause, contending that as the costs were not payable by virtue of a judgment of this Court, the Court had no jurisdiction to review the taxation.

Pickering, *Mellish* and *Quain*, being called upon to support the rule, contended that the Master acted as an officer of the Court, and not as an independent arbitrator. The judgment must be entered up in the court where the costs are taxed, and the words, "on the principles and according to the rules, &c. in actions at law," must mean that he is to do it under the surveillance of the Court of which he is an officer.

[*CHANNELL*, B.—The claimants get their costs by the judgment of the Commissioners. Sections 67. and 68. must be taken together.]

Either party may apply to any Master. Suppose different views taken by different Masters. There must be somebody to decide. If the taxing is to be done on the principles of the Courts of law, the guardians of those principles must preside over the taxation. The Commissioners cannot decide the question, for they are *functi officio*. The act says, that their proceedings shall not be interfered with, but makes no such provision as to the Master's taxation. Suppose he has exceeded his duty, is his taxation to be looked at in the light of an award? or is there to be a prerogative writ of mandamus to compel him to do his duty, *e. g.* a writ of mandamus from the Court of Queen's Bench to a Master of this court to review his taxation?

[They admitted that there was one case against their view—*In re Ross and the York, Newcastle and Berwick Railway Company* (5 Rail. Cas. 516; s. c. 18 Law J. Rep. (N.S.) Q.B. 199), decided on the 52nd section of the Lands Clauses Consolidation Act.]

POLLOCK, C.B.—We are all of opinion that this rule must be discharged. It appears to me that if it were intended that we should review this taxation (which is a matter wholly out of our jurisdiction), the legislature would have taken care specially to say so. The legislature has not so done, and therefore I think that if we were to interfere we should be taking upon ourselves a jurisdiction not intended to be given to us.

BRAMWELL, B.—Those who seek to shew that we have the power and authority which they call upon us to exercise should give a reason for our doing so. Now, I think there can be two reasons given to the contrary. One of them is, that, as to the costs of an ordinary action, it is the Court that awards them, and it is the Master or an officer of the Court who fixes them, and his award is, in truth, the award of the Court; and therefore inevitably there is an appeal from the officer to whom the Court has delegated the inquiry. On turning to this particular act of parliament, no such reasoning as that would apply. These costs are in no sense given by the award of the Court. Again, by section 67, in case of difference, the costs are to be taxed and settled

by the Master of a superior Court of law at Westminster. Now, that does not mean a Master of any particular Court, but any one of all the Masters of all the three Courts. And I take it to be clear upon that, that any Master to whom application has been made might say, that he had not time to attend to the matter, and that the parties must go somewhere else. If his objection were not made *bonâ fide*, he would be liable to an indictment for not performing his duty. But for all that it is not as a mere officer of the Court, but as one of a certain number of designated persons, that the Master has this duty put upon him, so that no appeal lies from him to us. It no more lies because the Master who taxes happens to be a Master of this Court, than it would lie if he happened to be a Master of any other Court. It seems, therefore, that there is no authority in this case for granting what is asked.

CHANNELL, B. and PIGOTT, B. concurred.

Rule discharged.

[IN THE EXCHEQUER CHAMBER.]

(*Appeal from the Court of Exchequer.*)

Nov. 30, 1865.

ROBERTS AND ANOTHER v. ROSE.*

35 L. J. Ex. 62; 4 H. & C. 103; L. R. 1 Ex 82; 13 L. T. 471; 14 W. R. 225;
12 Jur. N.S. 78.

Watercourse—Right to obstruct—Abatement of Nuisance—Damage to Innocent Person.

NUISANCE. WATER.—*In abating a nuisance to his property, a man may be justified in interfering (so far as is necessary) with the property of the wrongdoer, but not in interfering with the property of innocent third persons; and, consequently, where there are alternative modes of abating the nuisance, he is bound to choose that mode which may inflict damage, however great, on the wrongdoer, rather than that which would be productive of mischief, however small, to innocent third persons or to the public.*

This was an appeal, by the plaintiff, against the decision of the Court of Exchequer (May 4, 1864), making absolute a rule to enter a nonsuit.

The pleadings and the facts, which were stated for the Court of appeal in the form of a special case, are set out at length in the report below—33 *Law J. Rep.* (N.S.) Exch. 241.¹

The facts were shortly as follow.—The plaintiffs, who were the lessees of a colliery under Sir Horace St. Paul, obtained his consent to make a watercourse on his land (then in the occupation of William Lowe) to carry off the water pumped from their colliery. Lowe consented also, and in fact used a considerable quantity of water for his own purposes, the remainder running down an old mineshaft on Sir Horace St. Paul's land. Sir Horace St. Paul subsequently required the plaintiffs to extend their watercourse so as to convey their water to a canal-basin in the neighbourhood. They accordingly made a watercourse for this purpose. The defendant shortly afterwards obtained a lease from Sir Horace St. Paul of the coal in and under the land over which the water now ran; and finding that some of the water still escaped down the old mine-shaft into his colliery works, he, in January, 1863, gave the plaintiffs notice that he would not allow the water to continue to come that way, and

* *Coram*, Blackburn, J., Mellor, J., Montague Smith, J. and Lush J.

(1) See also 33 *Law J. Rep.* (N.S.) Exch. 1.

that if they did not provide another channel for it, it would be stopped. And accordingly he did subsequently stop it on the surface of the land occupied by Lowe, at a point close to the plaintiffs' land; and their colliery was subsequently flooded. It was in evidence that the water could not have been stopped elsewhere on Lowe's land without causing damage to him and to a public road.

The main issues were, whether the plaintiffs had a continuing or a revocable licence only to carry the water over the defendant's land; and whether, the defendant having the right to stop the water, it was reasonable that he should have stopped it where he did, supposing that it could have been stopped elsewhere on Lowe's land, causing comparatively little damage to Lowe and to a public road, and far less damage to the plaintiffs than was actually caused.

The argument of *Mellish* (with whom was *H. Matthews*), for the appellant, was substantially the same as that for the plaintiffs in the Court below.

Gray and *Macnamara* appeared for the defendant, but were not called upon to argue.

BLACKBURN, J.—We are all agreed that the judgment of the Court below should be affirmed. Where a person seeks to justify his having interfered with the property of another for the purpose of abating a nuisance, he may be justified if the other be a wrongdoer, but only in so far as his interference was necessary for the purpose. And we agree with the Court below, that, in abating a nuisance, if there be two ways of doing it, that way must be chosen by which the lesser mischief will be done.

We are also agreed, that where, in the alternative way of abating the nuisance, there may be some wrong done to the property of an innocent person or to the public, that mode cannot be adopted. No interference with property can be justified, unless it be the property of the wrongdoer. Applying this to the present case, we think, first, that the licence originally given to the plaintiffs, with Lowe's consent, by the defendant's lessor (he being at the time owner of the three adjoining pieces of property), was that the plaintiffs might pump their water into Lowe's watercourse, whence it would flow across Lowe's land, and then across the defendant's into the canal. And the effect of the arrangement between the three parties was, that this was merely a revocable licence, to be in force so long only as Lowe permitted the water to flow over his own land, and the defendant also authorized the flowing across his land. Then, when the defendant revoked his licence, and said the water should no longer come on to his land, I think the plaintiffs, having notice of the revocation, were wrongdoers in continuing to pump the water into Lowe's watercourse. Lowe had authorized them to do it, so long as it could run off on to the defendant's land, but so long only. Now, if the defendant had come to Lowe and said to him, "I can no longer allow this water to flow on to my land, therefore you must take care of yourself," Lowe would doubtless have said to the plaintiffs, "Stop the water coming to me, unless you can make some arrangement to take it away from me." There can be no question that the plaintiffs after that would have had no right to complain if Lowe had stopped the water coming on to his land; if that had been done, the very same mischief would have been done against the plaintiffs as has now been done, only it would have been done through Lowe and at Lowe's instance.

Now, could the defendant, without giving Lowe notice, have lawfully built a dam lower down, and so have turned Lowe's land into a pond? It seems to me he could not; it would have been a wrong against Lowe, and there is nothing to justify an interference with his property; the cause of action which Lowe would have had would not have been the defendant's building a dam on his own land, but the doing it when the effect of it would have been, without excuse, to cause the water to flow over Lowe's land,—not the obstructing of the watercourse, but the causing the water to flood Lowe's

land. Therefore, if the defendant had stopped it in the way in which the plaintiffs say he ought to have stopped it, he would have done a wrong to Lowe, and to the public road.

That being so, I think we must take into account all that I have already said in considering what was a reasonable way of abating the nuisance, so as to cause the least mischief. If we look to the mischief actually done to the wrongdoer's property, and consider at the same time that mischief would have been done to an innocent person if the water had been stopped in any other way, the fair and the reasonable way to stop the water would certainly seem to be to stop it in such a way as not to injure the innocent person.

There is one smaller point, arising from the fact that the defendant, in stopping the water as he did, necessarily committed a trespass against Lowe in crossing his land, and in filling up the watercourse where he did; and my Brother Montague Smith has some doubt whether or not the fact of the obstruction, involving thus either way a wrong against Lowe, did not raise a question for the jury. The point was not put at the trial, and the majority of the Court think that though the balance of these two wrongs might raise a question for the jury, the slightness of one wrong compared with the other brings it within the rule on which the Courts constantly act, viz. not to disturb a nonsuit merely because of there having been a *scintilla* of evidence for the jury, which, if it had been put to them, would not have warranted a verdict for the plaintiff.

MELLOR, J. and LUSH, J. concurred.

MONTAGUE SMITH, J.—I entirely agree in the principles of my Brother Blackburn's decision. I only doubt if it was not for the jury, upon the evidence, to say whether, having regard to the position of Lowe, the defendant had stopped this watercourse in a manner which would create the least mischief under all the circumstances of the case. Now, I think that if the defendant could have entered on Lowe's land without committing a trespass on Lowe, or if he could have stopped the water at a point lower down, and so have thrown the water upon the land of Lowe without subjecting himself to an action on the case by Lowe, then the defendant would have been open to this action on the part of the plaintiffs, because in that case, having two methods open to him, he chose that which did the greater injury to the plaintiffs. It appears clearly, however, upon the evidence, that the defendant could not have stopped the water lower down without flooding Lowe's land; and if the facts had remained there, then no doubt the nonsuit would have been right. But it appears to me that, stopping the water at the point where he did, the defendant was, in fact committing a wrong against Lowe, for which Lowe might have brought an action against him; so that the question of greater or less mischief to Lowe does, as it appears to me, arise, and that seems rather a matter for the jury. But, upon the whole of the facts, I think that the jury were not right in coming to the conclusion to which they did; and I only wish to express the doubt I feel whether we are not taking the province of a jury too much upon us in deciding that there was no evidence for their consideration. Upon the rest of the case, I entirely agree with my learned Brothers; substantial justice has been done, and the judgment should be affirmed.

Judgment affirmed.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Exchequer.)

June 21, 22; Dec. 1, 1865.

WOODS AND ANOTHER v. DE MATTOS.*

35 L. J. Ex. 64; L. R. 1 Ex. 91; 14 W. R. 226; 12 Jur. N.S. 78.

Distinguished, *Hoggarth v. Taylor*, [1867] E. R. A.; 36 L. J. Ex. 61; L. R. 2 Ex. 105; 15 L. T. 588 (Ex.). Referred to, *Robertson v. Goss*, [1867] E. R. A.; 36 L. J. Ex. 251; L. R. 2 Ex. 396; 16 L. T. 566; 15 W. R. 965 (Ex.). Approved but distinguished, *Sharland v. Spence*, [1867] E. R. A.; 36 L. J. C.P. 230; L. R. 2 C.P. 456; 16 L. T. 355; 15 W. R. 767 (C.P.). Commented on and not applied, *In re Thompson; Ex parte Wilmot*, [1867] E. R. A.; 36 L. J. Bk. 17; L. R. 2 Ch. 795; 16 L. T. 650; 15 W. R. 969 (L.C. & L. JJ.). Applied, *Hooper v. Marshall*, [1870] E. R. A.; 39 L. J. C.P. 14; L. R. 5 C.P. 4; 21 L. T. 639 (C.P.). See, *Bailey v. Bowen*, [1868] E. R. A.; 37 L. J. Q.B. 61; L. R. 3 Q.B. 133; 17 L. T. 470; 16 W. R. 396 (Q.B.). Not applied, *Solomon v. Isaacs*, 1873, 27 L. T. 624 (Ex. Ch.).

Debtor and Creditor—Bankruptcy Act, 1861, s. 192.—Deed of Inspectorship—Meaning of "Creditors"—Reasonable Provisions.

BANKRUPTCY.—Throughout the Bankruptcy Act, 1861, the word "creditor" is used in the sense of a person having a claim which can be proved under the bankruptcy, whether upon a debt or not; and in the 192nd section of the act, the word "creditors" means all persons who at the time of the execution of the deed had claims which would have been provable against the estate if the debtor had then become bankrupt. So held, by Crompton, J., Blackburn, J. and Byles, J.,—Willes, J. dubitante.

The validity of the deed in *Strick v. De Mattos* (3 Hurl. & C. 22; s. c. 33 Law J. Rep. (N.S.) Exch. 276) established.

This case arose out of a deed of inspectorship under the Bankruptcy Act, 1861, and was in substance an appeal from the decision of the Court of Exchequer in the case of *Strick v. De Mattos* (3 Hurl. & C. 22; s. c. 33 Law J. Rep. (N.S.) Exch. 276), where the same deed was held to be valid.

The deed was expressed to be made between the debtor of the first part, his inspectors of the second part, and "the several persons, companies and co-partnership firms who at the date hereof are respectively creditors of the said debtor, or who would be entitled to prove under an adjudication in bankruptcy against the said debtor founded on a petition filed on the day of the date of these presents, hereinafter called the said creditors," of the third part.

In addition to the clauses objected to in the Court below as being unreasonable—which are set out at length in the report of *Strick v. De Mattos* (3 Hurl. & C. 22; s. c. 33 Law J. Rep. (N.S.) Exch. 276)—the 23rd clause was now called in question.

This clause of the deed was as follows: "That if and when the estate shall have been fully administered according to the provisions hereof to the satisfaction of the said inspectors, or the survivors or survivor of them, or the inspectors or inspector for the time being, they or he may certify the fact in writing under their or his hands or hand, such writing to be indorsed upon or to refer to these presents; and thereupon and in case of such certificate being given, such certificate shall be conclusive evidence of the truth of the

* *Coram*, Crompton, J., Blackburn, J., Willes, J. and Byles, J. Keating, J. was present during the argument on all the points, except that which the Court took time to consider of.

matters to be therein alleged as aforesaid; or in case of such conveyance, assurance or assignment of all the estate and effects of the said debtor being made by him as in a previous article hereinbefore contained, and the same being in like manner certified, then and thenceforth such certificate (except only for the purpose and to the extent in this present clause hereinafter provided for, and without prejudice to the rights of the said creditors to or over the property so thereinbefore conveyed or assigned, or to or over any dividends or fund for dividends then provided but not actually paid to the said creditors) shall operate and be a release and discharge to the said debtor, his heirs, executors and administrators, as fully and effectually and in like manner as an order of discharge under an adjudication of bankruptcy, and may be pleaded accordingly to all actions, suits and proceedings in respect of any of the debts, claims and demands of all or any of the said creditors. Provided, nevertheless, that in case at any time after such conveyance and assignment the said debtor shall become or be made or declared bankrupt, and the arrangement hereby made or the property comprised in any such conveyance and assignment shall thereby be in any way prejudiced or affected, then such release and discharge as aforesaid shall not prevent the said creditors respectively from coming in under such bankruptcy for any purposes which they would but for such release and discharge have been entitled to come in."

Joseph Brown (Day with him), for the plaintiffs.—The 31st clause (containing an absolute release) ought to be struck out by reason of the 32nd clause, for it is inconsistent with the principles of the Bankrupt Laws. In a deed of inspectorship like this such a release is unreasonable, for it prejudices the non-assenting creditor's right to dividends. He could not after plea and judgment founded thereon verify his claim under the 13th clause. And its unreasonableness appears more obvious on comparing the 31st clause with the 23rd, where the release which follows the certificate is so far qualified as to save the right to dividends, whereas the 31st contains no such qualifying provision—*Dell v. King* (33 Law J. Rep. (N.S.) Exch. 47), *Hidson v. Barclay* (34 Law J. Rep. (N.S.) Exch. 217), and the Bankruptcy Act, 1861, s. 161. If the 31st clause be rejected under the 32nd, then the deed cannot be pleaded in bar—*Ipstones Park Iron Ore Company v. Pattinson* (33 Law J. Rep. (N.S.) Exch. 193).

The 23rd clause itself is unreasonable, for it makes an *ex parte* certificate conclusive, although the estate may not have been administered and some creditors may not have received dividends. It is hard against foreign creditors. Its provisions and consequences are very different from the provisions with regard to an order of discharge in Bankruptcy—see sections 140, 141, 159, 168. and 171. of the Bankruptcy Act.

[CROMPTON, J.—This is a deed of inspectorship, and puts the parties in a position to avoid administration in Bankruptcy. Unreasonableness must be considered *secundum subjectam materiem*.]

The 13th clause in this deed is analogous to the clause which was held unreasonable in *Coles v. Turner* (34 Law J. Rep. (N.S.) C.P. 198). The concluding part of the 30th clause is also objectionable as dividing the estate among the assenting creditors only, in case the deed be invalid. The 14th clause, too, is bad, as it allows a creditor to prove for part of his debt only, and may mislead other creditors—*Holmes v. Viner* (1 Esp. 134), *Britton v. Hughes* (5 Bing. 460; s. c. 7 Law J. Rep. (N.S.) C.P. 188), *Forsyth on Composition Deeds*, 51, 52.

Again, the deed professes to bind not only all creditors properly so called, but also all persons who would be entitled to prove under an adjudication founded upon a petition at the date of the deed. This is a larger sense than that given to the word "creditors" in the interpretation clause—the 229th section.

[BLACKBURN, J.—The 192nd section provides for debts and liabilities, and

in the 144th and 145th sections the word "creditors" is used in a larger sense than in the 229th.]

The process in the case of liabilities is specially provided for by the 172nd section of the Bankruptcy Act, 1849, and partially also by the 150th section of the act of 1861; but no such provision has been made with respect to deeds under section 192. The protection given by the 198th section, also, is only applicable in available cases of debt. Such provisions as those of section 154. (which relates to the proof for premiums on policies of insurance) cannot be applied here, for the creditor could not go to the Court till after registration. *Mare v. Underhill* (4 Best & S. 566) is in the plaintiffs' favour. The 19th clause, taken in connexion with the 30th, enables the inspectors to put a pressure upon non-assenting creditors by the threat of withholding their dividends—*Hernulewicz v. Jay* (34 Law J. Rep. (N.S.) Q.B. 201).—[He also cited *Woods v. Foote* (32 Law J. Rep. (N.S.) Exch. 199), *Leigh v. Pendlebury* (33 Law J. Rep. (N.S.) C.P. 172), and *Balden v. Pell* (33 Law J. Rep. (N.S.) Q.B. 200).]

Beresford (with whom was *Mellish*), for the defendant.—As to the 19th clause, before any assenting creditor gets a dividend, there must be a sum set aside for the non-assenting creditor, who can get it when he applies for it; it is clearly dependent on himself. There must be proof in either case.

[The COURT intimated that they were satisfied on all but the last point.]

The creditors referred to in the 197th section must mean creditors who have proved, for all rights under a deed are there assimilated to rights in Bankruptcy, and therefore in the 192nd section also the word means all who can prove. If it applies only to those who are creditors in respect of liquidated debts, then the 192nd section does not carry out the intention of the legislature, which was to prevent the estate being wasted. In *Ex parte Mendel* (33 Law J. Rep. (N.S.) Bankr. 14) it was assumed that a contract broken before the execution of a deed could have been proved under the deed.

Brown, in reply.—It is unjust that claimants for unliquidated debts, who could not make an affidavit of debt, should be bound without having a voice in framing the deed. It is something quite novel that creditors for liquidated sums should have it in their power to bind those who are creditors in respect of broken contracts or other liabilities, the amount of whose claims in many cases exceeds the amount of the debts properly so called.

Cur adv. vult. as to the last point.

BLACKBURN, J. (Dec. 1) delivered the judgment of the Court.—The question in this case was, whether a composition deed was binding on the plaintiffs, who had not assented to it. The same deed had been previously held good by the Court of Exchequer in the case of *Strick v. De Mattos* (3 Hurl. & C. 22; s. c. 33 Law J. Rep. (N.S.) Exch. 276), and the present case was in substance an appeal from that decision.

A great many objections were raised before us, all of which were disposed of in the course of the argument, except the following one: The deed is expressed to be made between the debtor, his inspectors, and the persons "who at the date hereof are respectively creditors of the said De Mattos, or who would be entitled to prove under an adjudication of bankruptcy against the said De Mattos on a petition filed on the day of the date of these presents, hereinafter called the creditors." And the different provisions of the deed are in favour of the creditors thus defined. It was objected, that many claims can be proved in Bankruptcy which are not strictly debts, and it was contended that the persons who were entitled to prove such claims were not creditors within the meaning of the 192nd section of the 24 & 25 Vict. c. 134. My Brother Willes entertained some doubts whether this objection was not well founded, and in deference to him we took time to consider. His doubts, I believe, are not yet altogether dispelled, though he does not dissent from our

judgment. The other members of the Court including the late Mr. Justice Crompton (whose opinion on the point was very decided), were of opinion,—and on consideration my Brother Byles and myself still are of opinion,—that throughout the Bankruptcy Act the word “creditor” is used in the sense of a person having a claim which can be proved under the bankruptcy, whether it is upon a debt or not; and we think that in the 192nd section “creditors” must be understood to mean all persons who had at the time of the execution of the deed a claim against the debtor, provable against his estate if he then became bankrupt.

We therefore think that this objection also fails, and consequently that the judgment must be affirmed.

Judgment for the defendant; thus virtually affirming the judgment in Strick v. De Mattos.

[IN THE COURT OF EXCHEQUER.]

Jan. 11, 1886.

JOURDAIN v. PALMER.

35 L. J. Ex. 69; L. R. 1 Ex. 102; 4 H. & C. 171; 13 L. T. 600; 14 W. R. 283;
12 Jur. N.S. 214.

Not applied, *Dobson v. Richardson*, [1868] E. R. A.; 37 L. J. Q.B. 261;
L. R. 3 Q.B. 778; 16 W. R. 1010 (Q.B.).

Interrogatories—Breach of Contract—Reduction of Damages.

DISCOVERY.—*A defendant who admits that he has committed the breach of contract alleged in the declaration will not, except under very special circumstances, be allowed to interrogate the plaintiff respecting the amount of damage which he has sustained, with a view to paying money into Court.*

Wright v. Goodlake (3 H. & C. 540; s. c. 34 Law J. Rep. (N.S.) Exch. 82) commented upon.

This was an application for a rule *nisi* calling on the plaintiff to shew cause why he should not answer certain interrogatories.

The declaration set out a memorandum of agreement between the plaintiff and the defendant, which, after reciting that the plaintiff was possessed of an invention for deodorizing oleaginous animal, mineral and vegetable matter, provided, amongst other things, that the plaintiff should forthwith, at the costs of the defendant, take all necessary steps to obtain provisional protection and letters patent for the invention; that the letters patent, when obtained, should be assigned to the defendant; that the defendant should use his best endeavours to promote the adoption of the invention by using it in his own manufactory and granting licences at fixed royalties; that the defendant should receive all monies to become due in respect of the invention, and keep full accounts of all such monies and all royalties; the monies, after payment of the expenses of obtaining the patent and keeping it in force by payment of future duties to be equally divided between the plaintiff and the defendant. Either party had power to determine the agreement and abandon his interest in the invention on giving certain notice. The declaration then alleged that provisional protection was obtained for the invention, and that the defendant did not give notice of any wish to relinquish

his interest in it, and that a stamp duty of 50*l.* became payable on the 10th of July, 1865, under 16 & 17 Vict. c. 5, which the defendant omitted to pay, whereby the letters patent became void, and the plaintiff lost the profits which he would have derived from the patent.

The defendant after declaration and before pleading, applied at chambers for leave to administer the following interrogatories.

1. Have you ever made or caused to be made any and what quantity of material under the patent the subject of this action? If yea, state the several quantities, and the dates of such manufacture and the places at which it was manufactured.

2. What quantity of such material is now in your possession? If you have disposed of any of it, state in detail what quantity you have disposed of, and to whom, stating the present address, and when, and for what consideration, and how much of such consideration has been received by you, and when.

3. Have you in your power or possession any and what diaries, documents, or books containing memorandums and entries of the quantities manufactured by you, the dates or other particulars of its disposal, or the prices received for the same, as in last interrogatory particularly mentioned? If yea, give the name and description of each of such diaries, documents, or books.

4. Did you receive any and what samples of material manufactured by the defendant under the said patent, and when? What has become of the same or any of them? and if yea, how many are at present in your possession or power?

5. Did you continually exert yourself to the most of your ability from the 10th of April, 1862, till the commencement of this action to obtain orders for material manufactured by the said process?

6. Have you been able to obtain a single order? and if yea, state the name and address of the person or persons from whom you obtained such order, and the date and amount of it.

The application was supported by an affidavit, stating that certain samples produced by the invention had been supplied by the defendant to the plaintiff for which he had never accounted.

Channell, B. refused to make the order.

The defendant afterwards pleaded to the action, and paid 50*l.* into court.

J. P. Murphy, in support of the application.—The defendant had committed a nominal breach of his contract, and he desires to administer these interrogatories with a view to estimating the sum which he ought to pay into court. The affidavit shews that for a long time the invention has been treated both by the plaintiff and the defendant as valueless, and that samples have been delivered to the plaintiff which have not been accounted for. If they have been disposed of by the plaintiff, the defendant is entitled to an account of the proceeds. If they have not, the defendant is fairly entitled to use the fact as strong evidence that the invention was valueless. The case of *Wright v. Goodlake* (3 H. & C. 540; s. c. 34 Law J. Rep. (N.S.) Exch. 82) shews that the defendant is entitled to the rule. There, the plaintiff had published a pamphlet, portions of which had been copied *verbatim* into the *Times*, and the action was brought against the printer and publisher of the *Times* for an infringement of copyright. The defendant was allowed to interrogate the plaintiff as to the number of copies of his pamphlet which he had sold in certain months preceding the infringement complained of. The marginal note to the report of that case is, "A defendant may interrogate a plaintiff for the purpose of ascertaining the damage which he has sustained, so as to enable the defendant to pay the real amount into court."

[*MARTIN, B.*—The discovery was there limited to the question, how many copies of the pamphlet had been printed? If *Wright v. Goodlake* (3 H. & C. 540; s. c. 34 Law J. Rep. (N.S.) Exch. 82) is understood to decide that a plaintiff may be called upon to limit the amount of his own damages, the sooner it is overruled the better. I remember that I was once much pressed

at chambers to allow a railway company to interrogate a person who had been injured by them, and who was suing them for compensation, as to his age, profession, income, his movements after the accident, the doctors whom he had consulted, and the places to which he had gone. I thought it monstrous, and refused to sanction it.]

The distinction between such a case and the present is, that here the defendant would be entitled to discovery in equity. A person injured in a railway accident can get no assistance in equity.

[CHANNELL, B.—I doubt whether a Court of equity would assist the defendant in the discovery which he seeks, unless he were able to aver that he had strictly performed his portion of the contract. But, however much you might be entitled to administer these interrogatories if you were pressing for an account in a Court of equity, they are not *ad rem* in the present action. There is a further distinction between this case and *Wright v. Goodlake* (3 H. & C. 540; s. c. 34 Law J. Rep. (N.S.) Exch. 82), that that was a case of tort, this of contract.]

POLLOCK, C.B.—I think that my Brother Channell was right. I am rather disposed to agree with my Brother Martin, and to doubt whether the case of *Wright v. Goodlake* (3 H. & C. 540; s. c. 34 Law J. Rep. (N.S.) Exch. 82) can be followed up on every occasion to which it may appear to be applicable. But that case is distinguishable from the present. The criterion of damages there was, no doubt, the value of the pamphlet which had been pirated, and the questions put in that case were put to shew that so few copies of the original pamphlet had been sold that the damage which the author had sustained was very small. Here the defendant's contention seems to be that, because a Court of equity would for some purposes allow the proposed questions to be put, we ought to allow them in this action. Now I do not think that these questions would be allowed in a Court of equity, except for the purpose of taking an account between the parties so as to ascertain their separate rights. That cannot be done in an action of this sort. Neither the rule to be collected from *Wright v. Goodlake* (3 H. & C. 540; s. c. 34 Law J. Rep. (N.S.) Exch. 82), nor those to be collected from the practice of the Courts of equity, seem to me to apply to this case.

MARTIN, B.—I am inclined to think that to allow these interrogatories would be contrary to the usual rule, that a party is entitled to a discovery as to all matters which establish his own case, but not as to matters which relate to the plaintiff's case. This is an action for a breach of contract, with a plea of payment of 50*l.* into court. The interrogatories seem really intended to discover whether or not certain goods have been sold, which cannot properly and fairly be the criterion of damages. A case may arise where interrogatories ought to be allowed respecting the damages which have been sustained, but I have heard nothing in this case to induce me to think that my Brother Channell was wrong in his decision.

PIGOTT, B. concurred.

CHANNELL, B.—I also think, upon consideration, that I was right in refusing to allow these interrogatories to be put. A plaintiff may be called on to disclose his case where the matters to which the interrogatories relate are common to his case and to the defendant's. That is the common law rule. There may be some cases in which a discovery may be obtained in equity, although not in law, and I am far from saying that if an account were being taken between these parties, the defendant would not have been entitled to call upon the plaintiff for an account of the monies which he has received. But on the question whether a Judge at chambers is bound to admit interrogatories upon the ground that the discovery might be obtained in a Court of equity, I am of opinion that they must be *ad rem*, with reference to the action in which it is intended to exhibit them, and not with reference to matters not raised by the pleadings. The defendant has now paid money into court. The replication, no doubt, will be that the plaintiff has

sustained damage beyond the 50l. That goes to shew, to my mind, that this is an application to exhibit interrogatories, in order to ascertain the damage which the plaintiff says that he has sustained. It would be a very cumbrous and expensive proceeding to allow that to be done through the medium of interrogatories.

Rule refused.

[IN THE COURT OF EXCHEQUER.]

Jan. 16, 1866.

ROE v. BRADSHAW.

35 L. J. Ex. 71; 4 H. & C. 178; L. R. 1 Ex. 106; 13 L. T. 641;
14 W. R. 284; 12 Jur. N.S. 29.

See now Bills of Sales Act, 1878, 41 & 42 Vict. c. 31, s. 10 (2).

Bills of Sales Act, 1854, (17 & 18 Vict. c. 36), s. 1.—Form of Oath—"To the Best of my Belief."

BILLS OF SALE.—*The Bills of Sales Act, 1854 (17 & 18 Vict. c. 36) requires that with every bill of sale shall be filed an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving it:—Held, that an affidavit which swears positively as to the time of the making of the bill of sale, but qualifies the description of the residence and occupation of the person making it by stating them to the best of the belief of the deponent, is sufficient to satisfy the requirements of the act.*

This was an action against a sheriff for making a false return to a writ of *fi. fa.*

At the trial, before Bramwell, B., at the Sittings in London after Michaelmas Term, evidence was given on behalf of the defendant that, previously to the delivery of the writ to the sheriff for execution, the judgment debtor had assigned certain of his goods by a bill of sale. In the affidavit filed with the bill of sale, the time of the giving of the bill of sale was stated positively, but the residence and occupation of the person making it were only stated by the deponent *to the best of his belief*. It was objected that the bill of sale was void as against judgment creditors, because the requirements of the Bills of Sales Act, 1854, 17 & 18 Vict. c. 36. s. 1, which enacts that every bill of sale of personal chattels made after the passing of the act, shall be filed, "together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same" had not been complied with.

BRAMWELL, B. thought that the act was sufficiently complied with, and directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for him.

Montagu Chambers (H. James with him) moved accordingly.

POLLOCK, C.B.—The question is, whether an affidavit made by a person stating that at the time of the execution of the bill of sale, to the best of his belief, the residence and occupation was as stated in the bill of sale, is a sufficient compliance with the statute. I think that it is. A man who in court or out of court states that such and such is his belief, imports that he has an acquaintance of the subject, and has formed a belief upon it. He ought not to be subjected to the quibble that he may have no belief at all in the matter, and therefore that the best of his belief may be nothing at

all. A Court of justice would vindicate its authority and the law and the dignity of its proceedings, if ever such a case came before it; and I would warn and caution all persons not to rely on the least laxity in such a form of oath.

MARTIN, B.—I am entirely of the same opinion. It is a clear case. The question is, whether the act of parliament is complied with; and if it be, we ought not to seek more. Now, what the act of parliament requires is, that an affidavit shall be made of the time of a bill of sale being made, and a description of the residence and occupation of the person making it. This does contain a description of the residence of the party making it, and a true description. It is said that under this act of parliament the person who is to make the affidavit should have knowledge, such as would not, on cross-examination, turn out to be heresay; but that would be more than the act requires. In my judgment, there is nothing whatever in the objection.

CHANNELL, B.—I also think that this affidavit is sufficient, though I cannot, I confess, think the matter so clear as it seems to my Brother Martin. The act requires an affidavit of the time of such bill of sale being made, and something more which is clearly defined, namely, a description of the residence and occupation of the person making the same. The act does not say, "an affidavit of the description, residence and occupation of the person"; but the phraseology is changed. I think that it may be read as requiring that the affidavit shall swear positively to the time when the bill of sale was made; but when that has been done, the affidavit may contain a description of the residence and occupation, so as to comply with the act of parliament, although the description be qualified by being to the best of the belief of the person who makes the affidavit.

BRAMWELL, B.—I reserved the point because this is really the first time that I remember any affidavit in this form. I think the matter not quite so plain as my Brother Martin thinks it, and that the way to deal with it is as the Lord Chief Baron has done. When a man swears to the best of his belief he substantially swears that he has a belief, and that it is what he states. I am not sure that this may not introduce a little laxity in affidavits, which are already loose enough. People say, "I have been informed and verily believe"; and it may be that some whose consciences are not hard enough to swear to that, will swear "to the best of my belief,"—hoping to escape on a quibble. I think that it was a right question to reserve; but I am of the same opinion as I was at the trial, that the objection is not valid.

Rule refused

[IN THE COURT OF EXCHEQUER.]

Jan. 17, 1866.

SPENCER AND ANOTHER v. DEMETT.

35 L. J. Ex. 73; 4 H. & C. 127; L. R. 1 Ex. 123; 13 L. T. 677; 14 W. R. 310;
12 Jur. N.S. 194.

Debtor and Creditor—Bankruptcy—Creditor's Election to prove—12 & 13 Vict. c. 106. s. 182.—Equitable Plea.

BANKRUPTCY.—*An equitable plea to an action for debt, that after the accruing of the plaintiffs' claim, and before suit, the defendant was adjudicated bankrupt, and after the commencement of the suit, but before declaration, one of the plaintiffs was appointed assignee of the defendant's estate, and the plaintiffs proved their debt under the bankruptcy and elected to take the benefit of the petition:—Held, bad.*

Harley v. Greenwood (5 B. & Ald. 95) *extended to equitable pleas.*

Declaration—For goods sold and delivered, and on an account stated.

Equitable plea—That after the accruing of the plaintiffs' claim, and after the passing of the Bankruptcy Act, 1861, and before this suit, the defendant committed an act of bankruptcy, and became bankrupt within the meaning of the statutes in force concerning bankrupts, and thereupon a petition for adjudication of bankruptcy against herself, the defendant, was duly filed, by the defendant, in the Court of Bankruptcy, Basinghall Street, London, according to the said statutes, and such proceedings were had in the matter of the said petition that the defendant was by the said Court duly adjudged bankrupt; and thereupon, and after the commencement of this suit, but before the plaintiffs declared therein, at a certain sitting duly appointed by the said Court of Bankruptcy in that behalf, the plaintiff, Edwin Hewitt, was duly appointed by the said Court to be and became the assignee of the estate and effects of the defendant under her said bankruptcy, and the plaintiffs then and there duly proved the debt and claim for which this action is brought under the said petition, and elected to take the benefit of such petition with respect to such debt and claim, whereby the defendant was and is in equity discharged from the said debt and claim of the plaintiffs, and their said proof of their said debt is still in force and effect. Demurrer.

Holl, in support of the demurrer.—The defendants will rely in support of their plea on section 182. of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), which enacts as follows: "No creditor who has brought any action or instituted any suit against any bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the bankruptcy, shall prove a debt under such bankruptcy, or have any claim entered upon the proceedings without relinquishing such action or suit, and the proving or claiming a debt under a fiat or petition for adjudication of bankruptcy by any creditor shall be deemed an election by such creditor to take the benefit of such fiat or petition with respect to the debt so proved or claimed: provided also, that any creditor who shall have so proved or claimed, if the fiat or petition for adjudication be afterwards superseded or dismissed, may proceed in the action as if he had not so proved or claimed." This section is similar in its terms to 49 Geo. 3. c. 121. s. 14, on which there is a decision in *Harley v. Greenwood* (5 B. & Ald. 95), where a plea similar to this was held to be bad, and no distinction can be made from this plea being pleaded on equitable grounds. The reasons given for the judgments in that case apply equally to legal and equitable pleas. The bankruptcy may be superseded, so that it is clear that, proving under the bankruptcy cannot act as an extinguishment of the debt. The other side will rely on *Elder v. Beaumont* (8 El. & B. 353; s. c. 27 Law J. Rep. (n.s.) Q.B. 25); but that case is distinguishable, for the defendant had obtained his certificate, and the Court held that where the principal debt was barred the covenant to keep up the securities could not be sued on. The proper course for the defendants to have pursued would have been to have applied for an order to stay proceedings, or they should have pleaded to the further maintenance of the action. *Ex parte Dyack* (2 Mont. & Ayr. 675) shews that a Court of equity would not, in such a case as this, grant a perpetual injunction.

J. Brown, in support of the plea.—The case stands on a different footing from similar cases which were decided before equitable pleas were allowed. It is admitted that *Harley v. Greenwood* (5 B. & Ald. 95) decides that the plea would be bad at law, but the defendant would be entitled to relief in equity, as in fact appears from *Ex parte Dyack* (2 Mont. & Ayr. 675).

[Pigott, B.—But would the relief be final and perpetual?]

Possibly, if the bankruptcy proceedings were annulled, the plaintiffs might go to the Court of Chancery and get the injunction dissolved.

[Pollock, C.B.—But why should the plaintiffs be compelled to do that? If the Court of Chancery would only give you relief *quousque*, you cannot plead this plea in bar. You ought to shew not only that the plaintiffs are not

now entitled to maintain the action, but that they never will be. You should have applied to stay proceedings.]

The COURT (Pollock, C.B., Martin, B., Channell, B. and Pigott, B.) being of opinion that the plaintiffs were entitled to judgment on the demurrer, it was arranged that judgment in the plaintiffs' favour should be given, but that the defendant should have leave to apply at chambers on affidavits to set the judgment aside and enter a stay of proceedings, the plaintiffs undertaking not to oppose the application on payment of the costs of the demurrer.

Judgment for the plaintiffs.

[IN THE COURT OF EXCHEQUER.]

Jan. 17, 18, 1866.

GRESTY v. GIBSON.

35 L. J. Ex. 74; L. R. 1 Ex. 112; 13 L. T. 676; 14 W. R. 284; 4 H. & C. 28; 12 Jur. N.S. 319.

Approved and followed, *Reeves v. Watts*, [1866] E. R. A.; 35 L. J. Q.B. 171; L. R. 1 Q.B. 412; 12 Jur. N.S. 565; 14 L. T. 478; 14 W. R. 672 (Q.B.). Referred to, *Brooks v. Jennings*, 1866, L. R. 1 C.P. 476; 14 L. T. 19; 14 W. R. 440 (C.P.); *Isaacs v. Green*, [1867] E. R. A.; 36 L. J. Ex. 253; L. R. 2 Ex. 352; 16 L. T. 633 (Ex.); *M'Laren v. Baxter*, [1867] E. R. A.; 36 L. J. C.P. 247; L. R. 2 C.P. 559; 16 L. T. 521; 15 W. R. 1017 (C.P.).

Debtor and Creditor—Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. s. 192.
—*Composition-Deed—Covenant with Creditors.*

BANKRUPTCY.—*A composition-deed was expressed to be made between the debtor of the one part and all his creditors of the other, and after reciting that the debtor had agreed to pay a certain composition by instalments, which the creditors had agreed to accept, it contained a covenant by the debtor with his said several creditors and each of them to pay the composition, in consideration of which the creditors released him from all actions, debts, contracts, agreements, &c., reserving the rights which individual creditors might have against other persons:—Held, upon the authority of Lay v. Mottram (19 Com. B. Rep. N.S. 419; s. c. 12 Jur. N.S. 6), that this was a good deed under section 192. of the Bankruptcy Act, 1861.*

Semble—A creditor could sue on the covenant, although not named in the deed.

Declaration on a promissory note, with money counts.

Third plea—That after action an indenture was made between the defendant and divers of his creditors, which was set out at length. It was expressed to be made between the defendant of the one part, and all his creditors of the other part, and after reciting that the creditors had agreed to accept a composition of 5s. in the pound upon the amount of their several debts, payable in three instalments, contained a covenant on the part of the defendant with his said creditors and each of them to pay the composition, and a release by the creditors in consideration of the premises from all "actions, suits, debts, accounts, contracts, agreements, bills, notes, &c.," with a reservation

of remedies against other persons liable with the defendant, concluding with a statement that the deed was intended to take effect under section 192. of the Bankruptcy Act, 1861, and to be for the benefit of all the creditors equally. The plea then averred that all the conditions necessary under the statute to render the deed binding on non-assenting creditors had been performed, and that the defendant was thereby released from the claim in the declaration mentioned.

Demurrer.

M'Intyre, in support of the demurrer.—In the first place this composition-deed, having been executed after action brought, should have been pleaded formally to the further maintenance of the action—*Oppenheimer v. Grieves* (7 Hurl. & N. 533; s. c. 31 Law J. Rep. (n.s.) Exch. 375), *Morgan v. Harding* (11 W. Rep. 65).

[The Court having intimated that the Common Law Procedure Act, 1852, rendered formal commencements and conclusions of pleas unnecessary, and that *Oppenheimer v. Grieves* (7 Hurl. & N. 533; s. c. 31 Law J. Rep. (n.s.) Exch. 375) differed from the present case, inasmuch as the release there was only conditional on the plaintiff's taking a further step in the cause, the objection was withdrawn.]

This deed professes to be made with all the creditors, but non-assenting creditors could not sue upon the covenant in it. This is distinctly stated, by Lord Westbury, C., in *Ex parte Cockburn* (33 Law J. Rep. (n.s.) Bankr. 17). And the decision in *The Chesterfield and Midland Silkstone Colliery Company v. Hawkins* (3 H. & C. 677; s. c. 34 Law J. Rep. (n.s.) Exch. 121) is to the same effect. Again, the deed is unreasonable, because the release is in consideration not of the payment of the composition, but of the bare promise to pay it. And it is too general, for it applies not only to debts but to contracts, to the discharge of which the composition would not be applicable.

Holker, in support of the plea.—In this case the non-assenting creditors could sue on the covenant, which is not made with the executing and non-assenting creditors only, as in *The Chesterfield and Midland Silkstone Colliery Company v. Hawkins* (3 H. & C. 677; s. c. 34 Law J. Rep. (n.s.) Exch. 121), but with all the creditors, of whom the plaintiff is stated in the plea to be one. What was said by Lord Westbury, C., in *Ex parte Cockburn* (33 Law J. Rep. (n.s.) Bankr. 17) was not necessary to the decision. The plaintiff could sue on this covenant because he is one of a class which is distinctly described. There is no uncertainty here, for *id est certum quod certum reddi potest*. *The Sunderland Marine Insurance Company v. Kearney* (16 Q.B. Rep. 925; s. c. 20 Law J. Rep. (n.s.) Q.B. 417) is a direct authority in my favour. There, by a policy of insurance under seal, in which Kearney was stated to be the owner of the ship insured, the defendants covenanted to make good all loss sustained; and it was held that a person who was not named in the policy, but was, in fact, jointly interested with Kearney, might be joined with him as co-plaintiff in an action on the covenant.

[POLLOCK, C.B.—The only question is, whether the description of the persons with whom the covenant is made is not too vague. If a man covenants severally with the members of a firm, no doubt they would be sufficiently named in the deed to enable each of them to sue.—MARTIN, B.—Debts may be disputed; and in order to ascertain whether a particular person is named in this deed, it might be necessary to try an action to decide whether he was a creditor or not.]

The creditors can easily be ascertained. *Whittaker v. Lowe* (35 L. J. Ex. 44; s. c. 1 Law Rep. Ex. 74) shews what creditors are to be included. The judgment of Blackburn, J., in *Dingwell v. Edwards* (33 Law J. Rep. (n.s.) Q.B. 161) is an authority that the creditors could sue, and so is that of Bramwell, B., in *Dewhurst v. Jones* (3 H. & C. 60; s. c. 33 Law J. Rep. (n.s.) Exch. 294). The objection was not allowed to invalidate the deed in *Stone v. Jellicoe* (3 H. & C. 263; s. c. 34 Law J. Rep. (n.s.) Exch. 11). As

to the objection respecting the inadequacy of the consideration, *Johnson v. Barratt* (35 L. J. Ex. 15; s. c. 1 Law Rep. Ex. 65) shews that it is groundless; and *Hazelgrove v. House* (35 L. J. Q.B. 1; s. c. 1 Law Rep. Q.B. 101) shews that the words of the release are not too wide, as their effect must be restrained by the words of the whole instrument so as to apply only to debts and claims which had accrued at the time of execution.

M'Intyre replied.—The deed in *The Sunderland Marine Insurance Company v. Kearney* (16 Q.B. Rep. 925; s. c. 20 Law J. Rep. (N.S.) Q.B. 417) was a deed-poll. In the other cases cited this point was not raised.

Cur. adv. vult.

POLLOCK, C.B. (Jan. 18.)—In this case, which was argued yesterday, the argument turned upon the point raised in *Ex parte Cockburn* (33 Law J. Rep. (N.S.) Bankr. 17), before Lord Chancellor Westbury. We have found a case, lately decided in the Court of Common Pleas—*Lay v. Mottram* (19 Com. B. Rep. N.S. 419; s. c. 12 Jur. N.S. 6)—which we cannot distinguish from this. There the Court held a plea similar to that pleaded here to be good. We think that we are bound by that decision, and on the authority of that case we give judgment for the defendant.

Judgment for the defendant.

[IN THE COURT OF EXCHEQUER.]

Jan. 23, 1866.

COOK v. JAGGARD AND OTHERS.

35 L. J. Ex. 76; L. R. 1 Ex. 125; 13 L. T. 717; 14 W. R. 373.

Referred to, *Hamilton v. Buckmaster*, [1867] E. R. A.; 36 L. J. Ch. 58; 15 L. T. 177; 15 W. R. 149 (V.C.). Discussed and distinguished, *Evans v. Jones*, [1877] E. R. A.; 46 L. J. Ex. 280; 36 L. T. 218 (Ex. D.).

Will—Construction—Residuary Clause—Ejectment.

WILL.—A testator, in his will, after directing that his debts and funeral expenses should be paid out of his personal estates, proceeded as follows: "All the rest of my worldly estate, both real and personal, I give, devise and bequeath as follows." He then gave and devised to his natural daughter an estate tail in certain copyhold hereditaments, and also an estate tail in certain other copyhold hereditaments. Then followed the residuary clause: "And all the rest, residue and remainder of my personal estate and effects wheresoever and whatsoever, and of what nature, kind or quality soever the same may be, monies, securities for money, or whatever I may be possessed of or entitled to at the time of my decease, I give and bequeath the same to my said daughter to and for her own sole use and benefit absolutely"—Held, that the reversions in fee expectant on the determination of the daughter's estates tail in the copyhold hereditaments did not pass to her under the residuary clause.

Wilce v. Wilce (7 Bing. 664; s. c. 9 Law J. Rep. (N.S.) C.P. 197) commented upon.

Ejectment brought to recover possession of a messuage and tenements at Chick St. Osyth, in the county of Essex, copyhold of the manor of Chick St. Osyth.

The plaintiff claimed as customary heir-at-law of Nathaniel Cook, who died in 1808, having made his will in the following terms:

"In the name of God, Amen. I, Nathaniel Cook, of the parish of Chick St. Osyth, in the county of Essex, farmer, being weak in body, but of sound and disposing mind, memory and understanding, but mindful of my mortality, do make, publish and declare this my last will and testament in manner and form following, that is to say: first, I desire that all my just debts, funeral expenses, and the expense of proving this my last will and testament, be paid out of my personal estate and effects, and all the rest of my worldly estate, both real and personal, I give, devise and bequeath as follows: I give and devise to my daughter Susannah Cook Westbroom, spinster, natural child of my late housekeeper Elizabeth Westbroom, deceased, all that my copyhold messuage, hereditaments, lands and premises, with all the appurtenances thereunto belonging, situate, lying, and being in the parish of Chick St. Osyth aforesaid, now in the occupation of John Bird, to have and to hold the said copyhold messuage, hereditaments, lands and premises, to my said daughter Susannah Cook Westbroom, and to the heirs of her body lawfully to be begotten, according to the custom of the manor in which the same is holden. Also I give and devise to my said daughter Susannah Cook Westbroom all that my copyhold messuage or tenement, hereditaments, land and premises thereunto belonging, situate, lying and being on the west side of Row Heath, in the parish of Chick St. Osyth aforesaid, and now in my own occupation, to have and to hold the said copyhold messuage or tenement, hereditaments, land and premises to my said daughter Susannah Cook Westbroom, and to the heirs of her body lawfully to be begotten, according to the custom of the manor in which the same is holden. And all the rest, residue and remainder of my personal estate and effects, wheresoever and whatsoever, and of what nature, kind or quality soever the same may be, monies, securities for money, or whatever I may be possessed of or entitled to at the time of my decease, I give and bequeath the same to my said daughter Susannah Cook Westbroom, to and for her own sole use and benefit absolutely. And I do hereby nominate, constitute, and appoint Mr. Thomas Sadler, of Chick St. Osyth aforesaid, farmer, and Mr. James Fisk, of the same place, farmer, to be executors of this my last will and testament, hereby revoking all former and other wills by me at any time heretofore made, and do declare this to be my last will and testament. In witness whereof I have hereunto set and subscribed my hand and seal this 13th of October 1808.

"Signed, Natl. x Cook, his mark.

"Signed, sealed and declared, &c.

"John x Bird, his mark.

"Judith x Carter, her mark.

"John Nightingale."

Susannah Cook Westbroom, the testator's natural daughter mentioned in this will, married Benjamin Jaggard, and died in 1817, leaving two children, both of whom died infants and unmarried. Benjamin Jaggard was, according to the custom of the manor of the copyholds, admitted tenant by the curtesy on his wife's death, and died in 1864.

The contention for the plaintiff was, that on the determination of the estate tail given by the will to Susannah Cook Westbroom, the premises reverted to the plaintiff, as customary heir-at-law to the testator, and that on the death of the tenant by the curtesy, the plaintiff was entitled to possession.

The contention for the defendants who claimed under Benjamin Jaggard was, that although an estate tail was specifically given to Susannah Cook Westbroom by the will, the residuary clause included the reversion in fee, so that the whole of the testator's estate passed to the devisee.

At the trial, before Pigott, B., at the Summer Assizes for Essex, a verdict was entered for the plaintiff, the defendant having leave to move to enter a nonsuit.

A rule *nisi* having been obtained accordingly,

Montagu Chambers and *A. L. Smith* shewed cause.—Although the preliminary part of a will may express an intention on the part of a testator to dispose of the whole of his property, yet unless words are subsequently used sufficient for the purpose, real estate will not pass—*Jarman on Wills*, p. 681, 3rd edit., and *Doe d. Bunny v. Rout* (7 Taunt. 79). In *Monk v. Mawdsley* (1 Sim. 286) and *Woollam v. Kenworthy* (9 Ves. 137), which resembled this case, the real estate was held not to pass. Besides, this will was made in 1808, before the enactment of the Wills Act, 1 Vict. c. 26, and, therefore, even if the residuary clause did apply to real estate, Susannah Cook Westbroom took only a life estate under it, there being no words of limitation. It is absurd to say that the testator having specifically given her an estate tail in the earlier part of the will, intended to give her a life estate in the residuary clause.

Philbrick supported the rule.—If the residuary clause stood alone, there is no doubt that the reversion in fee would not be included in it; but the testator has expressed his intention of disposing of the whole of his property. In *Monk v. Mawdsley* (1 Sim. 286) there were no words shewing that the testator intended not to die intestate as to part of his property. *Wilce v. Wilce* (7 Bing. 664; s. c. 9 Law J. Rep. (N.S.) C.P. 197) is precisely in point. There the testator said, "As touching such worldly property wherewithal it has pleased God to bless me in this world, I give, devise, and dispose of the same in the following manner and form," and after several specific dispositions of lands and goods he proceeded, "All the rest of worldly goods, bills, bonds, notes, book-debts, and ready money, and everything else I die possessed of, I give to my son George, whom I make my whole and sole executor." It was held there, that certain real estate not included in the specific devise passed to George, and that he took the fee.

[CHANNELL, B.—But there was no specific devise there of property, the reversion of which was held to be included in the residuary clause.]

That makes no difference. It is admitted that apt words must be used, but that has been done here. Although the residuary clause has the words "I give and bequeath," instead of "I give and devise," which are used elsewhere in the will, yet the word "give" is the old word of the law applicable to real estate. *Hogan v. Jackson* (Cowp. 299) and *Doe d. Andrew v. Lainchbury* (11 East, 290) are in point. As to the absence of words of limitation, even before the passing of 1 Vict. c. 26, if the intention of the testator that the fee simple should be given was clear, the fee was held to pass, without any words of limitation. The same case of *Wilce v. Wilce* (7 Bing. 664; s. c. 9 Law J. Rep. (N.S.) C.P. 197) shews this to be so.

[MARTIN, B.—That case, when it comes to be looked at carefully, will not decide that an estate in fee simple passed under the residuary clause in the will. It merely decided that the clause did apply to real estate not previously disposed of, but whether it passed an estate in fee, or only a life interest, was immaterial.]

POLLOCK, C.B.—I am of opinion that this rule should be discharged. It is true that the testator in the early part of the will has manifested an intention of disposing of the whole of his property, but he has not used language which will give effect to such an intention. After the specific devises of copyhold estate to his daughter comes the residuary clause. It is expressed to relate to "personal estates and effects." The kinds of property which it more specifically mentions, monies and securities for money, are in their nature personal. Then follow the words, "or whatever I may be possessed of, or entitled to at the time of my decease," and in my opinion they must be confined to property *ejusdem generis* with the personal property previously mentioned. It must be observed that the testator uses in this clause the word "bequeath," whereas in the clauses relating to the copyhold estates he uses the appropriate word "devise"; and that the general words are coupled to those which precede

them by the word "or," as if they were intended to be only a further description of the property already mentioned, while in the case of *Wilce v. Wilce* (7 Bing. 664; s. c. 9 Law J. Rep. (N.S.) C.P. 197), which was pointed out as being parallel to this, the general words were coupled to the preceding by the word "and," as if the testator in that case, after disposing of the property specifically mentioned, intended to pass to an entirely new kind of property. But apart from this distinction between the two cases, the decision in *Wilce v. Wilce* (7 Bing. 664; s. c. 9 Law J. Rep. (N.S.) C.P. 197) is merely that some real estate passed under the residuary clause, not that a fee simple passed. This case is rather governed by that of *Monk v. Mawsdley* (1 Sim. 286), where real estate was held not to pass under the residuary clause. The whole tenor of the will shews that this residuary clause is entirely applicable to personal property.

MARTIN, B. concurred.

CHANNELL, B.—I also am of opinion that the construction put upon this will by my Brother Pigott at the trial was correct. It is admitted that the rule cannot be made absolute unless the residuary clause is sufficient not only to act on the testator's real estate, but to pass an estate in fee simple. I am of opinion that it is not, and but for the case of *Wilce v. Wilce* (7 Bing. 664; s. c. 9 Law J. Rep. (N.S.) C.P. 197), which has been cited, I should have thought this case a tolerably clear one. At first that case seemed to conflict with the contention of the defendant; but my Brother Martin has drawn our attention to the fact that on the case there stated for the opinion of the Court of Common Pleas, it was not necessary to decide whether the son George there mentioned took an estate in fee simple, or whether he took only an estate for life. We are only bound by that decision to this extent, that some such words as are found in this will might be made effectual to apply to real estate, and that some estate in reality might pass under them. No doubt, in the earlier part of the will, the testator manifests an intention to dispose of the whole of his property, and this might assist us in construing the residuary clause; but it will not justify us in putting on it the defendants' construction. I think with the Lord Chief Baron, that the case falls rather within the decision in *Monk v. Mawsdley* (1 Sim. 286).

PIGOTT, B. concurred.

Rule discharged.

[IN THE COURT OF EXCHEQUER.]

Jan. 30, 31, 1865.

ALEXANDER v. JONES.

35 L. J. Ex. 78; 4 H. & C. 204; L. R. 1 Ex. 133; 13 L. T. 719; 14 W. R. 400;
12 Jur. N.S. 125.

Practice—Costs—County Court—Concurrent Jurisdiction—Dwelling-place
—9 & 10 Vict. c. 95. s. 128.—15 & 16 Vict. c. 54. s. 4.

COUNTY COURT.—*For the purpose of determining whether the superior Courts have concurrent jurisdiction within the meaning of the County Court Acts, a defendant, who has no permanent dwelling-place at the time of the action brought, must be taken to dwell at the place where he is temporarily residing at the time.*

The plaintiff in this case sued the defendant for money payable for work and services and commission. The defendant paid into court 15l. 7s. 6d., which

the plaintiff accepted in satisfaction of his claim. The plaintiff then applied at chambers for an order for his costs, on the ground that the superior Court had concurrent jurisdiction within the County Court. Affidavits were filed by the plaintiff and the defendant, and Baron Martin declined to make the order. A rule *nisi* was subsequently obtained on further affidavits, from which the following facts appeared. The plaintiff dwelt and carried on his business at Bristol. At the time when the cause of action arose the defendant kept the Royal Hotel, at Clevedon, about thirteen miles from Bristol, within the jurisdiction of the County Court of Gloucestershire, holden at Bristol. On the 10th of October, 1864, he disposed of the business and premises to his brother, and left Clevedon. He stayed for a few days at an hotel at Bristol, and on the 22nd of October went to Garbeibio, in Montgomeryshire, on a visit to his brother-in-law, and he remained there as a guest till the 6th of December. Garbeibio was within the jurisdiction of the County Court of Montgomeryshire, and more than twenty miles from Bristol. The action was commenced on the 29th of November, and the defendant was served with the writ at Garbeibio.

The plaintiff's affidavit, on which the application was made at chambers, was in the ordinary form, stating that the defendant dwelt at Garbeibio, more than twenty miles from Bristol, where the plaintiff resided and carried on his business, and that the cause of action did not arise within the jurisdiction of the County Court within which the defendant dwelt at the time of the commencement of the action.

The defendant's affidavit in reply stated the above facts; denied that the defendant dwelt at Garbeibio, or resided there otherwise than temporarily as a guest; alleged that his last place of abode previous to the commencement of the action was at Clevedon; and that the cause of action arose at Bristol.

None of the affidavits filed by the defendant stated that he had any fixed place of residence at the time when the action was commenced, or that he intended to return to reside permanently at Bristol, though it was alleged that he was returning to Bristol with a view of staying there for some weeks when he was served with the writ.

By the County Courts Act, 9 & 10 Vict. c. 95. s. 128, it is enacted, that "all actions and proceedings which before the passing of this act might have been brought in any of Her Majesty's superior courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought, . . . may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this act had not been passed."

By the 15 & 16 Vict. c. 54. s. 4, it is enacted, amongst other things, that if the plaintiff shall make it appear to the satisfaction of the Court in which the action is brought, or to the satisfaction of a Judge at chambers upon summons, that the action was brought for a cause in which concurrent jurisdiction is given to the superior Courts, by the 9 & 10 Vict. c. 95. s. 128, or for which no plaint could have been entered in any County Court, the Court or Judge shall direct that the plaintiff recover his costs.

H. Matthews shewed cause.—The superior Court had no concurrent jurisdiction in this case. The defendant was not dwelling in Garbeibio at the time of action brought. In *Macdougall v. Paterson* (11 Com. B. Rep. 755; s. c. 21 Law J. Rep. (N.S.) C.P. 27) it was held that a man who resided at Inverness, but came to London for some months in each summer for the purpose of carrying on his business, did not dwell in London within the meaning of the act, although he was residing there in fact at the time of action brought.

[CHANNELL, B.—But there the plaintiff had a permanent residence besides his temporary one. Here he does not seem to have had any fixed residence at the time of action brought.]

In cases of double residence there has been a conflict between the decisions of the Court of Queen's Bench and the Court of Common Pleas, the former

deciding, in *Bailey v. Bryant* (1 El. & El. 340; s. c. 28 Law J. Rep. (N.S.) Q.B. 86), that the superior Court had not concurrent jurisdiction, and the latter, in *Butler v. Ablewhite* (6 Com. B. Rep. N.S. 740; s. c. 28 Law J. Rep. C.P. 292) and *Pigrim v. Knatchbull* (18 Com. B. Rep. N.S. 798; s. c. 34 Law J. Rep. (N.S.) C.P. 257), maintaining the reverse. Here the onus lay on the plaintiff of proving affirmatively that the defendant dwelt at some place more than twenty miles from the plaintiff's dwelling-place.

Lumley Smith supported the rule.—The superior Courts have concurrent jurisdiction where the plaintiff dwells more than twenty miles from the defendant, and it is said that the plaintiff must prove this affirmatively to enable him to recover his costs; but there is also concurrent jurisdiction if the cause of action did not arise wholly or in some material point within the jurisdiction of the Court within which the defendant dwells or carries on his business at the time of the action brought, and as to this the onus lies on the defendant of shewing that he had a dwelling-place within the County Court jurisdiction within which the cause of action arose. Here the cause of action arose in Bristol, and if the defendant did not dwell at Bristol at the time of action brought, the cause of action did not arise within the jurisdiction of the Court within which he dwelt. Numerous cases are cited in 1 *Chitty's Archbold's Practice*, 482, which shew that the County Court has no jurisdiction unless the defendant has a fixed permanent residence. In *Rolfe v. Learmonth* (14 Q.B. Rep. 196; s. c. 19 Law J. Rep. (N.S.) Q.B. 10), Coleridge, J. distinctly says, that the statute contemplates some fixed place at which the party's business is carried on. If the defendant had in fact no permanent dwelling-place, he must be taken to dwell where he was temporarily abiding. The plaintiff could not have sued in the County Court of Montgomeryshire, nor except by leave of the Judge in the County Court of Bristol.

Cur. adv. vult.

MARTIN, B. delivered the judgment of the Court (Pollock, C.B., Martin, B., Channell, B. and Pigott, B.)—In this case we said that we would allow the matter to stand over until we had an opportunity of speaking to the Judges of some of the other Courts. We are of opinion that the plaintiff is entitled to the costs of the proceedings. The facts were, that a person who had resided in the jurisdiction of the County Court of Bristol left that place, and was so far living at a distance that it was considered that he had not an intention of returning to it. He went on a visit to his brother, and it is clear that he went there as a guest. It appears from the affidavits that he had no dwelling-place except his brother's, if that can be called a dwelling-place. He had left the hotel where he dwelt, and had gone away without acquiring any permanent dwelling. Whilst he was living in Montgomeryshire a writ issued against him. The question is, whether the plaintiff is entitled to costs? On the best consideration that we can give to the case, we think that he is. It is to be observed that jurisdiction is given to the County Court by the 9 & 10 Vict. c. 95. s. 60, which enacts, that "a summons may issue in any district in which the defendant dwells or carries on his business at the time of the action brought, or by leave of the Court for the district in which the defendant has dwelt or carried on his business at some time within six calendar months next before the time of the action brought, or in which the cause of action has arisen, the summons may issue in either of such last-mentioned courts;" so that the jurisdiction of the County Court is regulated by the defendant's dwelling. Then comes the 128th section, upon which this question turns. If the defendant had clearly no dwelling-place in the ordinary acceptation of the term, then, except he be taken to have been dwelling in Montgomeryshire, there would be no County Court with jurisdiction at all. We think that, for the purposes of these acts, a man in the position of the defendant must be taken to dwell at the place where he is living and abiding, though it may not be his dwelling-place in one sense of the term, and that the plaintiff has brought himself within the meaning

of the 128th section, so as to be entitled to the costs of his action. The rule will therefore be made absolute.

Rule absolute.

[IN THE COURT OF EXCHEQUER.]

Nov. 18, 21, 1865. Jan. 12, 1866.

NOBLE v. WARD AND OTHERS.

35 L. J. Ex. 81; 4 H. & C. 149; L. R. 1 Ex. 117; 13 L. T. 639; 14 W. R. 397; 12 Jur. N.S. 167: affirmed, [1867] E. R. A.; 36 L. J. Ex. 91; L. R. 2 Ex. 135; 15 L. T. 672; 15 W. R. 520 (Ex. Ch.).

Sale of Goods—Statute of Frauds, section 17.—Parol Alteration of Written Contract—Rescission.

CONTRACT. SALE OF GOODS.—*A contract for the sale of goods exceeding 10l. in value, being reduced to writing as required by the 17th section of the Statute of Frauds, it was subsequently agreed verbally between the parties that the times for commencing and concluding delivery should be each a fortnight later than the times for commencing and concluding delivery respectively fixed in the written contract:—Held, that by the 17th section of the Statute of Frauds, this latter agreement not being in writing could not be "allowed to be good" for any purpose, and therefore that the previous contract remained unaffected by it, and could be enforced in all its terms.*

The declaration stated, that whereas it was agreed between the plaintiff and the defendants that the plaintiff should sell and deliver to the defendants, and that the defendants should accept from the plaintiff within a certain agreed period, which elapsed before suit, a large quantity of cloth at certain prices to be therefore paid by the defendants, and then agreed upon between the plaintiff and the defendants, yet the defendants refused to accept or pay for the said cloth, although afterwards and before suit all things were done and happened, and all times elapsed necessary to entitle the plaintiff to have the said goods accepted and paid for by the defendants, whereby the plaintiff lost the difference between the agreed price and the lower price to which the said goods fell. There was also an *indebitatus* count. The defendants pleaded a denial of the agreement, a denial of the plaintiff's readiness and willingness to deliver, that the cloth was not according to sample, that the contract had been rescinded, and to the second count the general issue.

At the trial, before Bramwell, B., at the Summer Assizes for Manchester, the following facts were proved.

On the 12th of August, 1864, the agent of the defendants ordered of the plaintiff through his agent, 1,500 pieces of cloth, equal to sample, at an agreed price. A memorandum of the contract was signed on behalf of the defendants. It contained the clause, "To be delivered, commence in three weeks, complete in eight to nine weeks."

On the 18th of August a further order was given for 1,500 pieces, and a memorandum was signed on behalf of the defendants. The delivery clause was, "To follow on after order given 12th instant, and complete in ten to twelve weeks."

The plaintiff delivered a portion of the cloth; but the defendants objected to the quality, and refused to receive it. After considerable discussion, a verbal agreement was come to between the parties, on the 23rd of September, that the cloth delivered should be taken back, that the first contract should be cancelled, and that the times for the commencement and completion of the

delivery under the second contract should be respectively postponed for a fortnight; it being further stipulated that the first instalment should consist of not less than 150 pieces. On the 14th of October the plaintiff delivered 130 pieces, which the defendants rejected, as being neither equal to sample nor the proper quantity; and on the 15th of October the defendants gave notice to the plaintiff that they cancelled the order.

The plaintiff wrote in reply that the time for commencing delivery was the 21st of October. On the 21st of October he tendered 220 more pieces, which the defendants refused to accept. A further tender of a sufficient number of pieces to make up the number ordered was made before the 17th of November.

Bramwell, B. nonsuited the plaintiff, on the ground that the first two contracts had been rescinded, and that the third contract could not be enforced, as there was no memorandum of it in writing sufficient to satisfy the 17th section of the Statute of Frauds.

The plaintiff subsequently obtained a rule *nisi*, calling on the defendants to shew cause why the nonsuit should not be set aside, and a new trial had, on the ground that the plaintiff was entitled to recover on the old contract.

Holker and Baylis shewed cause.—The direction of the Judge was perfectly right. A contract which is required by the Statute of Frauds to be in writing, and is reduced to writing accordingly, can be rescinded by parol, though it cannot be varied in its terms by parol—*Goss v. Lord Nugent* (5 B. & Ad. 58), *Stead v. Dawber* (10 Ad. & E. 57; s. c. 9 Law J. Rep. (N.S.) Q.B. 101). It will be said that *Moore v. Campbell* (10 Exch. Rep. 323; s. c. 23 Law J. Rep. (N.S.) Exch. 310) is an authority to the contrary; but it is not so in fact. There goods in a ship were sold under a written contract, one of the terms of which was that they should be delivered from the quay. It was subsequently agreed by parol that the goods should be warehoused. It was held, that the parol agreement did not rescind the written agreement, but the reason was that the parties did not intend to rescind it absolutely, and no material alteration was made. Here the intention was that the contract of the 18th of August should be abandoned, and that of the 27th of September substituted; but the letter was not reduced into writing, nor was there any delivery and acceptance of goods under it so as to satisfy the Statute of Frauds. Besides, the plaintiff cannot recover on the contract of the 18th of August, because delivery under it was to follow on after the delivery under the contract of the 12th of August; therefore it ought to have commenced immediately after the cancelling of that order on the 27th of September; and the tender on the 14th of October was too late; so that the plaintiff fails to prove the allegation in his declaration of readiness and willingness to deliver.

Mellish supported the rule.—The delivery under the contract of the 12th of August need not have been completed for eleven or twelve weeks from that date, and therefore the delivery on the 14th of October was in time under the contract of the 18th of August, as following directly after the full time allowed by the first contract. But this point was not taken at the trial, and the nonsuit ought not to be sustained on that ground, because the difficulty might perhaps have been got over if inquired into.

[BRAMWELL, B.—I agree that to justify a nonsuit on a ground not taken at the trial an irresistible case ought to be made out.]

I contend that the contract of the 18th of August was not rescinded by the parol agreement of the 27th of September. In the first place the parties had no intention to rescind it, but merely to alter it in one particular, and in the next place the words of the 17th section of the Statute of Frauds are, that no contract for the sale of goods for the price of 10*l.* or upwards "shall be allowed to be good," without a memorandum in writing or part delivery. It cannot be good for any purpose, and therefore cannot rescind a previous contract. *Smith v. Hudson* (34 Law J. Rep. (N.S.) Q.B. 145) supports this view. In *Goss v. Lord Nugent* (5 B. & Ad. 58) and *Stead v. Dawber* (10 Ad. & E. 57; s. c. 9 Law J. Rep. (N.S.) Q.B. 101), the plaintiffs were suing on the amended contracts, which of course they could not do. *Moore v. Campbell* (10 Exch. Rep. 323;

s. c. Law J. Rep. (N.S.) Exch. 310) is strongly in the plaintiff's favour. There it was held that the plea that the contract had been rescinded was not proved under circumstances resembling these.

Cur. adv. vult.

CHANNELL, B. (Jan. 12).—In the case of *Noble v. Ward*, I have to read the judgment of my Brother Bramwell.

This case was tried before me at Manchester, and the plaintiff was nonsuited. The case comes before us on a rule to set aside that nonsuit. I think it was wrong, at least on the ground on which it proceeded. The action was for not accepting goods on a sale by the plaintiff to the defendants. The defendants pleaded, among other things, that the contract had been rescinded, and that the plaintiffs were not ready and willing to deliver. The facts were, that a contract for the sale and delivery of goods from the plaintiff to the defendants, at a future day, was entered into on the 12th of August, which may be called contract A; that another contract for sale and delivery by the plaintiff to the defendants, also at a future day, was entered into on the 18th of August, say contract B; that before any of the days of delivery had arrived, the plaintiff and the defendants agreed verbally to rescind or do away with contract A, and to extend for a fortnight the time for the performance of contract B, that is to say, the plaintiff had a fortnight longer to deliver, and the defendants a fortnight longer to take and pay for those goods. This, on principle and authority, was a third contract, call it C. It was a contract in which all that was to be done and permitted on one side was the consideration for all that was to be done and permitted on the other—see per Parke, B., in *Marshall v. Lynn* (6 Mee. & W. 117). It remains to add, that the declaration would fit either contract B. or contract C, and that goods were tendered by the plaintiff to the defendants in time for either of those contracts. My note and my recollection of my ruling are, that contract B. was rescinded and contract C. not enforceable, not being in writing. I think that was wrong. Either contract C. was within the Statute of Frauds, or not. If not, there was no need for a writing. If yes, it was because it was a contract for the sale of goods, and so within the 17th section of the statute. That says, that no contract for the sale of goods for the price of 10*l.* or upwards shall be allowed to be good, except there is an acceptance, payment or writing. The expression "allowed to be good" is not a very happy one; but, whatever its meaning may be, it includes this at least, that it shall not be held valid nor enforced. But this is what the defendant was attempting to do. He was setting up this contract C. as a valid contract. He was asking that it should be "allowed to be good" to rescind contract B. It is attempted to say that what took place when contract C. was made was twofold. First, the old contracts were given up; secondly, a new one was made. But that is not so. What was done was all done at once, was all one transaction, one bargain; and had the plaintiff asked for a writing at the time and the defendants refused it, it would all have been undone, and the parties remitted to their original contracts. I think, therefore, that on principle it was wrong to hold that the old contract was gone. *Moore v. Campbell* (10 Exch. Rep. 323; s. c. 23 Law J. Rep. (N.S.) Exch. 310) is an authority to the same effect. It is true that case may be distinguished on the facts, namely, that there what was to be done under the new arrangement in lieu of the old was to be done at the same time; so that it might well be the parties meant, not that the new thing should be done, but if done it should be in lieu of the old. Such an argument could not be used in this case. But it was not the ground of the judgment there, which is, that the new agreement was void. The cases of *Goss v. Lord Nugent* (5 B. & Ad. 58), *Stead v. Dawber* (10 Ad. & E. 57; s. c. 9 Law J. Rep. (N.S.) Q.B. 101), and others, only shew that the new contract C. cannot be enforced, not that the old contract B. is gone. I think it was not. Inconvenience and absurdity may arise from this. For instance, if the defendants signed the new contract and not the plaintiffs, the plaintiffs would be bound to the old and the defendants to the

new; or if in the course of the cause a writing turned up signed by the plaintiff, then they would first rely on the old and afterwards on the new contract. But this is no more than may happen in any case within the 17th section, where there has been one contract only. But then it was said before us, that the plaintiff was not ready and willing to deliver under contract B. Probably not, and he supposed contract C. was in force. In answer to this, the plaintiff contended before us that this point was not made at the trial; to which the defendant replied, neither was the point that the old contract was in force. My recollection is so; that the case was opened and maintained as on the new contract; but I agree with Mr. Mellish, that a nonsuit ought to be maintained on a point not taken at the trial, only when it is beyond all doubt. I cannot say this is. Consequently, I think the rule should be absolute; but, under the circumstances, the costs of both parties of the first trial ought to abide the event of the second.

The case, in my Brother Bramwell's opinion, turning on what was his own impression, he was desirous that this judgment should be read as his own judgment. But I am authorized by the Lord Chief Baron and by my Brother Pigott to say, that, although I have read it as the judgment of my Brother Bramwell, it is a judgment in which we all agree.

Rule absolute.

[IN THE COURT OF EXCHEQUER.]

June 3, 1865.*

COUSINS v. EMMA PHILLIPS, *executrix*, &c. of THOMAS PHILLIPS
(*deceased*).

35 L. J. Ex. 85; 3 H. & C. 892.

Landlord and Tenant—Renewal of Lease without Surrender of Agreement for Underlease—4 Geo. 2. c. 28. s. 6.

LANDLORD AND TENANT.—*The 6th section of 4 Geo. 2. c. 28, while it gives a lessee the right to surrender notwithstanding his contracts with his underlessee, leaves untouched the sub-interest, though it be merely an agreement for an underlease; and the effect of a new demise after the surrender for the residue of the original term is to make the new lessee the assignee of the reversion of the term created by the surrenderor.*

S. surrendered his lease to W, his lessor, after making an agreement (containing a stipulation to pay rent and repair) for an underlease to F, who entered and afterwards assigned his interest to the plaintiff, and who gave an indemnification to him, and assigned it over to the defendant's testator, who covenanted to indemnify the plaintiff; after the surrender W. granted a new lease for the remainder of S.'s term to H:—Held, that H. was in exactly the same position as S, and that F. having had to pay to H. money for rent and non-repair, in consequence of the default of the defendant's testator, and the plaintiff having repaid F, F. was entitled to recover such monies from the defendant.

The declaration stated that in the lifetime of the defendant's testator, on the 10th of October, 1862, by an indenture then made between the plaintiff and the said testator—reciting an agreement between William Solomon Smith and Jephthah Fawsitt for a lease from the said Smith to the said Fawsitt of a certain messuage, for a term of twenty-one years from Michaelmas day, 1857,

* Decided in Trinity Term, 1865.

determinable as therein mentioned, at the yearly rent of 36*l.* 15*s.*, payable quarterly, and subject to the several clauses and stipulations therein contained, and reciting an indenture of assignment from Fawsitt to the plaintiff of his interest in the said agreement,—the plaintiff did assign to the testator all his estate and interest in the said agreement, subject to the payment of rent, &c., therein contained, and the testator Phillips did thereby, for himself, his executors, &c., covenant with the plaintiff, his executors, &c., that he, the testator, his executors, administrators or assigns, would from time to time pay the rent reserved as and when the same should become due and payable, and also duly observe and perform the several clauses and stipulations in the said agreement contained, and which on the tenant's part ought to be paid, &c., and also should and would from time to time and at all times thereafter, keep harmless and indemnified the plaintiff, his executors, &c., from all actions, suits, or other proceedings which might be brought or prosecuted against the plaintiff, his executors, &c., and all damages and costs incidental thereto by reason of the non-payment of the rent or non-observance or non-performance of the clauses in the said agreement contained, or any of them, or in relation thereto. And that the testator from the time of the said indenture became and was tenant of the said messuage, upon and subject to the terms of the agreement, and that the plaintiff did all things, &c. to entitle him to have the said covenants observed by the testator, and to sue the defendant for the matters hereinafter mentioned, and that all necessary times in that behalf elapsed; yet the testator did not pay the said rent as and when the same became due, and that after the said assignment to the testator, and after he became tenant of the said house under and by virtue thereof (to wit), on the 29th of September, 1863, two quarters of the said rent became due and payable, which the testator wholly failed to pay, nor did the testator, after the said assignment, duly observe the several clauses in the said agreement contained, and which on the tenant's part ought to have been observed, but therein wholly failed, and wholly failed to observe a certain clause and stipulation in the said agreement by which the tenant was bound to keep the said house in repair and do certain repairs thereto, and by reason of the non-payment and of the non-observance of the said agreement, certain actions, &c. were brought and prosecuted against the plaintiff, and he thereby and incidental thereto sustained certain damages and costs; yet the testator did not, nor did the defendant as executrix as aforesaid, keep harmless or indemnify the plaintiff against the said action, suits, proceedings, damages and costs. And the plaintiff has been called upon and obliged to pay and has paid the said damages and costs, and has been and is by means of the premises otherwise damaged.

Pleas—*Non est factum*; denial of the breaches alleged; and, lastly, *plene administravit*.

As to the last plea, replication and interlocutory judgment of future assets *quando acciderint*.

Issue on the other pleas.

At the trial, before Channell, B., at the Sittings in Middlesex after Easter Term, 1865, the following deeds were put in evidence:

The agreement between Smith and Fawsitt dated the 26th of October, 1857, referred to in the declaration.

An indenture dated the 21st of January, 1860, by which Smith and one Hyland joined in surrendering Smith's lease to the Dean and Chapter of Westminster.

An indenture of lease dated the 23rd of January, 1860, from the Dean and Chapter to Hyland for thirty-four years (the remainder of Smith's term).

An indenture of assignment dated the 1st of January, 1862, whereby all the interest of Fawsitt in the agreement of the 26th of October, 1857, was assigned to the plaintiff.

The indenture of assignment dated the 10th of October, 1862, between the plaintiff and the defendant's testator (set out in the declaration).

It was proved that a quarter's rent of the premises being due at

Midsummer, 1863, Hyland (claiming under his lease from the Dean and Chapter) brought ejectment against Fawsitt, and obtained possession (judgment being signed for want of appearance) before the rent of the Michaelmas quarter was due. It was proved also that Fawsitt had paid 59*l.*, including 25*l.* for repairs, 18*l.* 7*s.* 6*d.* for half a year's rent, and 13*l.* 2*s.* 3*d.* for the costs of the action *Hyland v. Fawsitt*; and that the plaintiff applied to had given Fawsitt's attorney a bill for 59*l.* on account of debt, and 7*l.* for his costs, and that Fawsitt's attorney afterwards sued the plaintiff on the note and took 40*l.* in satisfaction of the claim. The plaintiff now sought to recover what he had so paid.

CHANNELL, B. directed a nonsuit, with leave to the plaintiff to move to enter a verdict for such sum as the Court should think fit; and *T. B. Holland* having obtained a rule accordingly,—

W. C. Beasley appeared to shew cause; but

G. R. Clarke (with whom was *T. E. Holland*), being called on by the Court, stated the plaintiff's case.—The statute 4 Geo. 2. c. 28. s. 6.¹ provides that where a lease is surrendered for the purpose of a renewal, old underleases shall stand on the same footing with respect to the new lessee as they did before to the original lessee. By the surrender Hyland agreed to purchase of Smith a portion of the premises originally demised to Smith, and instead of taking a mere assignment of that part from Smith, he got a new lease of the residue of Smith's term from the Dean and Chapter; so that he did not take under Smith at all. It is a question of privity of contract, not of estate. The testator's covenant remained. In *Doe d. Palk v. Marchetti* (1 B. & Ad. 715-721) Tenterden, C.J. said he had no doubt the intention of the legislature in framing the 4 Geo. 2. c. 28. s. 6. was to place all parties as to every matter in the same situation as if no surrender had taken place. If the 2 Geo. 4. c. 28. s. 6. has not the effect contended for, that effect is produced by the 8 & 9 Vict. c. 106. s. 9.² Hyland is in the same situation as if he had taken an absolute assignment from Smith. When he brought ejectment in August, 1863, Fawsitt had no defence to the claim for the quarter's rent due at Midsummer, 1863, being liable on his covenant with Smith; Fawsitt's remedy was against the plaintiff, and the plaintiff had no remedy but on the testator's covenant with him. The covenant is sufficient without entering on the question of rights at all.

Beasley then shewed cause against the rule.—All payments made by Fawsitt in consequence of the action of ejectment, notice of which was not given to the defendant, were purely voluntary.

[*G. R. Clarke* intimated that he gave up his claim to the costs of the defence, and held merely to the repairs and the rent.]

Fawsitt was well defended by title (as was also the plaintiff), if he had

(1) This section enacts, "That in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any of the underleases, be as good and valid to all intents and purposes as if all the underleases derived thereout had been likewise surrendered at or before the taking of such new lease; and all and every person and persons in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her and their executors and administrators shall be entitled to the rents, covenants and duties, and have like remedy for recovery thereof, and the underlessees shall hold and enjoy the messuages, lands and tenements in the respective underleases comprised, as if the original leases, out of which the respective underleases are derived, had been still kept on foot and continued; and the chief landlord and landlords shall have and be entitled to such and the same remedy by distress or entry in and upon the messuages, &c. for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such underlease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective underleases had been renewed under such new principal lease."

(2) This section enacts, that when the reversion expectant on a lease shall, after the 1st of October, 1845, be surrendered or merged, the estate which shall for the time being confer as against the tenant under the same lease the next vested right, shall to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.

chosen to defend himself properly. The re-entry was under the new lease, not under the agreement; and the agreement itself is no underlease, so that the 4 Geo. 2. c. 28. s. 6. does not apply. The covenant of the defendant's testator contains nothing about indemnity in reference to the rent. It does not appear whether the covenants in Hyland's new lease are the same as those in the agreement, and the estimate for repairs, &c. has been made on the footing of the new lease.

[CHANNELL, B.—The effect of the 4 Geo. 2. c. 28. s. 6. was clearly to treat Hyland as the legal assignee of the reversion.]

Still the defendant ought to have had notice.

MARTIN, B.—I think this is a clear case. Smith, (who held under a lease from the Dean and Chapter of Westminster) in October, 1857, entered into an agreement for a lease with one Fawsitt, in which were contained certain covenants for repair and for payment of rent. Fawsitt entered and paid rent, and in construction of law thereby became tenant from year to year to Smith, subject to the conditions contained in the agreement. The next matter to be considered is what took place between Smith and Hyland; and it seems to me that the 4 Geo. 2. c. 28. s. 6. put those parties exactly on the same footing, and in the same condition, so far as the defendant's testator was concerned, as if Smith had been owner in fee simple, and had, after creating this tenancy from year to year, assigned the reversion to Hyland. Then upon the 1st of January, 1862, Fawsitt sells his interest to the plaintiff, and takes from him a covenant to pay the rent, and to perform the other conditions in the agreement of 1857, and in the event of the plaintiff not performing the covenants, Fawsitt would have had a right to sue him for not doing so; and that is the point on which the question arises. Then the rent is not paid and Fawsitt is called upon to pay it, and he calls upon the plaintiff to pay; and the plaintiff, who has sold his interest to the defendant's testator, taking a similar covenant from him, has thereupon a right to come down on the defendant for payment of what the plaintiff has been compelled to pay. It seems to me that the act of parliament is to have the construction contended for by the plaintiff, and that the testator was liable by the deed of the 10th of October, 1862, to indemnify the plaintiff against a quarter's rent that became payable in June, 1863, and against the consequences of the premises being allowed to go out of repair. Therefore the verdict ought to be for the plaintiff for the rent and other expenses due under the covenant.

CHANNELL, B.—The first sum claimed by the plaintiff is 25*l.*, for costs of repairs, and 9*l.* 3*s.* 9*d.* for one quarter's rent, due at Midsummer, 1863, and to that extent I am of opinion that the rule should be made absolute. I do not say that, if the argument had been pressed beyond that, the plaintiff might not have recovered a larger amount. Now it should be borne in mind that the plaintiff's claim is founded on a contract entered into between the defendant's testator and himself. If there had been no surrender to the Dean and Chapter and no new lease granted by them, then, I apprehend, the case would have stood thus: on the 10th of October, 1862, the deed now declared on was signed by the defendant's testator, and it recited an instrument of the 26th of October, 1857, by which Smith made over his interest to Fawsitt; and it further recited the indenture of the 1st of January, 1862, by which Fawsitt made over his interest to the plaintiff, who, as he had been the covenantor, now became covenantee of the defendant's testator. And the question arises, by reason of the surrender by Smith to the Dean and Chapter and their new lease to Hyland for the residue of the term originally granted by them to Smith. It was necessary, on the part of the plaintiff, at the trial, to prove that Hyland had some interest in the matter; otherwise, he might have left the case in a very clear point of view, as he might have relied on the instrument of the 10th of October, 1862, the assignment to the defendant's testator, in which nothing was said about Hyland; but inasmuch as Hyland had put in force his claim against Fawsitt, which Fawsitt, in his turn, enforced against the plaintiff, it became necessary

for the plaintiff to shew what Hyland's interest was, and it now appears that Hyland had agreed with Smith for the purchase of a portion of the premises originally demised to Smith, and before he completed his purchase and became the legal assignee of this portion, it was agreed that there should be a surrender to the Dean and Chapter, and a new demise back to Hyland of the portion he contracted to buy. Now, I am of opinion that, by virtue of the 4 Geo. 2. c. 28. s. 6, the effect was to leave untouched the sub-interest that had been created before the surrender, but to give Smith the right to surrender (notwithstanding the previous contract creating the sub-tenancy); and the effect of the surrender was to make Hyland, as it were, assignee of the reversion; and then Hyland was entitled to proceed, as he did, by way of ejectment for the forfeiture, against Fawsitt; and Fawsitt, in his turn, was entitled to hold the plaintiff responsible to him for the rent that he contracted to pay, and for the performance of the other covenants. If, as was pressed upon us, the plaintiff's payment was a voluntary payment, it would make all the difference; but I take it that he only paid that which he was liable to pay, and I think that, not only upon the broad merits of the case, but on the pleadings in this particular case for these two sums of 25*l.* and 9*l.* 3*s.* 9*d.*, the plaintiff is entitled to a verdict.

BRAMWELL, B. was of the same opinion.

Rule absolute.

[IN THE EXCHEQUER CHAMBER.]

(*Error from the Court of Exchequer.*)

Feb. 7, 1866.

OAKLEY v. MONCK.

35 L. J. Ex. 87; 4 H. & C. 251; L. R. 1 Ex. 159; 14 L. T. 20; 14 W. R. 406;
12 Jur. N.S. 253.

Distinguished, *Wyatt v. Cole*, 1879, 36 L. T. 613 (C.P. D.). Referred to, *Keith v. R. Gancia & Co.* [1904] 1 Ch. 774; 90 L. T. 395 (Ch. D.): affirmed, [1904] E. R. A.; 73 L. J. Ch. 411; [1904] 1 Ch. 787; 90 L. T. 397; 52 W. R. 580 (C. A.).

Landlord and Tenant—Expiration of Lease—Holding over—Tenancy from Year to Year—Acceptance of Rent by a Remainderman ignorant of the Conditions of the Old Lease.

LANDLORD AND TENANT.—*Where a tenant for life granted a lease to a nurseryman containing (among others) a covenant that the lessor should, at the expiration of the term, pay for all fruit-trees upon the premises planted by the lessee at a fair valuation, and at the expiration of the term the lessee held over as tenant from year to year, and on the death of the tenant for life the tenant from year to year continued the occupation of the land, paying the same rent as the remainderman, the latter being ignorant of the existence of the covenant:—Held, that the receipt of rent by the remainderman, under the circumstances, was no evidence of a holding over under the terms of the lease so as to render it incumbent on the remainderman to take the fruit-trees at a valuation on the termination of the tenancy from year to year by notice to quit.*

In this case a verdict was found, at the trial, for the plaintiff, subject to the opinion of the Court of Exchequer upon a special case. That Court gave judgment in favour of the defendant, and against that decision the plaintiff now appealed. The pleadings and case will be found fully set out in the report of

the argument and judgment in the Court below (34 Law J. Rep. (N.S.) Exch. 137).

It will be sufficient to state here, that the plaintiff was the administrator of Henry Oakley. Henry Oakley, in the year 1826, entered into the occupation of certain premises under a lease for twenty-one years, granted to him by W. Stephens the younger, who was the tenant for life in possession under the limitations contained in the will of Richard Stephens, deceased. At Michaelmas, 1847, the lease expired, and Henry Oakley continued in possession as a tenant from year to year, nothing being said by him or his lessor about terms.

W. Stephens the younger died in April, 1856, and the defendant then became tenant for life in possession under the limitations in the will. Henry Oakley remained in the occupation of the premises till his death in 1859, and the plaintiff, his personal representative, continued in the occupation till it was determined at Michaelmas, 1862, by notice to quit given in the previous March.

Henry Oakley was a nurseryman, and one of the terms of his original lease was, that the lessor should at the expiration of the lease take all fruit-trees and shrubs planted by Henry Oakley at a valuation. There was no proof that this was ever made known to the defendant. The plaintiff maintained that the defendant was bound to take the fruit-trees and shrubs at a valuation, on the ground that the terms of the tenancies from year to year under W. Stephens the younger and the defendant, must be taken to be the same as those of the original lease.

O'Malley (Merewether with him), for the plaintiff, the appellant, repeated the arguments urged in the Court below, citing *Wardall v. Usher* (3 Scott, N.R. 508; s. c. 10 Law J. Rep. (N.S.) C.P. 316), *Hyatt v. Griffiths* (17 Q.B. Rep. 505), *Roe v. Ward* (1 H. Black. 97), *Doe d. Martin v. Watts* (7 Term Rep. 83), and *Roe v. Prideaux* (10 East, 158).

Keane (*Douglas Brown* with him), for the defendant, the respondent, was not heard.

WILLES, J.—We are all of opinion that the judgment of the Court below ought to be affirmed. It is impossible to read the case, and especially the 12th paragraph of it, without feeling that there may have been a hardship imposed on the plaintiff, inasmuch as the property, which he might have removed under the ordinary rule respecting fixtures, may have been lost to him in consequence of his not having pursued the proper course with respect to fixtures. If the equity of the case should turn out to be as it seems to be at present, it will be for the consideration of Mrs. Monck, whether the value of the trees ought not to be given to the plaintiff; but this is a matter of good conscience, and does not affect the legal question, which has been raised by the conduct of the plaintiff himself in insisting that the defendant was bound to take them and pay for them at a valuation. The question of law is whether the covenant to take the fruit trees at a valuation, which was contained in the original lease, was binding on the defendant. When the lease expired, the tenancy continued on all the terms of the lease which were not inconsistent with a yearly tenancy, and, probably, though it is not necessary for us to give a decided opinion on that point, if the tenant had been turned out then by a notice to quit, he would have been entitled to insist on payment of the value of the fruit trees. The lessor died, and the tenant might then have called on the lessor's executors, the tenancy from year to year having been determined by the death, to take the trees at a valuation, assuming that covenant not to have been, as I think it was not, inconsistent with a yearly tenancy. But the tenant, instead of removing within a reasonable time the property which was in the nature of fixtures, preferred holding on, and he did remain till his death, paying rent to the defendant. With the exception of the payment of rent, there is nothing in the case to prove that the defendant took on himself the burden of the covenants in the original lease. The old covenant expired with the lease. The subsequent tenancy was, in point of law, a new contract and a new demise. There was

nothing to shew that it was a part of the terms of that contract that there should be a valuation of the trees except the payment and receipt of rent. The strong improbability that the tenant for life should have entered into such a contract is pointed out in the judgment of my Brother Bramwell in the Court below, and it is expressly found in the case that nothing passed to shew that the defendant had any knowledge of the covenants of the original lease, or even of the existence of that lease. In the absence of express stipulation between the parties, we are bound to assume that a tenancy from year to year is, on the usual terms, according to the custom of the country. We are asked to superadd in this case a special provision, either because it was a term of the original tenancy, though in point of law the tenancy under the defendant is a new one, or because all parties consented to it, which they did not in fact do. No special condition can be assumed which is not according to the use and custom of the place where the premises lie. I do not rely on the improbability of the tenant for life assenting to such a condition; but it is satisfactory that, in deciding according to the common sense view, we are deciding according to the legal view also. It is suggested as a difficulty, that unless the lessor were bound by this special term, although he did not know of its existence, the tenant would hold on one set of terms and the lessor would hold on another, which would be a solecism. In answer, another case might be put, which would present a solecism equally great of an opposite description. Assume the first lessor to have survived Oakley, and that the plaintiff, the representative of Oakley, had continued to hold on, the lease which had expired having been given up to the lessor, or for some reason not having come to the knowledge of Oakley's representative; assume further, that the tenant for life had died during the tenancy of the present plaintiff after Oakley's death; then neither the tenant nor the landlord would be aware of the terms of the old lease. If we are to put one solecism against the other, it would be an infinitely greater absurdity that one should be bound by one set of conditions, and the other by another, than that the contract should be void for want of mutuality. It is in every case a question of fact, easy of solution in practice. A tenant enters and stipulates, as he supposes, that the landlord is to repair a particular fence. After paying rent for years, the landlord's agent insists that there was no such stipulation, and the jury find that there was an honest mistake as to the terms of the agreement. Is the contract to be void, or is it not the rational conclusion that, the principal object of the contract having been the letting of the land, the tenancy has been created and the landlord may recover rent? A case arose some time ago, in which the decision of the Court of Exchequer was supported by that of the Exchequer Chamber, where an indenture having been put in the fire by consent, a tenancy was nevertheless held to have been created. The case as decided below seems so clear that I am almost ashamed to have said so much upon it.

BLACKBURN, J.—I am of the same opinion. It appears from this case that the plaintiff was the representative of the tenant who was in the occupation of land, paying rent when the defendant came into possession. All that the defendant knew was, that a certain rent had been paid, which she continued to receive. The tenancy from year to year so created would be on the ordinary terms of such a tenancy, unless other terms are shewn to have been agreed upon. If both sides had known of the terms upon which the premises were previously held, it would be reasonable evidence for a jury, or for us drawing inferences of fact, to conclude that the holding was to be on those terms. But it is impossible to incorporate those terms into the agreement unless they were known. If they were known, it does not follow that all of them would be incorporated, but only such as were applicable to a tenancy from year to year. It is a question of fact; and, no doubt, there may be a case, such as was suggested by the plaintiff's counsel, where the remainderman may have said to the tenant, "I have no doubt that the terms of your holding were reasonable. I accede to them whatever they were." In this case I do not see that our decision imposes much hardship on the plaintiff.

A nurseryman has a right to remove his shrubs, but not to cut down trees which have got root. The covenant in the lease had nothing to do with trade stock; but it was intended to encourage an improving tenant to plant orchard trees. A jury might conclude that Oakley and Stephens agreed at the termination of the lease that the same terms should go on. But when Stephens died, Mrs. Monck succeeded him, in utter ignorance of those terms. It is, as pointed out in the judgment below, improbable that she would have agreed to such a condition as this if she had known of it; but as she did not know of it, she cannot be taken to have agreed to it.

KEATING, J.—I am of the same opinion, on the simple ground that the case finds, as a fact, that the defendant was ignorant of the terms of the original lease.

MELLOR, J., MONTAGUE SMITH, J. and LUSH, J. concurred.

Judgment affirmed.

[IN THE COURT OF EXCHEQUER.]

Jan. 17, 1886.

THE RAMSGATE VICTORIA HOTEL COMPANY (LIMITED) v.
MONTEFIORE. THE SAME v. GOLDSMID. MONTEFIORE v. THE
RAMSGATE VICTORIA HOTEL COMPANY (LIMITED).

35 L. J. Ex. 90; L. R. 1 Ex. 109; 4 H. & C. 164; 13 L. T. 715; 14 W. R. 335;
12 Jur. N.S. 455.

See *Baily's Case*, [1868] E. R. A.; 37 L. J. Ch. 255; L. R. 5 Eq. 428; 16 W. R. 571 (V.C.): affirmed, [1868] E. R. A.; 37 L. J. Ch. 670; L. R. 3 Ch. 592; 19 L. T. 58; 16 W. R. 1093 (L.C.); *Boyle's Case*, [1885] E. R. A.; 54 L. J. Ch. 550; 52 L. T. 501; 33 W. R. 450 (Ch. D.); *Portugese Consolidated Copper Mines*, 1890, 45 Ch. D. 16; 63 L. T. 423; 39 W. R. 25 (C. A.).

Joint-Stock Company—Allotment of Shares—Reasonable Time—Action for Calls—Repayment of Deposits.

COMPANY.—Where shares in a joint-stock company are applied for, they must be allotted by the directors within a reasonable time, otherwise the applicant may refuse to receive them, and may recover back the deposit paid on application.

Where shares were applied for on the 8th of June and allotted on the 23rd of November,—Held, that this was not an allotment within a reasonable time.

The Ramsgate Victoria Hotel Company (Limited) commenced actions against several persons for calls, and cross-actions were brought by those persons against the company for recovery of deposits paid on applications for shares. By consent and an order of Martin, B., a special case for the opinion of the Court was stated respecting all of them.

The special case set out the pleadings in the action by the company against Montefiore. The declaration contained a count for non-acceptance of shares duly allotted, and non-payment of deposit and calls thereon, and an *indebitatus* count for deposit and calls. The defendant traversed the material allegations in the declaration, and pleaded, in addition, to the first count, fifthly, that before allotment he had withdrawn his application; sixthly, that after the lapse of a reasonable time without allotment he had withdrawn his

application; and, seventhly, that after the lapse of a reasonable time without notice of allotment given to him he had withdrawn his application.

The substantial facts stated by the case respecting this action were as follows:

The company was completely registered on the 6th of June, 1864, on which day the articles of association were duly registered. By the 2nd of such articles, it was provided that the company should continue incorporated notwithstanding that the whole number of shares in the capital might not be subscribed for or issued, and might commence and carry on business when in the judgment of the board a sufficient number of shares had been subscribed to justify them in so doing.

Prior to the 8th of June, 1864, the defendant had received one of the company's prospectuses containing this statement: "Deposit on application, 1*l.* per share, and 4*l.* on allotment." On the 8th of June the defendant paid to the company's bankers the sum of 50*l.*, taking the printed receipt in the form attached to the prospectus for "50*l.*, being the deposit paid in accordance with the terms of the prospectus on an application for an allotment of fifty shares." On the same day he filled up and forwarded to the directors the printed application for shares, also attached to the prospectus, in the following form:

"To the directors of the Ramsgate Victoria Hotel Company (Limited).

"Gentlemen,—Having paid to your bankers the sum of 50*l.*, I hereby request you will allot me fifty shares of 20*l.* each in the Ramsgate Victoria Hotel Company (Limited), and I hereby agree to accept such shares or any smaller number that may be allotted to me, to pay the deposit and calls thereon, and to sign the articles of association of the company, at such times and in such manner as you may appoint. I am," &c.

The directors met for the first time after the complete registration on the 13th of June, and they had in all seventeen meetings, the last being on the 30th of November. The minutes of the meetings were to be referred to as part of the case.

At a meeting of the directors on the 17th of August the secretary submitted to the board a list of applicants for shares up to that time. The defendant's name appeared as a subscriber for fifty shares. Afterwards, and before the 23rd of November, the secretary prepared another list, which was attached to the case. This list shewed opposite the defendant's name fifty shares in the column of shares applied for, and fifty shares in the column of shares allotted. The minute of the meeting of directors held on the 2nd of November contained the following entry: "The secretary submitted the list of subscribers, but it was not deemed advisable to proceed to an immediate allotment."

Between the month of June and the 23rd of November the defendant received no direct communication from the directors or their secretary, and on the 8th of November he wrote to the directors stating that "the allotment of shares not having been made, he withdrew his application and requested a return of the deposit, and should decline to accept any shares if allotted."

On the 18th of November his solicitors wrote demanding a return of the deposit.

On the 23rd of November the directors passed the following resolution:

"Resolved that notice be given to all shareholders that the directors do hereby make the first call of 4*l.* already due on the allotment of their shares, and further, that the secretary inform them that in case any shareholder shall choose to pay up the whole amount due on his shares, he shall be allowed 7*l.* 10*s.* per cent. on the amount, being at the rate of 5*l.* per cent. for eighteen months, the time which it is calculated will elapse before the hotel is opened."

On the same day the secretary prepared a third list of shareholders, including the defendant's name as a holder of fifty shares, and notice of it was sent to him in the following letter from the secretary:

"I am instructed by the directors to acquaint you, that in compliance with your application, they have allotted to you fifty shares in this company, and have entered your name in the register of shareholders for the same, and I have to request that you will pay the balance of first call as noted below, on or before the 15th of December, to the London and County Bank, 21, Lombard Street.

"No. of shares, 50.

"Deposit £ 50

"Further payment on allotment 200

£250 "

The defendant's solicitor wrote declining the shares, and requiring the removal of the defendant's name from the list of shareholders, and a return of the deposit.

The secretary wrote in reply, that shortly after the incorporation of the company a list of shareholders had been made, which constituted an allotment of shares.

Cross-actions were then commenced; the company suing for the amount of the call and damages for not accepting the shares, the defendant suing for a return of the deposit.

In the action by the company against Goldsmid, the facts were stated to be the same, except that he had not withdrawn his application or given notice of any intention to do so.

The question for the opinion of the Court was, whether, under the above circumstances, the company or the other parties were entitled to maintain their actions.

Mellish (Digby with him), for the company.—The prepared lists of shareholders' names amounted to an allotment. It was not necessary to send notice of allotment to the shareholders. No doubt, in the case of ordinary contracts, the communication of an assent to a proposal within a reasonable time is essential, but that rule does not apply to a case like the present. From June to November may well be a reasonable time within which to make the communication. Directors have to wait to see what applications they have for shares, and if it is prudent to commence business. There may be a valid allotment without any communication of it to the shareholders, as appears from *Ex parte Cookney* (3 De Gex. & J. 170; s. c. 28 Law J. Rep. (N.S.) Chanc. 12; 26 Beav. 6) and *Ex parte Blozam* (33 Law J. Rep. (N.S.) Chanc. 519, 574).

[*POLLOCK, C.B.*—In those cases it was a question of putting the allottee on the list of contributories, which is very different from holding him liable for calls. This appears from the judgment of Lord Justice Turner, in the latter case.]

Montagu Chambers (Cohen with him), contra, was not called on.

THE COURT¹ gave judgment against the company in all the actions on the ground that there had been no allotment of shares till the 23rd of November, which was not an allotment within a reasonable time after the applications for shares.

Judgment accordingly.

(1) Pollock, C.B., Martin, B., Channell, B., and Pigott, B.

[IN THE COURT OF EXCHEQUER.]

Jan. 29, 1866.

CRAGG v. TAYLOR.

35 L. J. Ex. 92; 4 H. & C. 158; L. R. 1 Ex. 148; 12 Jur. N.S. 320;
13 L. T. 756; 14 W. R. 399.

Distinguished, *Dixon v. Wrench*, [1869] E. R. A.; 38 L. J. Ex. 113; L. R. 4 Ex. 154; 20 L. T. 492; 17 W. R. 591 (Ex.). Not followed, *Coates's Case*, [1877] E. R. A.; 46 L. J. Ch. 367; 35 L. T. 617; 25 W. R. 111 (V.C.). See *South Western Loan Co. v. Robertson*, [1882] E. R. A.; 51 L. J. Q.B. 79; L. R. 8 Q.B. D. 17; 46 L. T. 427; 30 W. R. 102 (Q.B.D. Div.). Distinguished, *Cooper v. Griffin*, [1892] E. R. A.; 61 L. J. Q.B. 563; [1892] 1 Q.B. 740; 66 L. T. 660; 40 W. R. 420 (Q.B.D. Div.).

1 & 2 Vict. c. 110. s. 14.—*Companies' Act*, 1862, section 30.—*Charging Order on Shares in Limited Company—Trustee*.

EXECUTION.—*The 30th section of the Companies' Act, 1862, enacts; that no notice of any trust shall be entered on the register of a company incorporated under the act; and, therefore, the Court will not set aside an order, made under the 14th section of the 1 & 2 Vict. c. 110, charging shares in a limited company, standing in the name of a judgment debtor, although he be owner of the shares as trustee only, and have no beneficial interest whatever therein.*

On the 31st of August, 1865, judgment was signed in this action against the defendant for 198l. 1s. 1d. damages and costs.

On the 4th of November Martin, B. made an order at chambers, under the 1 & 2 Vict. c. 110. s. 14,¹ that fifty shares in the Glynrhonwy Slate Company (Limited), registered in the name of the defendant, should stand charged with the payment of the said sum.

The order was made on an affidavit shewing that the company was incorporated in March, 1860, under the Joint-Stock Companies' Act, 1856, and that by a deed of transfer dated the 12th of July, 1865, and left at the office of the company on that day for registration, Vernon Pearce Taylor, the defendant's brother and a shareholder in the company, in consideration of 10s., bargained, sold, assigned and transferred to the defendant fifty shares in the company; and that on the 11th of September the directors of the company ordered that the transfer should be registered, and that it was duly registered accordingly in the company's books.

H. T. Cole obtained a rule to rescind the order, on affidavits of the defendant, his brother and his attorney, stating that the shares were transferred to the defendant merely as trustee for his brother, and that the defendant had at the time acknowledged in a letter to his brother that he held the shares as trustee for him; and that the transfer was so made in order that the defendant might be a director of the company for the support of his

(1) This section is as follows: "That if any person against whom any judgment shall have been entered up in any of Her Majesty's superior Courts at Westminster shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order."

brother's interests; and that the defendant had not any beneficial interest whatever in the said shares.

M'Intyre shewed cause.—The transfer is clear on the face of the defendant's own affidavits. His name is inserted as a member in the company's register; and by the Companies' Act, 1862, the shareholder is the person in whose name the shares are registered. He it is who is liable to calls, and it is with him alone that the act deals, for the act does not recognize trusts at all—25 & 26 Vict. c. 89. s. 30.² The words "in his own right," in 1 & 2 Vict. c. 110. s. 14, are equivalent to "in his own legal right," and are meant to exclude property standing in the debtor's name as executor, &c. But if the defendant has any interest at all in these shares, we are entitled to the order.—He cited *Fuller v. Earle* (7 Exch. Rep. 796; s. c. 21 Law J. Rep. (N.S.) Exch. 314) and *Baker v. Tynte* (29 Law J. Rep. (N.S.) Q.B. 233).

Cole, contra.—Shares in these companies are made the subject-matter of marriage settlements every day now. It cannot be that such shares—say in the London and Westminster Bank—are to be subject to the judgment debts of the trustee. The words "in his own right," in the 14th section of 1 & 2 Vict. c. 110, must be meant to exclude the case of a trustee holding shares for others, and to prevent the mischief arising of being sent to Equity for relief.

[POLLOCK, C.B.—The defendant could not defend in an action for calls by saying he was a trustee.]

That is a different matter. The question here is, has he any beneficial interest as against a judgment creditor? In *Fuller v. Earle* (7 Exch. Rep. 796; s. c. 21 Law J. Rep. (N.S.) Exch. 314), the point is left open by Martin, B. The effect of the 1 & 2 Vict. c. 110. is, that you can charge a beneficial interest in stock or shares standing in the name of a trustee, but not a trustee who has no beneficial interest himself in the stock or shares. The date of the registration of the transfer—after judgment—shews the *bona fides* of the transaction.

He cited *Whitworth v. Gaugain*.³

POLLOCK, C.B.—This order must stand. In the case of *Rogers v. Holloway* (5 Man. & G. 292; s. c. 12 Law J. Rep. (N.S.) C.P. 182) the Court of Common Pleas refused to interfere with a charging order on stock standing in the names of trustees for a defendant, Lord Chief Justice Tindal saying that the Court of Chancery was the proper tribunal to afford a remedy; and *a fortiori* we should not interfere in a case of this sort, referring to a new species of partnership property created by the Limited Liability Acts. Thus far on general principles. But the act of 1862 requires the shareholders' names to be entered on the register; and while the 43rd section provides for notice being taken of mortgages, the 30th section makes an express provision to the contrary with regard to trusts; and as there can be no such thing in an ordinary partnership, so neither can there be, as it seems to me, in a limited liability company.

MARTIN, B.—The order was right. The object of the act of 1862 was, that the members' names should appear on the company's register, informing the public who are the partners in the company; and by the 30th section no trust is to be recognized or taken into consideration at all. The charging order is to be made on shares standing in the judgment debtor's name in his own right, that is, as I apprehend, not in his right as executor. The 14th section of the 1 & 2 Vict. c. 110. entitles the creditor to the remedies he would have had if the charge had been made by the debtor, and so all that the act does here is to give the plaintiff a right of shewing in equity that he is entitled to such interest as the debtor had. By discharging the order we should be preventing the plaintiff from insisting on this right in a Court of equity.

(2) This section is as follows: "No notice of any trust, expressed, implied or constructive, shall be entered on the register or be receivable by the Registrar in the case of companies under this act, and registered in England or Ireland."

(3) 3 Hare, 416; s. c. 13 Law J. Rep. (N.S.) Chanc. 288; 1 Cr. & Ph. 325; 10 Law J. Rep. (N.S.) Chanc. 317.

CHANNELL, B.—I am of the same opinion, on the ground that the shares are standing in the defendant's own name upon the register of the company. This makes a *prima facie* case in favour of the order. Then comes the question whether the defendant can say that the transfer merely created a trust. I do not say the transfer was made *mala fide*; but I think a Court of equity is the place where the question ought to be raised.

PIGOTT, B.—The question is not free from difficulty. The relation of trustee and *cestui que trust* may possibly be created; but it is for a Court of equity to determine whether the relation exists here or not; and I am assisted in coming to this conclusion by the case of *Rogers v. Holloway* (5 Man. & G. 292; s. c. 12 Law J. Rep. (N.S.) C.P. 182). It would be an act of injustice if we, by discharging the order, precluded the parties from trying the question in equity.

Rule discharged.

[IN THE COURT OF EXCHEQUER.]

Jan. 31, Feb. 7, 1866.

WILSON v. JONES.

35 L. J. 1 Ex. 94; L. R. 1 Ex. 193; 14 L. T. 65; 14 W. R. 499: affirmed, [1867] E. R. A.; 36 L. J. Ex. 78; L. R. 2 Ex. 139; 15 L. T. 669; 15 W. R. 435 (Ex. Ch.).

Marine Insurance—Laying Submarine Cable—Construction of Policy—Insurance of the Entire Adventure—Total Loss.

MARINE INSURANCE.—*The owner of shares in a company formed for the purpose of laying down a submarine telegraph cable between I. and N. caused himself to be insured by a policy framed on the common form of a marine policy, but containing in addition the following clauses, viz.: "The risk to commence at, from and including the time of lading of the cable on board the G. E., and to continue till the cable be laid in one continuous length between I. and N., and until 100 words shall have been transmitted from I. to N., and vice versa;" and "It is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable from, and including its lading on board the G. E. until 100 words be transmitted from I. to N., and vice versa; and it is distinctly declared and agreed that the transmission of the 100 words from I. to N., and vice versa, shall be an essential condition of the policy":—Held, that this was an insurance on the entire undertaking of laying down the cable successfully, and that, on the cable breaking when half of it was laid down, the underwriter was liable as for a total loss, although the other half of the cable was saved and ready for use in a subsequent attempt to carry out the undertaking.*

Declaration—That the plaintiff, by J. H. Joyce his agent, by a policy of insurance bearing date the 21st of July, 1865, caused himself to be insured in the words and figures following, that is to say: "J. H. Joyce, in the name of God, amen, as well in his own name as for, &c., doth make assurance, and cause himself and them, and every of them, to be insured, lost or not lost, at and from Ireland to Newfoundland, the risk to commence at and from and including the lading of the cable on board of the Great Eastern, and to continue until the said cable be laid in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted from Ireland to Newfoundland, and vice versa, the risk of this policy then to cease and

determine,¹ upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of and in the good ship or vessel called the *Great Eastern*, whereof is master for this present voyage — or whosoever else, &c.; beginning the adventure, upon the said goods and merchandises from the loading thereof aboard the said ship as above, upon the said ship, &c., including risk of craft, and shall so continue and endure during her abode there upon the said ship, &c., and further, until the said ship, with all her ordnance, tackle, apparel, &c. and goods and merchandises whatsoever shall be arrived, &c. until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed; and it shall be lawful for the said ship, &c. in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this insurance. The said ship, &c., goods and merchandises, &c. for so much as concerns the assured by agreement between assured and assurers in this policy, are and shall be valued at 200*l*. On the Atlantic cable, value say on twenty shares valued at 10*l*. per share; *it is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable from, and including its lading on board the Great Eastern, until one hundred words be transmitted from Ireland to Newfoundland, and vice versa; and it is distinctly declared and agreed that the transmission of the said one hundred words from Ireland to Newfoundland, and vice versa, shall be an essential condition of the policy.*¹ Touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us in this voyage, they are of the seas—men of war, &c.”—[The rest of the policy was in the common form of a marine policy. The premium was 25 guineas per cent.; and all goods (other than those usually excepted) and the ship and freight were warranted free from average under 3*l*. per cent., unless general, or the ship be stranded. The defendant underwrote for 200*l*.]—Averments that the defendant for a certain premium paid to him by the plaintiff, subscribed the said policy for 200*l*., and became an insurer, &c.; and the said cable was shipped on the said ship to be carried thereon, and to be laid in one continuous length between Ireland and Newfoundland, and the plaintiff was then and thence, &c., interested in the said cable to the amount, &c.; and that the said ship with the cable on board thereof sailed on the said voyage, and afterwards, and whilst the said ship with the said cable on board thereof was proceeding on the said voyage, and during the continuance of the said risk, and before the said Atlantic cable was laid in one continuous length between Ireland and Newfoundland, and before one hundred words had been transmitted from Ireland to Newfoundland, and *vice versa*, the said Atlantic cable was by perils so insured against as aforesaid wholly lost, and all conditions were fulfilled, &c. to entitle the plaintiff to be paid the said 200*l*. by the defendant; yet the defendant has not paid the same.

Second plea, that the plaintiff was not interested in the said cable, as alleged. Third, that the said cable was not lost by the perils insured against, or any of them, as alleged. Fourth, that the alleged loss of the said cable was an average loss under 3*l*. per cent. within the meaning of the policy, and was not a general average loss, and the said ship during the said voyage was not stranded. Issue thereon.

This case was tried, before Martin, B., at the Liverpool Winter Assize, 1865, when evidence was given of the following facts. The Atlantic Telegraph Company were about to lay a submarine cable between Ireland and Newfoundland; and 2,200 miles of the cable were put on board the *Great Eastern*, from which it was to be paid out, as the ship went along. The *Great Eastern* left Valentia, Ireland, on the 23rd of July. On the 2nd of August, after about 1,100 miles of the cable had been laid down, some of it had to be hauled back

(1) The two clauses in italics were *written* in the margin of the policy, the body of which was the common *printed* form of a marine policy.

in consequence of a defect in the insulation; and whilst this was being done, the cable broke on board the *Great Eastern*, and the broken end fell into the sea, where it was about two miles deep. After some fruitless endeavours to raise the submerged portion, the *Great Eastern* returned to Sheerness with the remainder of the cable (nearly 1,200 miles in length) on board, where it remained up to the time of the action; and the directors of the company still hoped that the part saved might be made available for another attempt.

The plaintiff was the owner of twenty shares of 10*l.* each, in the company. The defendant underwrote the policy for 200*l.* on the 29th of July, the premium paid being 25 guineas per cent.

The jury found a verdict for the plaintiff for 200*l.*, and the Judge reserved leave to move to enter the verdict for the defendant, on the ground that the loss was not by the perils insured against, or if it were, that it was only an average loss, and there was no evidence that it was higher than 3 per cent.; or to reduce the damages on the ground that the loss was an average loss.

Brett having obtained a rule accordingly,

S. Temple and *Leofric Temple* shewed cause, contending that the policy was clearly on the face of it a policy on the entire undertaking, and not merely on the cable. The words in the margin would be useless if they did not mean perils other than the "perils of the seas."

Brett and *Quain* supported the rule.—The difficulty arises from a common marine policy having been used.

[*MARTIN, B.*—This contract is not a marine policy just because it begins with "In the name of God, Amen."]

A written document is to be interpreted according to the plain and ordinary meaning of the words used, and not according to what the parties to the instrument *might* probably have meant. Secondly, it is to be construed so as to give effect to all the words used, and not merely to isolated portions of the document; and, thirdly, if the written document has a general similarity to other documents which have been construed judicially by the Court, it must also be construed, as far as possible, according to the decisions of the Court. If this document can be made out to be a marine policy, the Court must not regard it as a wager. By its very terms it is a valued policy on the cable. If it had been a policy on the shares, it would have said in terms, "on the Atlantic cable, that is, on certain shares therein." Again, if it be a policy on shares, it is an insurance on an uninsurable subject-matter; for they are not within *Lawrence, J.*'s, definition of insurable interest—see 1 *Arnould*, 281 (2nd edit.), and *Lucena v. Crawford* (2 Bos. & P. N.R. 302). The policy could not have attached till the cable was on board the *Great Eastern*: the shares were never put on board. Again, if the cable had been laid successfully, and then a slight flaw had stopped the transmission of messages temporarily, the shares would have increased in value instead of becoming deteriorated. In *Paterson v. Harris* (1 Best & S. 336; s. c. 30 Law J. Rep. (N.S.) Q.B. 354), where the policy contained a memorandum that the insurance should "cover and include the successful working of the cable when laid down," it was held that the insurance was on the plaintiff's interest in the cable itself, and that the warranty clause applied. The marginal addition here does not alter the subject-matter of insurance; it only increases the risks and lengthens the time of risk. And if this were a policy on the shares, we must still come back to the question—what were the perils insured against? The words in the margin must be read after those in the body of the policy; and they must relate to risks *ejusdem generis* as those there specified. They do not cover any peril in the ordinary course of an ordinary voyage, or arising from an inherent defect in the cable itself—*Paterson v. Harris* (1 Best & S. 336; s. c. 30 Law J. Rep. (N.S.) Q.B. 354), per Cockburn, C.J. The accident here occurred from hauling in the cable where the sea was two miles deep, after a defect had been discovered in the insulation. Again, the loss cannot be considered total; for nearly 1,200 miles of cable have been brought home, and

are within the power of the assured. It is declared by the company to be of use again, and is therefore of value. Even if the policy be on the shares, still the loss is not total; for the shares are still of some value by reason of the cable saved. They are not the subject-matter of abandonment, and therefore cannot be abandoned.

Cur. adv. vult.

MARTIN, B. (Feb. 7) delivered the judgment of the Court.²—after reading the material parts of the policy and stating the facts as they are given above, his Lordship said—The contract is partly written and partly printed, and the agreement between the parties is to be ascertained by the words of it. The circumstance that it is upon the printed form, which is usually adopted for a common marine policy, is wholly immaterial if the language used and adopted by the parties shews that the insurance extends further than marine policies ordinarily do. In the present policy the risk of the insurance is declared to commence from the lading of the cable on board, and to continue until it be laid down *in one continuous length* between Ireland and Newfoundland, and until 100 words shall have been transmitted to and fro, when the risk is to cease and determine. Now, so far as these words go, they express that the subject-matter of insurance was the cable; but in the subsequent part of the policy it was declared to be agreed, that in addition to the ordinary perils and casualties insured against in the common marine policy, *the insurance is to cover every risk and contingency attending the conveyance and successful laying down of the cable.* It seems to us that words cannot be used more apt and fit to express that the underwriter contracted to insure against the risk and contingency which has happened, namely, the unsuccessful attempt to convey and lay down the cable. It seems to us that what has occurred is within the words of the contract; it was a risk and contingency which attended the conveyance of the cable, and the unsuccessful attempt to lay it down. In truth, the policy is not merely on the cable, but on the adventure.

The second question is, whether the loss be total or partial. We think it total. The adventure in respect of which the insurance was effected was the successful laying down of the cable, which was shipped on board the *Great Eastern*, in one continuous length between Ireland and Newfoundland. This has wholly failed, and in our opinion the circumstance that one-half of the cable has been saved is immaterial. The assurance was upon the adventure; and even if it had been merely on the cable, it was upon the entire continuous cable, and not on a portion of it. *Paterson v. Harris* (1 Best & S. 336; s. c. 30 Law J. Rep. (n.s.) Q.B. 354), which was cited for the defendant, really has no bearing whatever on the subject. It was an action upon a policy in the common form, and the Court "held that the loss there was not a loss by perils of the sea." So, too, it may possibly be, that the loss in the present case is not a loss by the perils of the seas; but upon this it is unnecessary to give an opinion, as we think the misfortune which has occurred is distinctly and plainly within the words of the policy, and that it was a risk and contingency against which the defendant contracted to insure. The rule will, therefore, be discharged.

Rule discharged.

(2) Pollock, C.B., Martin, B., Channell, B. and Pigott, B.

[IN THE COURT OF EXCHEQUER.]

Jan. 20, Feb. 9, 1866.

WILSON v. THE NEWPORT DOCK COMPANY.

35 L. J. Ex. 97; 4 H. & C. 232; L. R. 1 Ex. 177; 14 L. T. 230; 14 W. R. 558;
12 Jur. N.S. 233.

Damages—Breach of Contract—Consequential Damage.

DAMAGES. SHIPPING.—*The declaration stated that, in consideration that the plaintiff would bring his ship to the defendants' dock at a certain time, the defendants promised to dock her therein, and that the plaintiff brought her to the dock at the time appointed, but that the defendants refused to admit her into the dock, by reason whereof she grounded outside the dock when the tide ebbed, and was damaged.*

Evidence was given that the dock-gate could not be opened because a chain had broken, and that the plaintiff was informed of this immediately on the arrival of his ship opposite the dock. There was conflicting evidence as to the reason for the ship remaining in the river opposite to the dock-gate till she grounded.

The jury were asked, first, whether there was a place of safety to which the ship could have been taken before the tide ebbed; and, secondly, whose fault it was that she was not taken there—the captain's or the pilot's. They returned no answer to the first question, and replied to the second, that neither the captain nor the pilot was to blame.

Held, by Martin, B., that the damages consequent upon the ship taking the ground were not too remote to be recovered by the plaintiff.

Held, by Pollock, C.B., Channell, B. and Pigott, B., that without more assistance from the jury, the case was not ripe for the decision of the Court.

Hadley v. Baxendale (9 Exch. Rep. 341; s. c. 23 Law J. Rep. (N.S.) Exch. 179) *discussed.*

Declaration—That the defendants were proprietors of a certain dock communicating with a certain tidal river, to wit, the River Usk, which dock was used for the reception and docking of ships and vessels therein, for reward to the defendants in that behalf. And the plaintiff was the owner of a ship or vessel, and was desirous of having the same received and docked in the said dock, for reward to the defendants in that behalf as aforesaid, whereof the defendants had notice; and thereupon, in consideration that the plaintiff would cause the said ship to be brought at a certain time on a certain day towards and to the said dock, for the purpose of being so received and docked therein as aforesaid, the defendants promised him so to receive and dock the said ship therein as aforesaid. And the plaintiff says that he, relying on the defendants' promise, did cause the said ship to be brought at the time and on the day aforesaid towards, and the same was being brought towards and to the said dock for the purpose of being so received and docked therein as aforesaid, and all things were done, &c. to entitle the plaintiff to have had his said ship then so received and docked as aforesaid; yet the defendants, whilst the said ship was then being so brought towards and to the said dock, for the purpose aforesaid, then wholly refused to and did not nor would then receive and dock the said ship in the said dock. And the said ship, being by reason thereof left in the said river, at the ebbing of the tide there, grounded and took the ground there, and was thereby greatly damaged and injured, and the plaintiff incurred great expenses in and about having such damage and injury repaired.

Plea of payment into court of 15*l*.

Replication, that the sum paid into court was not enough to satisfy the plaintiff's claim.

The case came on to be tried, before Byles, J., at the last Monmouth Assizes, and the facts proved were as follows. On the 17th of November, 1863, the ship *Lord Elgin* was in dry dock at Newport, and upon the morning of that day, by the direction of the dock-master of the defendants' dock, she proceeded towards their dock for the purpose of entering it, being in ballast at the time. It was a very short distance from the dry dock to the defendants' dock, and the ship was towed down the river by a steam-tug, and arrived at the defendants' dock-gate about high water, when, in consequence of the chain of the dock gate being broken, or out of order, she could not be admitted. The captain of *Lord Elgin* was unacquainted with the river and its navigation, and he directed the ship to be anchored where she was. In about three hours afterwards, upon the ebb, she took the ground and was "hogged," in consequence of which about 2,000*l*. had to be expended on her in repairs, and the present question was in respect of this damage. The 15*l*. was paid into court to cover the expense of bringing the ship down to the dock. There does not seem to have been any application made to the learned Judge at the conclusion of the plaintiff's case to nonsuit, or direct a verdict for the defendants, upon the ground that there was no evidence to go to the jury; and witnesses were called for the defendants. It was contended, that upon the evidence the captain acted improperly; that he ought not to have anchored where he did; that he ought to have done one of several things; that he ought to have gone back towards the dry dock, or have gone down to a place called "West Point," where it was said the ship could have safely grounded, or have gone into deep water and there anchored. The captain stated reasons why, in his opinion, none of these ought to have been done. It was also alleged that the ship was not sufficiently ballasted.

According to the Judge's note, it was contended, on behalf of the defendants, that the damage was too remote, and was unconnected with the cause of action; and upon this point he gave leave to move. He then proposed two questions to the jury. First, whether there was, in fact, any place of safety to which the vessel might have been taken. Upon this question the jury could not agree. Secondly, whether both the captain and the pilot did the best they could under the circumstances, and whether either of them was guilty of any negligence? To this the jury answered, that they both did the best they could, and that neither of them was guilty of negligence. Upon this finding the learned Judge directed the verdict to be entered for the plaintiff, (the amount of damages having been agreed to be referred); and he gave the defendants leave to move, with power to the Court to draw any inferences from the facts consistent with the finding of the jury, adding that he did not disapprove of the finding.

The defendants afterwards obtained a rule to set the verdict aside, on the ground that the sum paid into court was sufficient to cover the damages legally recoverable, and the damages claimed for injury by the "hogging" of the ship were too remote,—the Court to draw inferences of fact not inconsistent with the finding of the jury; or for a new trial, on the grounds of misdirection by the Judge and miscarriage in the finding of the jury.

Huddleston having, in Michaelmas Term, obtained a rule accordingly—

Mellish, W. H. Cooke and Dowdeswell now shewed cause.—Damages arising from a breach of contract must, no doubt, be direct, and not merely consequential, to be recoverable, according to the rule in *Hadley v. Baxendale* (9 Exch. Rep. 341; s. c. 23 Law J. Rep. (N.S.) Exch. 179). And if the declaration had stated that, by reason of the injury to the ship, the plaintiff had had to pay damages to the charterer, that would have been consequential damage. But here the damage was direct.

[*POLLOCK, C.B.*—One test of liability is, did the defendants' misconduct

operate as *causa causans*, or as *causa sine qua non*? If only as the latter, then the mischief would amount to consequential damage only.]

The non-opening of the gates was the *causa causans*, though not the *causa proxima*. It was evident to everybody that the ship, if left outside, must inevitably take the ground and be injured. *Smeed v. Foord* (1 El. & El. 602; s. c. 28 Law J. Rep. (n.s.) Q.B. 178) shews that the plaintiff is entitled to recover. In *Collen v. Wright* (8 El. & B. 647; s. c. 27 Law J. Rep. (n.s.) Q.B. 215) the damage was infinitely more remote than here. So also in *Gibbs v. the Trustees of the Liverpool Docks* (3 Hurl. & N. 164; s. c. 27 Law J. Rep. (n.s.) Exch. 321), *Randall v. Roper* (1 El. B. & El. 84; s. c. 27 Law J. Rep. (n.s.) Q.B. 266), and *Davis v. Garrett* (6 Bing. 716). The grounding of the ship must be considered under the circumstances to have been the natural and reasonable consequence of the defendants' act; for the finding of the jury is, that neither the captain nor the pilot was to blame; and that is of itself enough to support a verdict for the plaintiff.

[CHANNELL, B.—The defendants cannot be worse off than if the jury had found the question against them.]

Huddleston, Gray and H. James supported the rule.—The accident was beyond the defendant's control, and the ship had several hours within which she might have been taken to a place of safety. The damages are too remote, according to the rule in *Hadley v. Baxendale* (9 Exch. Rep. 341; s. c. 23 Law J. Rep. (n.s.) Exch. 179) and *Fletcher v. Tayleur* (17 Com. B. Rep. 21; s. c. 25 Law J. Rep. (n.s.) C.P. 65). They were not within the contemplation of the parties. If a lodger is refused entrance to his lodging, and lies down on the pavement and gets run over, can he say the injury arose from the door being shut? If the ship had been injured by collision while at anchor opposite the dock, or had been capsized while there by a hurricane, the defendants would not have been liable. The immediate cause of the damage here was that there was a gale blowing at the time, and that the ship was not sufficiently ballasted to face it. It may be that she ought not to have left the dry dock at all.

[MARTIN, B.—The proximate cause was the ship remaining opposite the dock and grounding there. The defendants broke their contract in not opening the gate.]

The non-removal of the vessel was not the act of the defendants. The whole question is discussed in *Sedgwick on Damages*, chap. 3, and by Lord Campbell, C.J., in *Smeed v. Foord* (1 El. & El. 602; s. c. 28 Law J. Rep. (n.s.) Q.B. 178). The possibility of the gate being immovable, and of a gale blowing at the time, was not in the contemplation of the parties to the contract. The non-entry into the dock was merely *causa sine qua non*.

[POLLOCK, C.B. cited *Gee v. the Lancashire and Yorkshire Railway Company* (6 Hurl. & N. 211; s. c. 30 Law J. Rep. (n.s.) Exch. 11).]

In *Gibbs v. the Trustees of the Liverpool Dock* (3 Hurl. & N. 164; s. c. 27 Law J. Rep. (n.s.) Exch. 321) everything was found for the plaintiff, and negligence was proved in the defendants' manner of keeping their docks. In *Collen v. Wright* (8 El. & B. 647; s. c. 27 Law J. Rep. (n.s.) Q.B. 215) the defendant represented he had authority when he had not. The principle there was, that notice was given of the Chancery suit, the costs of which were held to be recoverable as damages; and in *Randall v. Roper* (1 El. B. & El. 84; s. c. 27 Law J. Rep. (n.s.) Q.B. 266) the damage arose from a breach of warranty as to the quality of the barley sold, and was clearly within the contemplation of the parties.

Cur. adv. vult.

On the 9th of February—

The Judges, differing in opinion, delivered their judgments as follows:

MARTIN, B., after stating the pleadings and the facts as they are given above proceeded as follows—I think that the direction of the learned Judge that the verdict should be entered for the plaintiff was right in point of law.

The question of damages is of constant occurrence; it occurs in almost every action of contract, except contracts for the payment of a certain fixed sum of money, and necessarily in every action for a wrong. Ordinary cases on contracts are actions for the non-delivery or non-acceptance of goods agreed to be sold, on agreements for the sale of land, for breaches of promise to marry, for non-acceptance or non-delivery of stock or shares; and an infinite variety of others might be named. So also, in actions for wrongs, it occurs every day; for instance, in actions for injuries sustained by accidents on railways and by collision, which now constitute a very considerable number of the causes tried at Nisi Prius; in actions for libel and slander, for assault and false imprisonment, and in numberless other cases. In some instances the measure of damages is fixed and ascertained by long-established usage; for instance, for the non-delivery of goods which are the subject of common sale in the market, I apprehend that a Judge is bound to tell the jury that the measure of damages is the difference between the contract price and the market price; and that, if he does not, his summing up would be liable to objection. And there are other cases in which the like long usage has fixed the measure of damages. So also in some cases the matter of damages has been the subject of decision in the superior Courts; and I apprehend that when this has been so, the decision is a binding authority upon the same and other Courts in like manner and to the same extent as other decisions. For instance, the case of *Hadley v. Bazendale* (9 Exch. Rep. 341; s. c. 23 Law J. Rep. (N.S.) Exch. 179) is a decision of this kind. The plaintiffs, who were millers, had delivered to the defendants, common carriers of goods at Gloucester, a broken iron shaft, to be carried by them to Greenwich and delivered to an engineer there, in order to enable him to use it as a model for making a new shaft. The defendants were told that the mill was stopped in consequence of the shaft being broken, and they promised that, if the shaft was sent before a certain hour, it would be delivered at Greenwich on the following morning. The delivery of the shaft was delayed by some neglect, and the plaintiffs did not receive the new shaft till some days after the time they otherwise would have done, and they claimed damages for the loss of profit which they would have made had the new shaft been delivered earlier. Crompton, J. left the case generally to the jury, who found a verdict for the plaintiffs. A rule was granted by the Court of Exchequer for a new trial for misdirection, because they were of opinion that the learned Judge ought to have told the jury to exclude the loss of profit in estimating the damages. This case is, therefore, an authority that in a similar case such loss of profit cannot be made an element of damages, and must be excluded; but it is an authority no further, and anything said by the Court in delivering judgment, is to be judged by its being consonant to law and reason.

The decision in *Hadley v. Bazendale* (9 Exch. Rep. 341; s. c. 23 Law J. Rep. (N.S.) Exch. 179) is, therefore, no authority whatever in the present case, for no loss of profits is claimed; nor is it an authority that loss of profits is not a legitimate element of damages in many other cases, for instance, in a railway accident, whereby a tradesman or workman is prevented from attending to his business by the injuries he has sustained, the loss of profit in such cases is a constant element of damage; and in a case tried the other day at Liverpool, where so large a sum as 7,000*l.* was given in a case under Lord Campbell's Act, the sole element of damage was the loss of profit of the deceased in his profession of surgeon, and no objection was made on this ground; and I have no doubt whatever that, if the Judge had told the jury to exclude it, there would have been misdirection. In regard to the present case, there is no established rule and no decision, and the general rule is to be applied. This rule is, that the damage to be compensated for ought to be proximate to, and not remote from, the breach of contract or the wrong, and ought fairly and reasonably and naturally to arise from them. I do not adopt the qualifications mentioned by Alderson, B., in the judgment in *Hadley v. Bazendale* (9 Exch. Rep. 341; s. c. 23 Law J. Rep. (N.S.) Exch. 179) as applicable to every case.

They may have been perfectly right there, but they are not of universal application. "Naturally," he says, means "according to the usual course of things." Contracts, however, are infinite in variety, and suppose, as in this case, no such claim for damage had ever been known to have been made, then no usual course of things exists; but still the damages to be recovered by the plaintiff are not, in my opinion, therefore to be nominal. He then proceeds to say "or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." Now this may properly enough be taken into consideration in the case of carriers and their customers; but in the bulk of broken contracts it has no application whatever. Parties entering into contracts contemplate that they will be performed, and not broken; and in the infinite majority of instances the damages which may arise from the breach never enter into their contemplation at all. As to *Hadley v. Baxendale* (9 Exch. Rep. 341; s. c. 23 Law J. Rep. (N.S.) Exch. 179), I was a party to it, and have no desire to depreciate it; but in *Boyd v. Fitt* (14 Ir. Com. Law Rep. 43) the Court of Exchequer in Ireland dissented from it, and approved of the views of Crompton, J. in *Smeed v. Foord*, and of Wilde, B. in the case of *Gee v. the Lancashire and Yorkshire Railway Company* (6 Hurl. & N. 211; s. c. 30 Law J. Rep. (N.S.) Exch. 11) as being sounder expositions of the law as to remoteness of damages. The general rule is therefore to be applied to the present case, and ought, as all other general rules, to be fairly, candidly and impartially applied. It has been said that the damage sustained here has been very great. Now I am clearly of opinion that this ought to be no element whatever in the application of the rule, and whether the damages be 10*l.* or 10,000*l.* is immaterial.

The circumstances are these: In pursuance of the defendants' contract to admit the ship into the dock at a certain time upon a certain day, the ship was brought to the entrance of the dock; the defendants could not admit her in consequence of a defect in a chain of the dock-gate, and their contract is admitted to have been broken. No blame attaches to them; it was their misfortune that the chain had been broken. The ship was then left in the river, which is one emptying itself into the Bristol Channel, where the tide ebbs and flows to a very great height. The captain had to decide what was to be done under the circumstances in which he was placed. Four courses have been suggested as open to him: one, that he should have remained and anchored where he was; secondly, that he should have gone up the river to the place from whence he came; thirdly, that he should have gone down to West Point, where it was said that the ship, upon the ebb, would have settled upon soft mud; and, fourthly, that he should have gone into deep water, where the ship would always have been afloat. Now, I think that the defendants had a right to a *bona fide* and reasonably sound judgment being exercised upon this matter. The captain decided upon remaining where he was. The tide was ebbing, and the weather threatening. If either of the other courses had been adopted, it might have been that the ship would have sustained no damage, but it might have been that the ship would have been totally lost. But I think this was a question for the jury, and that they have decided it; they have found that the captain did the best he could under the circumstances, and was not guilty of any negligence. The consequence was, that when the tide ebbed the ship took the ground and sustained damage; and the question argued before us is, that this damage is too remote and so unconnected with the cause of action that it must, as a matter of law, be borne by the plaintiff, and that the defendants cannot be responsible for it. I do not concur in this view: there has been damage; it must be borne by some one; neither the plaintiff nor his captain is in the slightest default. If the defendants had performed their contract, no damage would have occurred; in consequence of their default the captain was compelled to exercise his judgment and discretion, and the jury have found that he did the best he could,

and was guilty of no negligence: by which I understand that in deciding to remain where he was he exercised such judgment and discretion as became a reasonable and prudent man. His doing so was, no doubt, the immediate cause of the damage; but in my opinion his remaining there was, in contemplation of law, the same as if the ship had been compelled to remain there by a *vis major*. The rule is, that the damage must be proximate (not immediate), and fairly and reasonably connected with the breach of contract or wrong. As to what is so, different minds will differ, but many instances could be mentioned in which damages much more remote than the present were held to be the subject of compensation,—as in *Towne v. Salisbury* (2 You. & J. 391 and *Powell v. Wilson* (15 Ir. Com. Law Rep. 332). There is a case of constant occurrence at Guildhall: a barge is injured by collision in the Thames; she is taken to the nearest convenient fitting place upon the shore; with the ebbing of the tide she comes down upon a pile and sustains further damage. My own belief is, that compensation for such damage has been recovered over and over again without objection, and upon referring to some gentlemen at the bar, whose experience upon this subject is the greatest in the profession, I have been informed that it has uniformly been so. Such damage is precisely analogous to the present.

Some possible cases were mentioned in the argument, and it was asked whether the defendants would there have been responsible. One was, if the ship had been run down by another ship whilst at anchor. I think the liability in such a case would depend upon the circumstances, and a material one would be whether the running down ship was in the wrong. Another case put was, if the ship had been upset when she was anchored by a hurricane. I think that this would raise a question for the jury, whether in all human probability the same misfortune would not have happened to the ship wherever in the river she happened to have been. In my opinion, the discussion of instances like these is of little bearing or weight, when the facts of the case to be adjudicated upon are clear and well defined. In questions of damages, each case must be determined upon its own circumstances.

But I think the point is decided by *Jones v. Boyce* (2 Starkie's Law of Evidence, 3rd edit. 296, and 1 Starkie's R. 493). The plaintiff there was a passenger by a stage-coach, and a rein broke; the coachman drove the coach to the side of the road and one of the wheels was stopped by a post; the plaintiff jumped off and his leg was broken, and he brought an action against the coach-proprietor for damages. Lord Ellenborough said there were two questions for the jury. First, as to the defendant's default in regard to the rein, which is immaterial to the present case; the second was, whether the defendant's default was conducive to the injury the plaintiff had sustained: for if it was not so far conducive as to create such reasonable apprehension in the mind of the plaintiff as rendered it necessary for him to jump down from the coach in order to avoid immediate danger, the action was not maintainable. Amongst the observations on the peculiar circumstances of the case, he said that it was for the consideration of the jury whether the plaintiff's act was such as a reasonable and prudent mind would have adopted; and he added, "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the circumstances."

I think the present case is analogous. The defendants did not perform their contract to admit the ship into their dock; they thereby imposed on the captain four perilous alternatives; he adopted one. The jury found that he did the best he could, and was guilty of no negligence, and damage ensued to the ship. In my opinion, the defendants' default directly conduced to this damage; and they are responsible for it upon the principle enunciated by Lord Ellenborough in *Jones v. Boyce* (2 Starkie's Law of Evidence, 3rd edit. 296, and 1 Starkie's R. 493), which in my opinion is equally good law and good sense. For these reasons, I think the damage is not too remote, and that the learned Judge submitted the right questions to the jury; and I concur

with him that the verdict is unobjectionable; the rule should therefore be discharged.

POLLOCK, C.B.—I have to state the opinion of my learned Brothers Channell and Pigott, and my own. The questions for our decision seem to be—first, ought the verdict to stand (a verdict not found by the jury, but entered for the plaintiff by the learned Judge on the jury answering one question, and being unable to agree upon another question, which we think the more important and decisive of the two); or, secondly, ought we to enter the verdict for the defendants; or, thirdly, ought we to direct a new trial?

In deciding these questions, it is necessary to ascertain the facts of the case as found by the jury, for with evidence so contradictory and repugnant we cannot find any verdict ourselves. It is not our province. If the facts can be ascertained, then what is the law applicable to them? We apprehend, when the facts are known, it is the province of the Court to say for what matters damages are to be given. But the amount of damages is a question for the jury quite as much as the credit due to the witnesses. When the result of the evidence is uncertain, it is for the jury to find the facts, and therefore they will often have to find whether facts fall within the rule of law to be laid down on the subject. The case of *Hadley v. Baxendale* (9 Exch. Rep. 341; s. c. 23 Law J. Rep. (N.S.) Exch. 179) was cited at the trial, and much commented on during the argument. That case was very much considered. The argument took place several weeks before the judgment was given, and I know that great pains were bestowed upon it. Lord Wensleydale, the late Baron Alderson and my Brother Martin were parties to it, and it is due to Lord Wensleydale and the late Baron Alderson to say that a more extensive and accurate knowledge of decisions in our law books, and a more acute power of analyzing and discussing them, and, as far as my Brother Martin is concerned, a larger acquaintance with the exigencies of commerce and the business of life, never combined to assist at the formation of any decision. And, certainly, it does not lessen the authority of that case that Lord Campbell, in *Smeed v. Foord* (1 El. & El. 602; s. c. 28 Law J. Rep. (N.S.) Q.B. 178), said, that it merely affirmed what was to be found in *Pothier*,—in 2 *Kent's Com.* 665,—in the *French Code*, and in all the other authorities; and it may be added, that Justice Crompton (against whose summing up it was directed), in that same case, said he agreed with it as far as it went,—which we consider to be agreeing with it altogether. That decision was not presented as any new discovery in jurisprudence; but we think it put in a clearer and more distinct light a principle which had been previously recognized in prior cases, and the want of which, in the English law, had been pointed out. The authorities are all collected in a note to *Vicars v. Wilcocks* (2 Smith's Lead. Cas. 5th ed. 461). It is quite true, as remarked by Wilde, B., in the case referred to by my Brother Martin, that that case is not applicable to, and does not decide every case. No rule, no formula could do that. Cases of damage differ as much as the leaves of a tree differ from each other, or rather, as the leaves of different trees. No two are exactly alike, and one description cannot be applicable to all. No precise positive rule can embrace all cases; and, notwithstanding any rule of law that may be laid down, it must be admitted, after all, that the question of the amount of damages is one for the jury and the jury only; and, provided the law on the subject be properly laid down by the presiding Judge, and then the amount of damages be left at large to the jury, we apprehend a Court would not interfere with their verdict because the jury had, apparently, come to some compromise among themselves, and had not strictly observed the supposed rule of law. We think that the decision of twelve jurymen, instructed from the Bench in the rules of law, but exercising their own judgment on a subject connected with the business of life with which they are familiar, would, practically, lead to a result often more just and equitable than any mere rule of law would arrive at. And, that there may be no mistake as to our meaning, we may add,

that should this case go to a second trial, some of the jury might think the plaintiff entitled to recover the whole damage; others might think it the height of imprudence on the part of the master to attempt to remove a vessel from a dry dock to a wet dock about the time when the wind was blowing a hurricane, (which from his evidence seems to have been the case),—from which charge of imprudence the verdict of the jury has not relieved him. The result might be a compromise, which we are confident the Court would not, and which we think they ought not to disturb. We think we are not able to determine from the materials before us, whether or no the loss was occasioned by circumstances which, according to the case of *Hadley v. Bazendale* (9 Exch. Rep. 341; s. c. 23 Law J. Rep. (N.S.) Exch. 179) and the other authorities, would make the dock company liable for the damage the ship sustained.

If the state of the weather was the efficient cause of the loss, we think the defendants are not liable. Now, as to the state of the wind: the evidence of the mate is, "Not much wind; blowing pretty stiff; a fresh breeze." The evidence of the captain was, "It was only a few hours before a perfect hurricane." James Dunster, the master rigger, says, "It was blowing so hard, it would not have been safe to take her into deep water." If the weather was such that on being excluded from the dock she had no alternative but to perish on account of the gale or hurricane,—which seems to me to have been the opinion of the master,—then it may be doubted whether she ought to have been taken to the dock-gates at all in such a state of the weather. And the opinion of the jury, by a verdict, should have been obtained on these and other circumstances; and the verdict ought to have been found by them on a larger issue than whether the master and the pilot did their best after they found the vessel could not be received into the dock,—which I take to be the only finding of the jury. It is clear that the pilot thought the master was obstinate, and determined to do nothing to save the ship. We cannot find the defendants liable for this damage, because the jury were disposed to relieve the captain and the pilot from the odium of a charge of negligence. The verdict of the jury ought to have gone more into the merits, in order to fix the defendants with these damages. What the jury did not find, and could not agree upon, was quite as important as what they did find; and the result of their verdict seems to be, "We cannot agree as to the liability of the defendants; but we desire to throw no blame on the captain or the pilot."

We are therefore of the opinion that the jury have not found enough, in point of fact, to enable us to decide that the verdict entered for the plaintiff is what would have been, or (referring to the evidence actually given) what ought to have been their verdict, if the entire case had been left to them to find a verdict for the plaintiff or for the defendants.

Looking at the evidence and the finding of the jury, we cannot come to any conclusion that would make the defendants responsible for the damage done to the vessel. If there was any place of safety to which the vessel might have been taken, and could have been taken (which, we think, is included in the learned Judge's question), we think the plaintiff is not entitled to recover. The jury could not agree on an answer to this question. If they had found this question in the affirmative, we think the plaintiff was clearly not entitled to recover; and we presume the Judge would have directed a verdict for the defendants. But after many hours they could not agree, and it is plain that some of the jury were of opinion in the affirmative,—others might have been in the negative. It is true, they found, that neither the captain nor the pilot were guilty of negligence, but we think it very uncertain what they meant by that finding. They certainly did not mean, by that finding, inferentially to decide the other question, or they would have found it, and, not ultimately have disagreed about it. If there was a safe place to which the vessel might and ought to have been taken, a verdict for the plaintiff would be a great act of injustice; and we are invited to find this for the jury by a process of

reasoning, when the jury would not, and apparently could not, and certainly did not, find it for themselves.

As to entering a verdict for the defendants, there is a similar difficulty (though, perhaps, not so great, because, if the plaintiff does not establish his case, the defendants are entitled to a verdict). But we think we cannot be certain what would have been the verdict of the jury, if they had gone into, and had decided upon the whole case for themselves. We think, therefore, there ought to be a new trial.

CHANNELL, B.—I entirely agree in the opinion his Lordship has expressed in the judgment he has just read. If no new light should be thrown upon the case by the finding of the jury before whom the case will be tried again, then it is possible that the legal result may be that at which my Brother Martin has arrived. But the question now is, whether the present verdict for the plaintiff is to stand; and I wish merely to say, that I think the case is not at present ripe for decision.

PICOTT, B.—That is my view, and that is why I concur in the judgment of the Lord Chief Baron. I do not think the case is concluded by the finding of the jury upon the one question that was submitted to them. It seems to me, that they could not agree upon one of the questions, and they did agree upon the other. That is inconsistent in my view of the matter, and, in that state of things, I do not think the plaintiff is entitled to recover the large damages which he seeks.

Rule absolute for a new trial.

[IN THE COURT OF EXCHEQUER.]

Jan. 16, 18, 19, 20, 1866.

DYER v. BEST.

35 L. J. Ex. 105; 4 H. & C. 189; L. R. 1 Ex. 152; 18 L. T. 758; 14 W. R. 886; 12 Jur. N.S. 142.

See *Robinson v. Curry*, [1881] E. R. A.; 50 L. J. Q.B. 561; L. R. 7 Q.B. D. 465; 45 L. T. 368; 30 W. R. 39 (C. A.).

Action for Penalties—Statutes of Limitation—31 Eliz. c. 5.

LIMITATIONS (STATUTES OF). PENALTY.—*The period of limitation fixed by 31 Eliz. c. 5, within which an action must be brought for a penalty which may be sued for by the Crown or an informer, applies to cases where the penalty can be sued for by the informer only; and such actions must therefore be brought within one year after the commission of the offence.*

Culliford v. Blandford (Carthew, 232; Comberbach, 195; Shower, 353; Holt, 522; 4 Mod. Rep. 129), if an authority to the contrary, overruled.

Action for penalties. The declaration stated, that the defendant was one of the Commissioners appointed under the Town of Burton-upon-Trent Act, 1853, and became disqualified to act in his said office by reason of his having, while such Commissioner, participated in a contract made between the Commissioners of the one part, and the defendant and another of the other part, for work to be done under the authority of the act. It then averred that, after so becoming disqualified, the defendant acted as Commissioner on six specified occasions in the year 1863, and four specified occasions in the year 1864, contrary to the form of the said statute, whereby he became liable to pay the

plaintiff, who sued under the said statute, the sum of 50*l.* for each time of his so acting and offending.

The defendant pleaded, first, not guilty, by statute 21 Jac. 1. c. 4. s. 4; secondly, that the cause of action did not accrue within one year before action.

The Town of Burton-upon-Trent Act, 1853, incorporates the Commissioners Clauses Consolidation Act, 1847, (10 & 11 Vict. c. 16,) section 9. of which enacts, "That any person who after his appointment or election as a Commissioner is concerned or participates in any manner in any contract, or in the profit thereof, or of any work to be done under the authority of such act, shall thenceforth cease to be a Commissioner." Section 15. of the same act imposes a penalty of 50*l.* on the offence of acting as a Commissioner after having become disqualified, and enacts, that such penalty may be recovered by any person, with full costs of suit, in any of the superior Courts.

At the trial, before Channell, B., at the Summer Assizes at Stafford, it was proved that the defendant was elected Town Commissioner in 1856, being at the time in partnership with one Bowler, as a builder. Small jobs of work were done by the defendant and Bowler at the gas-works, which were under the control of the Commissioners during each of the years from 1856 to 1863, payment being made by the Commissioners in the early part of each of the years following the work done, after the accounts had been sent in to be examined by the plaintiff, who was manager of the gas-works. The jury found by their verdict that the defendant, after becoming disqualified in the manner above mentioned, acted four times as Commissioner, and that one occasion of his so acting was within one year of the commencement of this action; but they did not fix the dates either of the acts of disqualification or of the acts done by the defendant as Commissioner after becoming disqualified.

On this finding of the jury, the plaintiff claimed to have a verdict entered for him for 200*l.*, being the amount of four penalties. The defendant objected that by the 31 Eliz. c. 5. s. 5. an action for penalties must be brought by any person other than the Queen within one year after the offence committed, and therefore that only one penalty could be recovered in this case. A verdict was entered for the plaintiff for 200*l.*, the defendant having leave to move to reduce it to 50*l.*

A rule *nisi* was obtained for this purpose, and also for a new trial on the ground of misdirection. No judgment was given respecting the latter part of the rule; and the arguments upon it are therefore not reported.

Huddleston and H. Matthews shewed cause.—The 31 Eliz. c. 5. s. 5.¹ applies only to actions of two kinds: first, where the penalty can be sued for by the Queen alone; secondly, where it can be sued for by the Queen or a private individual. The present action is of a third kind, namely, for a penalty which can be sued for by a private individual only, without any limitation in favour of the Queen, and it is a *casus omissus* in the statute. There is an old case of *Culliford v. Blandford* (Carthew, 232; Comberbach, 195;

(1) 31 Eliz. c. 5. s. 5. is as follows: And be it further enacted, by the authority aforesaid, that all actions, suits, bills, indictments or informations which, after twenty days next after the end of this session of parliament, shall be had, brought, sued or exhibited for any forfeiture upon any statute penal made, or to be made, whereby the forfeiture is or shall be limited to the Queen, her heirs or successors only, shall be had, brought, sued or exhibited within two years next after the offence committed or to be committed against such act penal, and not after two years. 2. And that all actions, suits, bills or informations which after the said twenty days shall be had, brought, sued or commenced for any forfeiture upon any penal statute made or to be made, except the statute of tillage, the benefit whereof is or shall be by the said statute limited to the Queen, her heirs or successors, and to any other which shall prosecute in that behalf, shall be had, brought, sued or commenced by any person that may lawfully pursue for the same as aforesaid, within one year next after the offence committed or to be commenced against the said statute. 3. And in default of such pursuit, that then the same shall be had, sued and exhibited or brought for the Queen's majesty, her heirs or successors, at any time within two years after that time ended. 4. And if any action, suit, bill, indictment or information for any offence against any penal statute made or to be made, except the statute of tillage, shall be brought after the time in that behalf before limited, that then the same shall be void and of none effect, any act or statute made to the contrary notwithstanding."

Shower, 253; Holt, 522; 4 Mod. Rep. 129) which expressly decides this. It is variously reported by the different reporters, and in *Carthew* it is said to have been a *qui tam* action, but that must have been a mistake. In that report it is expressly said by Mr. Justice Eyre to be a *casus omissus* in the statute. The case went into a court of error, as appears from a note to the report in *Shower* and from a note to the report of the case of *Lookup v. Frederick* (4 Burr. 2018), and it was there affirmed by a majority of the Judges against the opinion of Treby, C.J. and Powell, J.

[MARTIN, B.—*Culliford v. Blandford* (*Carthew*, 232; *Comberbach*, 195; *Shower*, 253; *Holt*, 522; 4 Mod. Rep. 129) does not seem to be cited in *Williams Saunders* (See 2 Wms. Saund. 63, n. 6), and its omission from such a book throws, in my opinion, great doubt upon its authority.]

It was followed in *Chance v. Adams* (1 Ld. Raym. 77), and is recognized as law in *Comyns's Digest*, tit. 'Information,' (A. 3). There is a contrary decision in *Lookup v. Frederick* (4 Burr. 2018), but it is not clear that the judgment was really on the point.

Gray and Staveley Hill supported the rule.—The periods of limitation of penal actions were first fixed by 7 Hen. 8. c. 3, and by that statute actions for penalties to be recovered by the informer alone were to be brought within one year, while four years were allowed where they were to be recovered by the king alone, and two years where by the king or the informer. The 31 Eliz. c. 5. was passed for the purpose of restricting still further those periods, and it repealed the former statute. It is absurd to say that while it restricted the sovereign to a period of two years it enlarged the time which the common informer previously had. The case cited of *Culliford v. Blandford* (*Carthew*, 232; *Comberbach*, 195; *Shower*, 253; *Holt*, 522; 4 Mod. Rep. 129) seems, from some of the reports, to have been decided on the point that as a *latitat* had been sued out within the year the requirements of the statute had been satisfied. It is mentioned in *Buller's Nisi Prius*, 195, where, it would seem that judgment was eventually given for the defendant. In 1 *Tidd's Practice*, 13, it is said that the more reasonable opinion is that as the informer is restricted to one year when the King is joined with him, much more should he be bound when he sues by himself.

[MARTIN, B.—Mr. Tidd was the Lord Coke of practice.]

The case was argued on the 16th and 17th of January, and on the 19th the following judgments were delivered—

POLLOCK, C.B.—With respect to the question about the Statute of Limitations, I am of opinion, and no person acquainted with the history of our law can entertain any doubt whatever, that a penal action brought by a common informer must be brought within a year after the commission of the offence. It is supposed that the question turns entirely upon the 31 Eliz. c. 5, and perhaps, strictly speaking, it does so. But in order to come to a conclusion in favour of the plaintiff, we must suppose that the legislature, which in the 7 Hen. 8. c. 3. had strictly limited informers to one year, and in the 18 Eliz. c. 5. had taken especial care and pains to direct that every writ of that nature should have indorsed on it the day when it was issued (and both the one statute and the other expressly say it is to prevent the vexation arising from penal actions by common informers), afterwards, in the 31 Eliz. c. 5, when the statute of 7 Hen. 8. c. 3. was repealed, but that of 18 Eliz. c. 5. was left unrepealed, committed this extraordinary blunder, that while limiting the Queen to two years instead of four, and the informer *qui tam* to one year, they set free the informer *pro se ipso* altogether and allowed him to bring his action when he liked. That is the conclusion to which we are invited to come by the argument in this case. I am clearly of opinion that the latter part of the section may be read so as to include every species of penal action. To limit the Queen and the informer to one year and to leave the informer alone without any limitation, is to come to a conclusion so very absurd and to impute such

carelessness and folly to the legislature, that we ought not to do so, particularly after the thorough understanding which has existed in the profession, to my certain knowledge, for more than fifty years, as to the state of the law. Mr. Tidd's experience carries it back some thirty or forty years at least prior to that. And when we come to the authorities cited in favour of a contrary view, they appear to me to be so questionable, and are reported in such different ways that, the "authorities," meaning by that the actual decisions of the Courts, seem to be in favour of the construction which this Court is disposed to put upon the statute, and in accordance with the opinions entertained by the members of the profession whose recorded opinions we have. We have, in addition, the opinion of Chief Baron Comyns in his work; we have the opinion of Mr. Justice Buller in his work on *Nisi Prius*; we have the opinion of the learned editor of *Williams Saunders*; and greater authorities, so far as names are concerned, cannot be cited. With the reverence which is due to the legislature, we must not impute to them the folly which some of the older reports would seem to indicate, if indeed they correctly state what passed. But they seem to me to omit all the arguments, and all mention of the statute of 7 Hen. 8. c. 3, which I think an extremely important statute, and which seems to my mind to reconcile the whole course of legislation. I must therefore express my strong opinion that the statute passed in the 31 Eliz. applies to the present case. I am of opinion, also, that if the action is well founded and the verdict is to stand, the plaintiff can recover but one penalty only.

But I am further of opinion that there ought to be a new trial. In an action upon a penal statute, unless the legislature expressly directs that certain proof shall be sufficient, it is not sufficient to give evidence which is consistent with the guilt of the person charged, but you must go further, and prove that the defendant has incurred the penalty with reasonable certainty; and I think that that has not been done in this case. It is not desirable, where a new trial is to be granted, that either party should know more than that the Court considers the case not to have been sufficiently made out. I do not think it is the duty of the Court to point out how it can be made out; and certainly if there be any case in which I should be sorry to point out to the plaintiff in what way he might succeed, it would be the present. Upon the point upon which alone it is necessary for the Court to give an opinion, I am clearly of opinion that the penalty can only be recovered within a year after the commission of the offence.

MARTIN, B.—I am quite of the same opinion. With respect to the first point, on which, in my judgment, the whole thing depends, that is, whether the limitation of one year is imposed on this action. I own that I entertain no doubt. It is a notorious matter of history that these actions existed to an enormous extent in the reign of Henry the Seventh; and it is one of the reproaches cast upon his memory that he encouraged informers to bring actions, which, no doubt, caused him a great deal of unpopularity, continuing possibly to the present time. It appears that there were at that time three species of these actions; there were proceedings directly by the Crown, there were proceedings directly by the Crown and another person, and there were proceedings directly by an individual himself—the common informer. Mr. Matthews stated that he had made research, but was unable to find that prior to this statute of Elizabeth there was any statute which gave the entire penalty to the informer. It is quite clear that he is in error, for the statute of Henry the Eighth shews clearly that at that time such actions did exist, and it specially enacts that they must be brought within the year. The matter went on, and in the 31st year of the reign of Queen Elizabeth, which was, I expect, when she was so exceedingly unpopular in consequence of monopolies, a step was taken for the purpose of still further discouraging these actions.

By a not unreasonable construction of that act, it may be taken to comprise all that the act of Henry the Eighth comprised. Being made in aid of that act, it would be a monstrous construction to hold, that a limitation having

been put upon two sets of these actions, no limitation at all should be put on the third. I need not say more than that it seems to me that if we had to decide this case upon the statutes of Henry the Eighth and Elizabeth alone, the construction I have mentioned would be the proper and correct one. But the case is decided by the judgment of the Court of Common Pleas on the special case in *Lookup v. Frederick* (4 Burr. 2018). The very point is stated by Mr. Justice Buller to have been decided there; and Mr. Tidd, in his *Practice*, relies upon it as an authority to that effect, and he says that there was an opinion held to the contrary; but that it was an unreasonable one. Therefore I think that no doubt can exist that the statute of Elizabeth prescribes one year for the bringing of those actions. [The rest of the judgment was upon the evidence given at the trial, and to the effect that a new trial must be had.]

PIGOTT, B.—I am of the same opinion. I quite agree with what has fallen from the Lord Chief Baron and my Brother Martin with reference to the statute of Elizabeth, and if anything were wanting to shew the true construction it would be found in 21 Jac. 1. c. 4. s. 3, which, without distinguishing between an action brought by the common informer and a *qui tam* action, requires the plaintiff to make an affidavit that the penal act was done within the twelve months. [The remainder of the judgment was upon the evidence, and was in favour of a new trial.]

CHANNELL, B.—I agree with the rest of the Court, that if the plaintiff is entitled to a verdict it can, by force of the statute, be for one penalty only. Upon that point I feel it to be quite unnecessary to add anything to the observations made by the other members of the Court. [The remainder of the judgment was to the effect that the judgment should stand for one penalty.]

On the following day (Jan. 20),—

POLLOCK, C.B. said—I wish to add to the judgment which we delivered yesterday that there is a case in the Exchequer of Pleas in Ireland, in which the Court expressed a strong opinion that the statute applied to all penal actions, although the point was not expressly decided, and some time afterwards, in another case, where the action was brought by the common informer, the Court acted on that opinion, and pronounced precisely the judgment that this Court did yesterday in this case. The case in Ireland was *Johnson v. Barratt* (2 Jones, Ir. Ex. 197), and all the authorities cited before us were cited there. I mention this because the argument on the part of the plaintiff was conducted with considerable ability and research, and with a very large proportion of zeal and apparent confidence, and we originally met the case by stating what had been the opinion of the profession for, as I could certify, half a century, and, as I believe, for thirty or forty years before; but we had no case in our Courts such as that which I now mention in the Courts of Ireland. The reason probably is, that the point has been considered so thoroughly settled that it was useless to raise the question.

Rule absolute for a new trial.

[IN THE COURT OF EXCHEQUER.]

Jan. 22, 31, 1866.

BAXENDALE AND OTHERS v. THE SOUTH-WESTERN RAILWAY COMPANY.

35 L. J. Ex. 108; L. R. 1 Ex. 137; 4 H. & C. 130; 14 L. T. 26; 14 W. R. 458; 12 Jur. N.S. 274.

Referred to, *Attorney General v. Mersey Railway Co.*, [1907] 1 Ch. 81; 96 L. T. 100 (C. A.): reversed, [1907] E. R. A.; 76 L. J. Ch. 568; [1907] A.C. 415; 97 L. T. 524 (H.L.). Explained, *East and West India Dock Co. v. Shaw*, [1888] E. R. A.; 57 L. J. Ch. 1038; 39 Ch. D. 524; 60 L. T. 142 (Ch. D.).

Railway—Equality of Charge—Separate Parcels in one Consignment—Carriage beyond the Limits of the Railway.

CARRIERS.—*The defendants, a railway company, incorporated by a special act of parliament, containing an equality clause, in the ordinary form, requiring them to take the same rates and tolls from all persons under the same or similar circumstances, were in the habit of charging a tonnage-rate upon packages weighing more than 1 cwt., and a higher rate upon packages weighing less. When several parcels were delivered by the same person in one consignment, addressed to the same consignee, they were not weighed and charged for separately, but were weighed together, and a tonnage-rate charged for the whole consignment, if the gross weight exceeded 1 cwt. The plaintiffs were common carriers, trading under the name of "Pickford & Co.," and they were in the habit of collecting parcels in London and forwarding them to customers in the country. Each parcel was addressed to the person to whom it was ultimately to be delivered; but it was labelled with the name of "Pickford & Co." and that of the station to which it was to be sent; and all the parcels for the same station were delivered in one consignment consigned to the plaintiffs at that station. The defendants refused to charge the plaintiffs for the carriage of their parcels at a tonnage-rate upon the gross weight, and charged for each parcel separately according to its individual weight:—Held, that this created an inequality.*

The defendants were in the habit of carrying goods from London to the Isle of Wight, by their own railway from London to Southampton, and thence by tramway and steamer. The plaintiffs also were in the habit of carrying goods from London to the Isle of Wight, using the defendants' line from London to Southampton, and thence conveying them by carts and steamer. The plaintiffs claimed to have their goods carried by the defendants from London to Southampton at a sum equivalent to the defendants' through-charge from London to the Isle of Wight, less a fair charge for collection in London, and for carrying from Southampton station to the Isle of Wight:—Held, that they were not entitled to this; the delivery by the defendants beyond the limits of their line not being a delivery auxiliary or subsidiary to their business as carriers on their own line, but to their general business as common carriers, and therefore differing from a case of delivery in the immediate neighbourhood of a station.

The declaration contained counts for work done, money paid, money had and received, and on accounts stated. The defendants paid 9l. into court, and pleaded never indebted as to the residue.

At the trial, before Martin, B., at the Sittings in London after Trinity Term, 1864, a verdict was entered by consent for the plaintiffs for the damages claimed in the declaration, subject to the opinion of the Court upon a special case. The following were the material facts stated by the case.

The plaintiffs are common carriers, and carry on business under the style of "Pickford & Co.," and they are in the habit of employing various railway companies as common carriers, for the carriage of goods, including the defendants. The defendants are incorporated by the 4 & 5 Will. 4. c. lxxxviii., local and personal, which act has been amended by various subsequent acts. Their railway runs from their station at Nine Elms, London, to, amongst other places, Guildford and Southampton.

By section 149. of the first-mentioned act, the company are empowered to demand and receive for the tonnage of all articles conveyed along or upon the said railway rates or tolls not exceeding 3*d.* per mile for some, and 6*d.* per mile for other things specified in the section.

By section 155. it is enacted, "That it shall be lawful for the said company from time to time to make such orders for ascertaining and fixing the price or sum to be charged or taken by the said company in respect of small parcels (not exceeding 500*lb.* weight), specie and bullion, quicksilver, platina and cochineal, to be carried upon the said railway, and from time to time to repeal or vary the same, as to them shall seem proper. Provided always, that the provision hereinbefore contained as to goods, shall not extend to goods, articles, matters and things sent in large aggregate quantities, although made up of separate and distinct parcels, but only to single and undivided parcels."

By section 156. it is further enacted, "That it shall be lawful for the said company, and they are hereby authorized to carry and convey upon the said railway all such goods, articles, matters and things, and all such cattle and other animals as shall be offered to them for that purpose, and all such persons as shall apply to be carried and conveyed along the said railway or any part thereof, and to demand, receive and recover to and for the use and benefit of the said company, for such carriage and conveyance as aforesaid of all goods, articles, matters and things, cattle, animals and persons carried and conveyed upon the same, in addition to the usual rates and tolls hereinbefore authorized to be charged and received, such sum of money as the said company or the said directors may from time to time fix and require."

By section 158. it is further enacted, "That it shall be lawful for the said company from time to time, and so often as they shall think fit, to reduce all or any of the rates, tolls or sums by this act authorized to be taken, and afterwards, from time to time, again to raise the same or any of them, so that the same respectively shall not at any time exceed the amount by this act authorized. Provided always, that the said company shall not partially raise or lower the rates, tolls or sums payable under this act, but all such rates, tolls and sums shall be so fixed that the same shall be taken from all persons alike under the same or similar circumstances."

The defendants carry on the ordinary business of a railway company upon the said line of railway, and they also carry on the business of common carriers between the stations upon their line, and also between their several stations and places beyond the limits of their line.

The grounds of complaint alleged by the plaintiffs against the defendants, and in respect of which this action is brought, are three in number, namely :

First in respect of overcharges upon consignments of goods, by charging for their carriage rates according to the weight of packages contained in those consignments taken separately, instead of a tonnage-rate upon the whole of the consignments by the plaintiffs of the same class of goods.

Secondly, overcharges in not allowing to the plaintiffs a sufficient deduction or rebate for the collection, delivery and cartage of goods both in London and in the country, when those services were not performed by the defendants.

Thirdly, overcharges by charging upon goods carried for the plaintiffs by the defendants from Nine Elms to Southampton station, thence to be forwarded by the plaintiffs to the Isle of Wight, rates which are higher than those charged to other persons, under the same or similar circumstances.

The facts upon which the plaintiffs' first claim arises, are as follows. The defendants are in the habit of charging for goods carried by them upon their line according to two different rates, viz., a tonnage-rate upon goods over 1 cwt., and a small parcels' rate for articles under that weight. The small parcels' rate is considerably higher than the tonnage-rate.

When goods are delivered to the defendants by one person in a single consignment, at one and the same time, and are addressed to the same consignee, the defendants are in the habit of adding the weight of all such small packages under 1 cwt. together, and charging for them upon their aggregate weight a tonnage-rate, although such goods consist of a number of small packages, each singly weighing under 1 cwt.

The plaintiffs have been and are in the habit of sending by the defendants' railway from one station to another large consignments of goods, each consignment frequently consisting of a number of small parcels. In every such case the plaintiffs themselves delivered the goods to the defendants at the station whence they were to go, directed and consigned to the plaintiffs at the station to which they were to be carried, and where they were to be delivered to the plaintiffs, and at such last-mentioned station the plaintiffs themselves received them from the defendants. In such cases the plaintiffs delivered to the defendants with each consignment a declaration or ticking-off note, containing the name of the plaintiffs' firm as the consignors, and also as the consignees of the goods, the description but not the weight of the goods, and the name of the station to which they were to be carried.—[These declarations or ticking-off notes were all similar to one annexed to the case, containing a list of the names of the persons to whom the various small parcels were to be delivered, the whole consignment purporting to be "from P. & Co. on account of P. & Co., to Guildford station."]—Each package comprised in any consignment was labelled with a label, on which was printed in plain letters the name of "Pickford & Co.," and the station to which it was to be carried. Many of such packages had, in addition to such label, the names and addresses of the persons to whom the plaintiffs intended to deliver them, and had been desired by their customers so to deliver them, such addresses being conspicuously shewn on such packages. Where goods were delivered by the plaintiffs to the defendants to be carried and delivered by the defendants for the plaintiffs to persons other than the plaintiffs themselves, the names of such other persons were inserted as consignees in the consignment-note or declaration, and the goods were addressed to them only, and no such label as before mentioned of "Pickford & Co." was affixed on the goods.

Down to the 29th of February, 1864, whenever consignments of goods were delivered to the defendants by the plaintiffs, and labelled, directed, and consigned to the plaintiffs themselves in the manner before described, the defendants charged the plaintiffs the tonnage-rate on the aggregate weight of each consignment, whatever the weight of the several packages of which it was composed might be, and whether the names of the persons to whom the plaintiffs intended to deliver the packages after they had received them at the defendants' station appeared upon the packages or not, and if they did appear, whether the same name appeared upon all the packages in any one consignment, or a different name appeared upon each package.

From and after the 1st of March, 1864, the defendants altered the system and rate of charge, and the only terms on which they would carry for the plaintiffs were then adopted by them as hereinafter mentioned; that is to say, they charged the plaintiffs separately for each package contained in each consignment sent by the plaintiffs by the defendants' railway, labelled and directed, and consigned by the plaintiffs to themselves in the manner before mentioned, at the tonnage-rate, or small parcels' rate, according to the weight of each package singly, whenever the names of the parties to whom the plaintiffs intended to deliver them after being received at the defendants' station appeared upon the packages in addition to the plaintiffs' label, except

in those cases in which the same name appeared upon two or more packages in the same consignment, in which case the defendants lumped together the weight of the last-mentioned packages, and charged the tonnage-rate upon their aggregate weight. No difference was made by the defendants in thus charging the plaintiffs, and in charging any others of the public who sent goods under similar circumstances.

Between the 1st and 26th of March, 1864, the plaintiffs sent by the defendants' railway, labelled, directed and consigned to themselves at various stations in the manner already described, numerous consignments of goods, each consignment being in the aggregate of more than 1 cwt., though composed of a number of packages varying in size, some being under and some over 1 cwt., and upon these the defendants charged in the manner stated in the preceding paragraphs.

The plaintiffs before action paid the charges so made under protest, and they now seek to recover back the difference between the rate upon each package which they were actually charged, and the tonnage-rate upon each consignment which they allege they ought to have been charged, amounting in the whole to 50*l.* 8*s.* 1*d.*

As to the second head of the plaintiffs' claim it is unnecessary to state the facts. It was admitted by the defendants that according to the law as settled by recent decisions the plaintiffs were entitled to some rebate or deduction for collection and delivery at the stations from and to which they were sent; and the case found that the money paid into court was insufficient.

As to the third claim of the plaintiffs, the facts are as follows: The plaintiffs, in the course of their business of carriers, have been in the habit of carrying goods for their customers from London to Cowes and Newport, both in the Isle of Wight, and in doing so have made use of the defendants' railway for the carriage of goods from the Nine Elms station to the Southampton station. All carriage and cartage of the goods off the line has been done by the plaintiffs themselves, and such goods have been consigned by the plaintiffs to themselves at Southampton only, and not at Cowes or Newport. For the carriage of these goods between Nine Elms and Southampton stations the defendants have charged the plaintiffs uniform rates of 11*s.* 8*d.*, 16*s.* 3*d.* and 19*s.* 7*d.* per ton, according to the classes of the goods, being the same rates as the defendants have charged the rest of the public for similar goods between Nine Elms and Southampton.

The defendants, by arrangements with owners of steam and sailing vessels, have also themselves, in their capacity of carriers, been in the habit of carrying goods to and from London to Cowes and Newport. For the carriage of goods from London to Cowes and Newport they have charged their customers' uniform rates of 20*s.* and 26*s.* 8*d.* per ton, according to the classes of the goods, which charges included collection in London and cartage to Nine Elms, carriage on the railway from Nine Elms to Southampton station, carriage by tramway from that station to the wharf, and wharf dues there, and carriage by boats from Southampton to Cowes and Newport, but did not include delivery beyond the quays at Cowes and Newport.

The actual cost, both to the plaintiffs and the defendants, of collection and cartage of such goods to Nine Elms station, being the fair market price of such collection and cartage, is not less than 5*s.* per ton. The actual cost to the plaintiffs and the fair market price of the conveyance of such goods from the Southampton station to Cowes and Newport, including cartage to the wharf at Southampton, dues there and boat-carriage thence to Cowes and Newport, is not less than 8*s.* per ton, of which sum the cost of cartage to the wharf at Southampton is not less than 1*s.* 6*d.*, and the residue consists of the charges for wharf-dues and the cost of boatage. The actual cost to the defendants of the conveyance of such goods from the Southampton station to

(1) An exception was made of goods conveyed for customers under certain special contracts which were set out in a schedule to the case: but nothing turned on this.

Cowes and Newport, including carriage by the defendants' tramway from the Southampton station to the wharf at Southampton, dues there and boat-carriage thence to Cowes and Newport, does not average more than 5s. 4d. per ton, of which sum 4d. is the cost of the carriage by tramway from the station to the wharf, and the residue consists of a lump sum paid by the defendants by arrangement to the owners of steamboats and sailing ships or vessels conveying the goods for wharf-dues and boatage.

The plaintiffs allege that under the circumstances herein set forth, the actual charge made by the defendants to their Cowes and Newport customers for the carriage of their goods from Nine Elms to Southampton is only at the rate of 7s. per ton, and the plaintiffs therefore claim to be entitled to have their goods carried at a corresponding rate.

Between the 1st of January and the 26th of March, 1864, the plaintiffs sent large quantities of goods consigned to themselves at Southampton, intended for Newport and Cowes respectively (but the actual destination was not declared to the defendants), by the defendants' railway from Nine Elms to Southampton station, where the plaintiffs received them, and paid for them, under protest, at the above-mentioned rates.

The plaintiffs now seek to recover back the difference between the amount so paid and the amount which they ought to have been charged for the same goods, and which is, as they contend, 7s. per ton.

[The particulars of the alleged overcharges in this respect were set out in a schedule to the case, and they amounted in the whole to 9l.]

The Court was to be at liberty to draw inferences of fact, and the question for their opinion was, whether the plaintiffs were entitled to recover the before-mentioned sums, or any part thereof.

Bovill (C. Pollock with him), for the plaintiffs.—As to the first point, the facts shew a state of circumstances similar to those shewn in "packed parcel" cases. The only distinction is, that there is here one consignment instead of one packed parcel. With respect to packed parcels, it has been settled that they must be treated as single parcels, and not as collections of small parcels. The consignment here is to Pickford's at, for example, Guildford station, and it makes no difference that in addition to Pickford's label on any parcel there is the name and address of another person. As between the plaintiffs and the defendants the only direction is to Pickford's.

[CHANNELL, B.—Would the defendants' contract have been performed if they had delivered to the other persons named on the parcels instead of to the plaintiffs' agent at Guildford?]

Certainly not. The first case on packed parcels was that of *Pickford v. the Grand Junction Railway Company* (10 Mee. & W. 399; s. c. 10 Law J. Rep. (n.s.) Exch. 342), which was followed by *Crouch v. the Great Northern Railway Company* (11 Exch. Rep. 742; s. c. 25 Law J. Rep. (n.s.) Exch. 137), and there have been a succession of cases down to *Sutton v. the Great Western Railway Company* (3 H. & C. 800; s. c. 35 L. J. Ex. 18).—(He was then stopped on this point.) As to the third point, the principle contended for by the plaintiffs is the same as that admitted to have been established in the cases bearing upon the second point. It has been settled that they must not collect and deliver gratuitously, and similarly they must not forward parcels from Southampton at rates which, if not gratuitous, are unreasonably low. Camden Town is as distinct a place from Southwark as Cowes from Southampton, and it has been settled that the defendants may not compete unfairly with the plaintiffs by carting gratuitously from or to a place like Camden Town. Would it make any difference if the goods were sent across the Thames in a boat, instead of being carted over Waterloo Bridge?

[MARTIN, B.—The case of delivery in the town in which the terminus is, however large that town may be, is quite different from the case of delivery at another place beyond the limits of the railway. Suppose Pickfords, having goods to deliver at Ringwood, choose to take them from the railway at

Southampton and forward them by cart to Ringwood, would they be entitled to deduct from the company's charge for carrying all the way from London to Ringwood the amount which would be a fair charge for carrying from Southampton to Ringwood?]

That is the plaintiffs' contention, and it is supported by the decisions in *Baxendale v. the Great Western Railway Company (Bristol case)*²; and *Re Same v. Same* (5 Com. B. Rep. N.S. 336; s. c. 28 Law J. Rep. (N.S.) C.P. 81). The plaintiffs claim to deduct from the rate of 20s. charged by the defendants for carrying from London to Cowes, 5s. for the collection in London, and 8s., which is what it costs us to carry from Southampton to Cowes; but in respect of the carriage from Southampton to Cowes, the plaintiffs are entitled at the very least, taking the defendants' own rate of expense, to deduct 5s. 4d. This would leave, at most, 9s. 8d. as the proper charge to be made to the plaintiffs, whereas the plaintiffs are charged 11s. 8d.

C. W. Wood (*Mangles* with him), for the defendants.—As to the last point, there is no inequality in any rate of conveyance from station to station such as to be illegal. The defendants have a perfect right to charge their Isle of Wight customers less in proportion than they do their Southampton customers. The company may charge less in proportion for a long distance along the line than for a short distance, or for carrying goods off the line than for carrying from station to station. The case is virtually decided by *Jones v. the Eastern Counties Railway Company* (3 Com. B. Rep. N.S. 718), citing *Hosier v. the Caledonian Railway Company* (17 Sess. Cas. 2nd Series, 302 (Scotch)), and by *Garton v. the Bristol and Exeter Railway Company* (1 Best & S. 112, 254; s. c. 30 Law J. Rep. (N.S.) Q.B. 273, 291). But if any deduction is to be made it is at most only 4d., which is what it costs the defendants to carry from the station to the quay, and 5s. for carrying from Southampton quay to Newport. As to the first point, there is no similarity between the present case and that of packed parcels. The parcels are all separately addressed, and there is no inequality. The company are justified in their discretion in fixing reasonable charges for their carriages as separate parcels. He also cited *Baxendale v. the Eastern Counties Railway Company* (4 Com. B. Rep. N.S. 63; s. c. 27 Law J. Rep. (N.S.) C.P. 137).

Cur. adv. vult.

The judgment of the Court³ was delivered, on the 31st of January, by—

CHANNELL, B.—This was an action, brought, by the plaintiffs, who are common carriers, to recover the amount of certain overcharges alleged to have been made by the defendants, paid by the plaintiffs under protest. At the trial it was agreed that a verdict should be taken for the plaintiffs, subject to a special case. That special case was afterwards stated and argued before us. My Brother Martin went to chambers before the argument was entirely completed; and therefore the judgment which I am now about to deliver is to be considered more particularly as the judgment of the Lord Chief Baron, my Brother Pigott, and myself, but I believe that my Brother Martin concurs in our opinion.

The question that is stated for the opinion of the Court at the end of the case is very general, and it is, whether the plaintiffs are entitled to recover anything beyond the sum of 9l. paid into court; but the facts of the case shew that there are three specific claims on the part of the plaintiffs, and we have to see whether, in respect of any one of them, the plaintiffs are entitled to recover. The case turns on certain sections—149, 155, 156 and 158—of the defendants' act, 4 & 5 Will. 4. c. lxxxviii.; the 158th section

(2) 14 Com. B. Rep. N.S. 1; s. c. 32 Law J. Rep. (N.S.) C.P. 225; and in Ex. Ch. 16 Com. B. Rep. N.S. 137; s. c. 33 Law J. Rep. (N.S.) C.P. 197.

(3) Pollock, C.B., Channell, B. and Pigott, B. Martin, B. only heard a portion of the argument.

being what has been called, in some cases, the "equality" clause, and being similar in terms to sections which have been inserted in other acts of parliament incorporating railway companies, and in the Railways Clauses Consolidation Act, upon which there have been decisions.

Under the first head of claim, the plaintiffs claim to recover in respect of overcharges made by the defendants on consignments of goods, by charging for the separate packages, according to the weight of each, instead of for the whole consignment, at a tonnage rate upon the total weight. Without recapitulating the facts stated in the case, we content ourselves with saying that, having carefully considered them, we find that the case is brought within the range of the authorities cited, and known as the "packed parcel" cases; and we are clearly of opinion that, on the first head of claims, the plaintiffs are entitled to recover.

With reference to the second head, Mr. Wood very properly admitted that he could not support the company's claim; and we hold that the plaintiffs are entitled to recover.

As regards the third claim, it is in respect of the defendants having, as is alleged, charged the plaintiffs for goods carried for them by the defendants from Nine Elms to Southampton, thence to be forwarded by the plaintiffs to the Isle of Wight, higher rates than those charged to other persons, under the same or similar circumstances. It appears that the defendants collected parcels in London; took them by their line from London to their Southampton station; by a tramway to wharfs there, and by steamers to Cowes and Newport. It appears, further, that the defendants took goods for the plaintiffs from London to Southampton station, which goods the plaintiffs themselves delivered to their consignees at Southampton and in the Isle of Wight.

It is said that the costs incurred by the defendants in carrying goods from Southampton to the Isle of Wight by tramway and steamer was less than that necessarily incurred by the plaintiffs in carrying the goods for their different consignees from Southampton to the Isle of Wight; and the case calls upon us to institute an inquiry into the relative charges or costs of portions of the journey, and there is a statement made respecting the profit and other particulars in connexion with the entire charge, which, under one contract, was made by the defendants for receiving goods in London and delivering them at Newport, or other places in the Isle of Wight. We consider that the defendants were clearly entitled to do what they profess to do, and to carry on the business of common carriers from London, or any place in London to Newport in the Isle of Wight, and to use, as far as serviceable, their own line of railway; and that they are quite at liberty to act as common carriers beyond their Southampton terminus. Several cases have been pressed upon us with the view of shewing, that where a railway company collects goods in London from their ordinary customers, in the immediate neighbourhood, or at some little distance from their station, for which they make no charge, or at the other end, or near any station upon the railway, deliver them free of charge, the circumstance of collecting in the first instance and of delivering in the other, free of charge, has been held to constitute an inequality if the same rate is charged to parties who have the duty of collecting and delivering themselves. We entirely abide by those decisions; but the collection and delivery in those cases was a collection and delivery auxiliary to and subsidiary to their business, not merely as common carriers, but as carriers upon their own line of railway. When they choose to avail themselves of the opportunities which they have of chartering steamers for the purpose of delivering goods at Newport, they are not doing what is auxiliary, or rather subsidiary to the conduct of their business as carriers upon the line. Their real and true position is this, that they are common carriers from London to Newport, availing themselves of their line of railway as far as it serves them. We must look at this case upon the facts as stated, and take what has been done to have been done

bona fide, there being no suggestion of any *mala fides*; and the question is, whether we can see upon the facts stated a necessary inequality. We cannot do so, and are therefore of opinion, that on the first and second claims, judgment must be for the plaintiffs, but on the third claim for the defendants.

Judgment for the plaintiffs for the amounts of their first and second claims, for the defendants as to the third claim.

[IN THE COURT OF EXCHEQUER.]

May 26, 1865.*

SAUNDERS AND WAINE v. MERRYWEATHER, KELLY AND ANNE HIS WIFE.

35 L. J. Ex. 115; 3 H. & C. 902; 13 W. R. 814; 11 Jur. N.S. 655.

Ejectment—Assignment without Licence—Covenant with Mortgagor—Estoppel.

ESTOPPEL. LANDLORD AND TENANT. MORTGAGE.—*A demise by a mortgagor and mortgagee of leasehold premises contained a proviso for re-entry by either of them if the lessee should assign without the mortgagor's consent. After several mesne assignments with the mortgagor's consent, the premises were assigned to M. by a deed to which S. (assignee of the mortgage) and the mortgagor were parties, and which contained a proviso for re-entry by the mortgagor on M. assigning without his consent. M. paid rent to the mortgagor, and subsequently assigned without his consent, whereupon S. and the mortgagor brought ejectment:—Held, that M. was not estopped from shewing that the mortgagor was not the legal reversioner; and held, also, that neither the mortgagor nor S. could recover—the one having only an equitable title to the premises, and the other having no right of re-entry reserved to him.*

This was an action of ejectment to recover possession of a public-house, on the ground of forfeiture for assigning without licence.

At the trial, at Liverpool, before Mellor, J., at the Spring Assizes, 1865, a verdict was found for the plaintiff, with leave to the defendants to move for a nonsuit, under the following circumstances:

By an indenture of lease, dated the 26th of April, 1849, between one Tyrer, mortgagee of the premises, of the first part, the plaintiff Waine, the mortgagor, of the second part, and one Johnson, of the third part, after reciting the mortgage by Waine to Tyrer, the mortgagor and mortgagee jointly demised the premises to one Johnson for twenty-one years, from the 21st of May, 1849, with a proviso for re-entry by the mortgagor and mortgagee, or either of them, their executors, &c., on the lessee assigning, letting or under-letting the premises contrary to a proviso thereafter contained, by which it was agreed that Johnson might at any time during the term let the premises for the residue of the term, or any part thereof, to any good, respectable and responsible person, of whom Waine should approve in writing.

The mortgage was, after several mesne assignments assigned to the plaintiff Saunders on the 28th of November, 1859. There were also several assignments of the lease with Waine's consent; and at last, by indenture, dated the 7th of February, 1861, the term became vested in one Reid.

* Decided in Trinity Term, 1865.

By indenture, dated the 4th of October, 1864, and expressed to be made between Reid's executrix, of the first part, Waine, of the second part, and the defendant Merryweather, of the third part, reciting the lease of the 26th of April, 1849, and the subsequent assignments with Waine's consent, and that Reid was under a covenant not to assign without the consent of Waine, the executrix assigned the premises to the defendant for the residue of the term, the defendant in his turn covenanting not to assign without Waine's consent. There was a proviso for re-entry by Waine in that event.

The defendant Merryweather afterwards assigned without Waine's consent to Anne Snowdon, who afterwards married the defendant Kelly.

Mellish obtained a rule for a nonsuit, on the ground that there was no right of re-entry reserved to Saunders on an assignment by the assignee without Waine's consent; and that Waine could not recover because he had no legal title to the premises, and the alleged right reserved in the deed of 1864 was void.

Brett and Arthur Peel now shewed cause.—The indenture of 1864, on which the question turns, was executed after 22 & 23 Vict. c. 35. s. 1, which altered the law as previously settled by *Dumpor's case* (1 Smith's Lead. Cas. 28 (5th edit.); s. c. 4 Coke, 119). Besides, it expressly provides that the assignee is not to assign without Waine's consent. Taking from Waine, the defendants recognized his title, and therefore cannot now dispute it. By agreeing to accept a lease from Waine the lessee treats him as having power to grant the lease.

[MARTIN, B.—It does not appear from the recitals that Waine was the owner of the reversion.]

If the true construction of the deed shews that he has the reversion, it need not be so stated in express terms. A tenant who has paid rent cannot set up against his lessor the superior title of a third person—*Doe d. Bristow v. Pegge* (1 Term Rep. 758, 760, n.), per Lord Mansfield, C.J. And in respect of disputing title there is no difference between tenant and licensee—*Doe d. Johnson v. Baytup* (3 Ad. & E. 188). There is nothing on the face of the deed to shew that Waine was merely a mortgagor. The intention of the parties clearly was to secure a responsible tenant, and provisoes of this sort should not be construed with the strictness of conditions at common law, but just as other contracts—*Doe d. Davis v. Elsam* (1 Moody & M. 189), per Lord Tenterden; that is, according to the intention of the parties—*Stadhard v. Lee* (32 Law J. Rep. (N.S.) Q.B. 75), per Cockburn, C.J.

[CHANNELL, B.—The difficulty here is, that the law does not allow the parties to make this condition in favour of a stranger.]

The mortgagor was no stranger in the eye of the man who made the condition.

Mellish (with whom was C. Russell), for the defendant, said, that the original lease reserved the right of re-entry to Waine only, and not to the mortgagee; and therefore, while on the one hand Waine could not recover as he had only an equitable title, so on the other hand there was no covenant on which Saunders could sue.

MARTIN, B.—I am of opinion that the rule ought to be made absolute. It seems to me that the points made for the plaintiffs fail. It is said that the defendant Merryweather was estopped from shewing that Waine was not in reality the legal owner of the reversion, but was in point of fact a mortgagor only; I am clearly of opinion that he is not estopped from shewing that. If I were to read this deed of October, 1864, without knowing anything more of the matter, I might draw the conclusion that Waine was the reversioner; but it is clear by reference to the recital in this deed of the indenture of the 26th of April, 1849, that the legal owner of the reversion was Tyrer or Tyrer's assignee; and that Waine being the mortgagor, and having an interest in the house being occupied by a proper tenant, is only joined for

the purpose of shewing that he was satisfied that the defendant Merryweather was a fit and proper person to become tenant of the house.

This indenture of October, 1864, contains a proviso, in the form of a condition, that if Merryweather, the assignee of the lease, should assign without Waine's consent, it should be lawful for Waine, his executors, administrators or assigns, to enter into and upon the premises, &c. The question then comes,—was Waine in a position to enable him to take advantage of this condition? It does not seem to be disputed that the condition must be made to the lessor; but it was argued that the terms of this proviso shew clearly that it was the meaning of these parties that the defendant should not be allowed to assign without Waine's consent. That is, no doubt, true; and if I could see my way to carrying out that intention, by putting any reasonable construction on the condition, I should be inclined to do so; but it is impossible to strain the rules of law so as to construe this proviso, not as a condition, but as a re-assignment to Waine, to take effect *in futuro* upon an assignment by Merryweather without licence. Waine's relation to the defendant is in reality that of a stranger, and he cannot avail himself of this condition.

POLLOCK, C.B., concurred.

CHANNELL, B.—I am also of opinion that this rule should be made absolute. When we come to look at the term of the assignment to the defendant and to the recital therein, I think it clear that the doctrine of estoppel does not apply. Nor do I think that the language of the proviso can be held to operate as a kind of re-assignment to Waine without straining its language and giving an effect to it the reverse of its natural meaning. There is, therefore, no ground on which Waine can succeed in this ejectment. Saunders, again, who takes under the original mortgagee by conveyance to him of the legal reversion, has no right of re-entry reserved to him, and therefore cannot recover.

Rule absolute.

[IN THE COURT OF EXCHEQUER.]

Nov. 22, 1865; Feb. 26, 1866.

HAUGHTON AND OTHERS v. THE EMPIRE MARINE INSURANCE COMPANY (LIMITED).

85 L. J. Ex. 117; 4 H. & C. 44; L. R. 1 Ex. 206; 15 L. T. 80; 14 W. R. 645; 12 Jur. N.S. 376.

Marine Insurance—Construction of Policy—Meaning of “at and from.”

MARINE INSURANCE.—A ship was insured on a valued policy “lost or not lost at and from Havana to Greenock.” Upon arriving inside the harbour of Havana she proceeded up the harbour in charge of a pilot. When past the mass of the shipping lying off the city of Havana, and past the point where she was ultimately discharged, she began to stir up the mud, whereupon the pilot ordered her to be anchored. She sustained damage from settling down on the anchor of another ship:—Held, that the word “at” was to be construed in its ordinary and geographical sense, and that it was—according to the ruling of Lord Hardwicke, in *Motteux v. the London Assurance Company* (1 Atk. 545, 548)—equivalent to “at her first arrival at”; and that therefore the policy attached immediately the ship entered the natural boundaries of the harbour of Havana.

The declaration, which was on a valued policy of insurance on the ship

Urgent, "lost or not lost at and from Havana to Greenock," averred that the said ship when at Havana and after the commencement and during the continuance of the risk sustained injury by perils insured against, such injury being caused by grounding and by contact with some substances other than water, within the meaning of the policy, and thereby sustained an average loss exceeding 3l. per cent. There were also a count upon accounts stated.

Pleas—First, that the said ship did not, when at Havana, after the commencement and during the continuance of the said risk, sustain injury by the perils insured against as alleged; second, that the said ship was not, after the commencement and during the continuance of the said risk, stranded, sunk or burnt within the meaning of the said policy, and that the said loss and damage did not constitute a general average loss, and amounted to less than 3l. per cent.; third, a denial of the plaintiff's interest in the ship; and fourth, as to the second count, never indebted.

Issue on all the pleas.

The case was tried before Montague Smith, J., at the Liverpool Summer Assizes, 1865, when it appeared that the *Urgent* arrived off the harbour of Havana on the 5th of May, 1864, and that her captain when inside the harbour engaged the services of a pilot and a steam-tug for the purpose of taking the ship to a clear anchorage. She was towed up the harbour, past the thick of the shipping above the city, and past the place where she ultimately discharged her cargo. When near the "Regla Shoal," at the head of the harbour, she began to stir up the mud, but she was not felt to take the ground. The anchor was then let go by order of the pilot, who immediately afterwards went ashore, leaving the ship anchored as she was. The next morning the captain attempted to get her head to wind, but could not; and later in the day he found that she had sustained damage from settling down on the anchor of another ship. She was afterwards moved to her place of discharge, which was pointed out by the purchaser of her cargo, and was nearer to the mouth of the harbour than the shoal was.

The sole question was whether the policy had attached at the time the damage was sustained.

The verdict was entered for the plaintiffs for 353l. 3s. 1d., with leave to the defendants to move to enter a nonsuit.

Edward James, in Michaelmas Term, 1865, obtained a rule to set aside the verdict, and to enter a nonsuit or a verdict for the defendants, on the ground that the policy had not attached, the vessel not having arrived at Havana within the meaning of the policy when the damage was sustained.

Brett and Baylis shewed cause (Nov. 22).—Whether the injury took place before the ship was finally moored or after makes no difference. As it was, she was actually stopped and held at her own anchor, and the pilot had left her. The policy attached the moment she was inside the natural boundaries of the harbour, for she was then at Havana. She was clearly at Havana when the damage was sustained. A ship is at Liverpool when lying in the Sloyne; and at London when anchored at Gravesend, although her ultimate destination be the London Docks. When a ship is in Dover Roads she is off Dover; but the moment she is between the piers at the entrance of the outer harbour she is at Dover. It may be said that a homeward policy does not attach unless the ship is "at" the outward port in a seaworthy condition. But it is admitted here that the ship was seaworthy. If she had been insured for the outward voyage to Havana, the policy would have covered her till she had been moored for twenty-four hours—but that is by express words in the policy. According to the latest decisions the home policy attaches before the outward policy is at an end, so that the two policies overlap one another. It is clear here that something more is meant to be insured than the home voyage.

[*POLLOCK*, C.B.—It has been said that the vessel must be at her destination in safety, i.e. the dangers of the voyage out must be over.]

In *Arnould on Marine Insurance* (Vol. 1, pp. 388, 389, 3rd edit. by Maclachlan) it is certainly said: "If the ship be insured and the adventure made to commence upon her 'at and from' some foreign port at which the ship is expected to arrive, with the view of protecting her for her homeward voyage, it is now settled in this country that, in order to make the homeward policy attach on the ship, she must have once been at the outward port in good physical safety;" and *Parmeter v. Cousins* (2 Campb. 235) and *Bell v. Bell* (Ibid. 475) are cited as authorities; but in *Parmeter v. Cousins* (2 Campb. 235) Lord Ellenborough, C.J., held, that it was sufficient that the ship while in the foreign port should "be in such a condition as to enable her to lie there in reasonable security till properly repaired and equipped for her voyage." In *Motteux v. the London Assurance Company* (1 Atk. 545, 548), Lord Hardwicke laid it down that when a ship is thus insured, the words "first arrival" are always implied. So *Palmer v. Marshall* (8 Bing. 318; s. c. 1 Law J. Rep. (N.S.) C.P. 19, per Tindal, C.J.), and *Smith v. Surridge* (4 Esp. 25); but in none of these authorities is a satisfactory definition given of the word "at." Therefore the word "at" must be taken in its popular and geographical sense; and then the policy attached the moment the ship entered the natural harbour of Havana. Any artificial interpretation given to the word "at" would only create confusion in this as well as in other respects. Even if it be held that she must be anchored before the policy attached, the defendants are still liable, for the ship was anchored when she sustained the injury.—They also cited *Patrick v. Ludlow* (3 Johnson's Cases, 10) and *Seamans v. Loring* (1 Mason's Circuit Rep. 127, per Story, J.).

Potter (*Edward James* with him), for the defendants.—Granted that a moment of time exists when the outward and the homeward policies overlap each other, still the vessel could not be said to be *at* Havana unless she was there in such a sense that twenty-four hours afterwards the liability of the underwriters on an outward policy would cease. Now here that liability would have existed for twenty-four hours after the *Urgent* was at her point of discharge. It was not the intention of the pilot to anchor where he did: it was a mere temporary anchoring, rendered necessary by the emergency of the moment. The outward voyage must be concluded before the homeward voyage commences. In *Samuel v. the Royal Exchange Assurance Company* (8 B. & C. 119) Lord Tenterden, C.J. held, that as the ship in question had never been at the dock where she was to be discharged, she had not been moored at her place of destination twenty-four hours in good safety; virtually ruling that the word "London" may be restricted in meaning to a particular dock in London. So in the case cited in *Phillips on Marine Insurance*, s. 968; and, therefore, "*at* Havana" must mean "*at* the dock or place of discharge *at*" Havana to which the ship was required to proceed.

Cur. adv. vult.

On the 25th of February the following judgments were delivered—

CHANNELL, B.—The question in this case is, whether or not the policy had attached at the time when the damage occurred to the *Urgent*. In my opinion, the ship was at that time at Havana, and consequently the risk under the policy had attached. The damage occurred "*at* Havana," geographically speaking; and there is nothing which, to my mind, shews that the parties, at the time this policy was underwritten, contemplated any other meaning of the word "*at*." All the limitation which the law appears ever to have imposed as to the time of the commencement of the risk in such a case is, that the ship should arrive at the port at which she is insured, in a state of sufficient repair or seaworthiness to be enabled to be there in safety—see *Parmeter v. Cousins* (2 Campb. 235) and *Bell v. Bell* (Ibid. 475), in the latter of which cases the ruling of Lord

Ellenborough, C.J., at Nisi Prius was upheld by the Court in Banc. Here, however, there seems to be no doubt that the ship was really within the harbour in good safety, and the loss occurred from a peril of the harbour, and in no way from any injuries she had received before her arrival. The ship being insured while at Havana, is evidently (in the absence of any provision to the contrary) insured all the time she is there, and therefore the risk commences on her first arrival, as put by Lord Hardwicke in *Motteux v. the London Assurance Company* (1 Atk. 545, 548).

Unless, therefore, we can say that her first arrival at the port is when she casts anchor there, instead of when she enters the port, our judgment must be for the plaintiffs. In many cases, the nature of the port may be such that the two events may be identical. There may be nothing to shew the arrival till the vessel casts anchor. But here we have evidence as to the port of Havana which is sufficient, in my judgment, to shew that the arrival was before casting anchor. It has been argued that the first arrival, which must be no doubt in good safety, must be identical with the mooring in good safety usually named in outward policies. But I think we cannot construe the terms of our contract by reference to those of another not referred to in it. And it is clear that there is no usage that the durations of the outward and homeward policies should not overlap, because the outward policy usually extends to twenty-four hours after the vessel is moored in good safety. During those twenty-four hours there is no question that there is a double insurance, and therefore I see no ground for saying that the parties contracted subject to any usage that such a policy would not attach until the previous one had determined. If they had wished to make such a condition, it might easily have been done: or if, having in view any special dangers, as shoals or the like, within the port of Havana, they had chosen to make the risk date from the vessel being moored in safety, they would have done so; but as it stands it is from her first arrival, which, as a matter of fact, I think to be on her entering the port. My judgment is, therefore, for the plaintiffs, that the rule be discharged.

PIGOTT, B.—I also am of opinion that the policy had attached when the mischief occurred. I agree with the plaintiffs' counsel that the language used by the parties ought to have a plain construction put upon it, and that, as the ship had arrived, geographically speaking, within the harbour of Havana, and was in safety there before the injury was received, the risk had then commenced.

A policy of insurance is to be construed by the same rules as other contracts, the duty of the Court being to collect the meaning of the parties by taking the language employed in a plain and ordinary sense, and not to speculate on some supposed meaning which they have not expressed. For the defendants it was argued that, Havana being an outward port as regards this ship, the meaning of the words "at and from" such outward port was, that the risk should commence when the ship has so far performed her outward voyage that nothing remained to determine the outward policy but the effluxion of the twenty-four hours from her arrival, and that so understood this policy had not attached, inasmuch as the ship had not arrived at her place of discharge.

But it seems to me that this would be a very artificial construction to adopt, and we have no safe guide to conduct us to it.

It might with equal plausibility be argued that the risk "at and from" a port should not commence till the insurance "to" that port ceased, which is at the end of the twenty-four hours, and not at the commencement of them. The answer to both suggestions seems to be that the construction of this contract cannot depend upon the contents of another and distinct contract which is wholly unconnected with it, and that the Court is not called upon to know or assume that there is in fact any outward policy in existence.

This view is supported by the authority of Lord Hardwicke, who, in *Motteux v. the London Assurance Company* (1 Atk. 545, 548), mentions a case

tried before him at Guildhall, in which he says, "It was debated whether the words at and from Bengal meant the first arrival of the ship at Bengal;" and he adds, "It was agreed the words 'first arrival' were implied, and always understood in policies." Now there can be no question about the sense in which Lord Hardwicke uses the words "first arrival," viz. in contradistinction to her being moored in a particular place, or discharging her cargo. In *Parmeter v. Cousins* (2 Campb. 235) Lord Hardwicke's report of the above case is mentioned, and the learned reporter adds, "there seems no doubt that the rule laid down by Lord Hardwicke, qualified by the principal case (to which the note is appended), is to be considered as established law upon the subject." The qualification there alluded to is, that the ship shall be once in good safety at the port, a matter not in dispute in the present case.

This doctrine, and the authority for it, are to be found in several of the text-books on Insurance, and may be thus taken to have been long considered as the meaning of those who so word their policies. In *Arnould on Insurance* (Page 28, section 25, 2nd edit.) it is the form recommended to be adopted for the advantage of the assured in protecting the ship from the moment of her arrival.

I do not think it necessary to advert to the other question raised, viz.—Whether in fact this ship had not anchored in the harbour before the damage was sustained, and at a place even further within it than her place of ultimate discharge; and whether that would make any difference in the case.

In my judgment the plaintiffs are entitled to keep their verdict, and the rule should be discharged.¹

Rule discharged.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Exchequer.)

Feb. 7, 8, 1866.

CARR v. LAMBERT, WOODHALL AND OTHERS.

35 L. J. Ex. 121; L. R. 1 Ex. 168; 14 W. R. 405; 14 L. T. 255; 4 H. & C. 257; 12 Jur. N.S. 194.

Referred to, *Warrick v. Queen's College, Oxford*, [1871] E. R. A.; 40 L. J. Ch. 780; L. R. 6 Ch. 716; 25 L. T. 254; 19 W. R. 1098 (L.C.); *Johnson v. Barnes*, [1872] E. R. A.; 41 L. J. C.P. 250; L. R. 7 C.P. 592; 27 L. T. 152 (C.P.): affirmed, [1873] E. R. A.; 42 L. J. C.P. 259; L. R. 8 C.P. 527; 29 L. T. 65 (Ex. Ch.). Observation adopted, *Robertson v. Hartopp*, [1890] E. R. A.; 59 L. J. Ch. 553; 43 Ch. D. 484; 62 L. T. 585 (C. A.). Referred to, *Att.-Gen. v. Reynolds*, [1911] E. R. A.; 80 L. J. K.B. 1073; [1911] 2 K.B. 888; 104 L. T. 852 (K.B. D.).

Common—Levant and Couchant—Prescription Act, 2 & 3 Will. 4. c. 71.

COMMON.—*To a declaration in trespass, the defendant pleaded thirty years' enjoyment of a right of common of pasture over the locus in quo for cattle levant and couchant upon a certain toftstead belonging to him as appurtenant thereto:—Held, that it was not necessary for the support of the plea that the cattle should be actually fed upon the produce of the toftstead, they being*

(1) Channell, B. said that he had not been able to ascertain whether Pollock, C.B. concurred in this judgment or not; but that the judgment was at any rate that of the majority of the Court, as Martin, B., having only heard a portion of the argument, took no part in the judgment.

housed thereon, and the condition of the toftstead not being so completely changed from its original arable state that it might not again be used for the production of food for cattle; and that there is no difference in this respect between a plea founded on the Prescription Act and a plea founded on prescription, properly so called.

This was an appeal from a decision of the Court of Exchequer, reported 3 H. & C. 499; s. c. 34 Law J. Rep. (N.S.) Exch. 66.

The declaration was in trespass. The fifth and sixth pleas are set out in the report of the case below. The defendants claimed under them a right of common of pasture over the *locus in quo* for cattle levant and couchant upon a certain toftstead of the defendant, John Woodhall, enjoyed for thirty years and sixty years respectively before suit.

It was proved at the trial that at the time of the alleged trespasses the defendant John Woodhall was possessed of a toftstead, consisting of a cottage and stable, with a garden and orchard of the extent of about two acres. Evidence was given that about fifty years before the commencement of the action this had been planted with fruit-trees; but that before that time it was swarth, and had been depastured with cattle. No direct evidence was given as to the number of cattle which it had then supported, or was capable of supporting; and no point was raised at the trial on either side as to the necessity of proof on this subject. After a great deal of evidence had been given, Blackburn, J. suggested that on the evidence the fact seemed clear that the owners of the toftstead had as of right turned the cattle housed on the toftstead, but not deriving their sustenance therefrom, on the *locus in quo* for more than thirty years, and that the only question was one of law, viz., whether such a right of common was legal, or, in other words, if such cattle were levant and couchant. Both sides assented to this suggestion, and no other question was required to be, or was, in fact, left to the jury, and thereupon the learned Judge directed a verdict to be entered for the plaintiff, with leave to the defendants to move to enter a verdict for them.

A rule *nisi* was accordingly obtained by the defendants, and, after argument, made absolute.

The plaintiff appealed from the decision.

Hayes, Serj. (Kemplay with him), for the plaintiff, the appellant.—The cattle levant and couchant, for which the right of common is claimed, must be connected with the land in some closer manner than by merely being housed upon it. If the character of the land is entirely changed, as by being built upon, or by having a reservoir dug upon it, it would be absurd that the right of common should remain. Even supposing that the cattle need not be fed upon the produce of the land, the land must be in such a condition that they might be fed upon its produce if necessary. In addition to the authorities cited in the Court below, he referred to 1 Wms. Saund. 28 c., note 4, *Bennett v. Reeve* (Willes, 227), and *Com. Dig.* tit. 'Common,' (B.) and (C).

Field (T. P. Thompson with him), for the defendants, the respondents.—The land was formerly in a condition to support cattle by its produce, and there is nothing to prevent it from being easily restored to that condition. Levancy and couchancy is merely a test of the number of the cattle in respect of which common of pasture may be claimed. If the cattle must be connected with the land, it is quite sufficient that they are housed upon it, or if the land is capable of their being housed upon it. This is the conclusion to be drawn from the authorities cited.

On the following day (Feb. 8) the judgment of the Court² was delivered by—

WILLES, J.—We are all of opinion that the judgment of the Court of

(2) Willes, J., Blackburn, J., Mellor, J., Montague Smith, J. and Lush, J.

Exchequer should be affirmed. The argument, on the part of the appellant, consisted in this, that the character of the dominant tenement had been so altered from its original state of pasture-ground by having buildings placed upon it, and by being turned into orchard-ground, that a thirty years' user to put the cattle of the dominant tenement upon the plaintiff's common was evidence, if anything, of a right which could not exist in law. This argument might have had considerable force if the character of the dominant tenement had been so altered that it could not be applied to the purpose of producing fruits which would feed cattle. Had a case been made out of a town extending over the whole of the dominant tenement, or, as in the case put in the course of the argument, had a reservoir been dug there, the question might have arisen, whether the right of common was not extinguished, or at least suspended. We are not to be taken as expressing an opinion upon that question. It is unnecessary for the decision of the present case to do so, because the facts shew that the toftstead consisted of a cottage and stable, with a garden and orchard of the extent of about two acres of land, which might either be laid down for pasture or meadow, or cultivated so as to produce artificial plants and roots for the feeding of cattle. No case is made out upon the evidence of such a change in the character of the dominant tenement that cattle might not be fed off its produce. Even, therefore, if my Brother Hayes had succeeded in satisfying the Court that levancy and couchancy is not a mere measure of the number of cattle which the land is capable of keeping out of the produce, natural or artificial, grown within its limits, but that it has reference to the capacity of the land in its actual state to produce food for cattle,—he could not have succeeded in shewing that the facts negative the capacity of the land for the purpose. Land in a state of cultivation, in which it was capable of sustaining cattle upon it, is afterwards partly built on and partly turned into a garden and orchard, not with a view, it is true, to sustain cattle, but at the same time in such a state that the occupier might at any time use it to produce fruit that would sustain cattle. We find no authority in the cases relating to the abandonment or loss of rights, by a destruction absolute or temporary of the enjoyment, which would at all justify us in holding under these circumstances that the right of common once created and existing was destroyed by the subsequent acts of the proprietor. His acts of enjoyment, which are spread over a long period, ought, if possible, to be referred to a legal origin, rather than treated as a series of trespasses; and we ought to assume that there was a legal origin of the right, unless the facts are evidently inconsistent with it, or the right has been either extinguished or suspended. We think that the enjoyment was referable here to the legal origin which I have described, and there is nothing to shew that the right so created was extinguished. This was the ground upon which the judgment of the Court below proceeded, and I think it must be in the experience of those who have heard trials with reference to rights of common of this description, that that judgment was in accordance with the direction usually given respecting lands capable of being applied to maintain cattle, that levancy and couchancy is a measure of capacity, rather than a description of cattle as actually lying down on the land, or actually sustained by the fruits thereof.

Judgment affirmed.

[IN THE HOUSE OF LORDS.]

Feb. 27, 1866.

THE GREAT WESTERN RAILWAY COMPANY v. THE ATTORNEY GENERAL.

35 L. J. Ex. 123; L. R. 1 H.L. 1; 14 L. T. 33; 14 W. R. 519; 12 Jur. N.S. 417.

Revenue—Duties on Railway Fares—Exemption—Parliamentary Trains—5 & 6 Vict. c. 79.—7 & 8 Vict. c. 85.

RAILWAY.—*The Midland Railway Company from Birmingham to Gloucester have running powers over a great portion of the line belonging to the Great Western Railway Company, forming a loop-line with their own, but their powers extend only to the carriage of passengers over any portion of the loop-line who travel also over some portion of the Midland main line. The Midland Company, however, ran one train daily which stopped at every station on the loop-line. The fares paid by passengers getting into the train at stations on the loop-line were received by the officials of the Great Western Company, and they accounted for them to the Midland Company, but refused to render accounts of such receipts to the Commissioners of Stamps and Taxes, or to pay upon them the duty prescribed by the statute 5 & 6 Vict. c. 79, on the ground that these fares were not received by them for carrying the passengers, inasmuch as they were not the carrying company, the train, engine, carriages, &c. belonging to the Midland Company. Neither did they receive the fares from any other company by way of toll, but in a manner wholly unprovided for by the act:—Held, affirming the decision of the Court of Exchequer, that it was unimportant for whom the Great Western Company received the fares, they being the hands that received them; and that the receipts, being in respect of passenger traffic, they must be accounted for, and the duty paid to Her Majesty.*

By the 7 & 8 Vict. c. 85, it was enacted (section 6), that on and after the several days thereafter specified, "all passenger railway companies shall, by means of one train at the least to travel along their railway from one end to the other of each trunk, branch or junction line belonging to or leased by them, so long as they shall continue to carry other passengers over such trunk, branch or junction line, once at the least each way on every week day, except Christmas Day and Good Friday (such exception not to extend to Scotland), provide for the conveyance of third-class passengers to and from the terminal and other ordinary passenger stations of the railway, under the obligations contained in their several acts of parliament and with the immunities applicable by law to carriers of passengers by railway, and also under the following conditions": one of such conditions being, that "such train shall start at an hour to be from time to time fixed by the directors, subject to the approval of the Lords of the Committee of Privy Council for Trade and Plantations;" and another, that "such train shall, if required, take up and set down passengers at every passenger station which it shall pass on the line." The train in question ran over all the railway over which the Midland Company carried passengers, and stopped at every station, and started at an hour which had been at one time approved by the Board of Trade; but as the Midland Company could not set down at any station on the loop-line a passenger who had also been taken up at another station on the loop-line, the Board of Trade had since withdrawn their approval:—Held (affirming the decision of the Court of Exchequer), that inasmuch as the Midland Company in running their trains from Birmingham into Gloucester had not the power of stopping at every station on the loop-line for the purposes of setting down passengers not taken up on the main line, they could not comply with the latter of the above conditions; and that they could not bring themselves within the former

of such conditions, as the Board of Trade had refused to give them their sanction, and so no exemption could be claimed under the 7 & 8 Vict. c. 85. from the duties imposed by the 5 & 6 Vict. c. 79.

The suit originated by information filed by the Attorney General in the Court of Exchequer, to recover from the Oxford, Worcester and Wolverhampton Railway Company (now amalgamated with the appellant company—the Great Western Railway Company) passenger duty in respect of so much of the fares received by them for the conveyance from stations on their loop-line, between Abbott's Wood and Stoke Prior, to stations on the Midland Railway line, of passengers by cheap traffic trains belonging to the Midland Railway Company, as was derived from the conveyance of such passengers over such loop-line.

The questions on the appeal were the same as in the Court below: viz., first, whether any duty at all was payable in respect of the passenger fares in question; and, secondly, whether, if duty was payable, the appellant company—the Great Western Railway Company—were liable to pay the same.

The judgment of the Court below was in favour of the Crown, and against the appellants on both points; with regard to the first point, Martin, B. dissented from the rest of the Court, holding that no duty was payable; but on the second point the Court were unanimous in their opinion (31 Law J. Rep. (N.S.) Exch. 218).

The circumstances giving rise to the questions in dispute are as follows:

In 1845, the Oxford, Worcester and Wolverhampton Railway Company obtained an act of parliament, enabling them to make a line of railway commencing at a place on the Birmingham and Gloucester line, called Abbott's Wood, and running thence through Worcester and Droitwich, and returning to the Birmingham and Gloucester line at a place called Stoke Prior. This line of railway is about fourteen miles long, and is the line referred to as "the loop-line."

The Birmingham and Gloucester Railway Company (now merged into the Midland Railway Company) are, under a licence and authority for that purpose conferred on them by the Oxford, Worcester and Wolverhampton Railway Company's Act, entitled to use, as they do in fact use, this loop-line for the conveyance of passengers from stations on the loop-line to stations on their own line, and *vice versa*; the act, however, provided that the said Birmingham and Gloucester Railway Company should not be permitted to convey any passengers along the loop-line, or any part thereof, unless such passengers should have passed or be intended to travel or pass in the same train over some portions of the Birmingham and Gloucester Railway between Abbott's Wood and Gloucester or between Stoke Prior and Birmingham.

With regard to the trains of the Midland Railway Company conveying passengers from stations on the loop line, the passengers by such trains were booked at the stations of the appellant—the Great Western Railway—company and by their clerks, no separate establishment of any sort being kept, and the balance of the money received, after deducting the share of it which belonged to the appellant—the Great Western Railway—company, was accounted for, through the medium of the clearing house, to the Midland Railway Company, and it was in respect of fares received by the appellant—the Great Western Railway—company for passengers booked by them at their stations on the loop-line, for conveyance to stations on the Midland line by trains belonging to the Midland Railway Company, and which, so far as they ran over the line of the latter company, complied with the requisitions of the Cheap Traffic Trains Act, and were, therefore, to that extent exempt from duty, and which also stopped at all stations on the loop-line, and purported to be cheap traffic trains for passengers from stations on the loop-line to stations on the Midland line, and *vice versa*,—that the duty in question was claimed.

The act by which the duties at present payable in respect of passengers

conveyed by railways are imposed is the 5 & 6 Vict. c. 79, which was passed in 1842. The material sections are the 4th and 5th, which are as follows :

Section 4. " And be it enacted, that the proprietor or company of proprietors of every railway in Great Britain, and every other person who shall carry or convey, or cause to be carried or conveyed, any passenger for hire in or upon any railway in Great Britain, shall, from time to time and at all times, keep and enter, or cause to be entered, in a book or books to be kept for that purpose, in such manner and form as the Commissioners of Stamps and Taxes shall direct or approve, a just and true account of all and every sum and sums of money which shall be received or charged daily by or for such proprietor or company or other person for the hire, fare or conveyance of all such passengers, as aforesaid, whether the same shall be received for the conveyance of passengers on the railway of such proprietor or company or other person only, or on such last-mentioned railway and any other railway, or on any such other railway only, and for or in respect of all which sums of money the duties charged by this act shall, in manner hereinafter directed, be paid by the said proprietor or company or other person so receiving or charging the same as aforesaid, without any deduction or abatement thereout on any account or pretence whatever; and the proprietor, or company of proprietors, of any railway so receiving or charging any such sums of money as aforesaid shall also in like manner keep and enter, or cause to be entered, an account of all sums of money paid or accounted for, or to be paid or accounted for, by such proprietor or company to the proprietor or company of proprietors of any other railway (specifying the same) upon which any of such passengers shall be carried or conveyed, as his or their share or proportion of any of such sums of money so received or charged as aforesaid, or as or for or in the nature of toll or otherwise for the use of such last-mentioned railway in the conveyance of such passengers; and the proprietor or company of proprietors of every such last-mentioned railway shall in like manner keep and enter, or cause to be entered, an account of all sums of money so paid or accounted for to him or them as last aforesaid, and for or in respect of which the duties shall or ought to have been paid as aforesaid by such first-mentioned proprietor or company; and every such proprietor and company, and other such person and persons respectively, shall, within five days after the first Monday in every calendar month, deliver to the Commissioners of Stamps and Taxes, or to the proper officer appointed for receiving the same, a true copy or true copies of the account or accounts by this act directed to be kept, so far as the same shall relate to all sums of money received or charged and paid or accounted for as aforesaid during the preceding four or five weeks, as the case may be; (that is to say,) from and including the first Monday in the preceding month up to the first Monday of the month in which such account shall be rendered, or ought to be rendered as aforesaid; and to and with every such account there shall be annexed and delivered an affidavit (to be taken before any one of Her Majesty's Justices of the Peace) of such proprietor or other person as aforesaid, or of the secretary, chief clerk or accountant of such proprietor or company or other person, stating that the deponent is well acquainted with the books and accounts of the said proprietor, company or other person, and that he has examined and checked the same, and also the account to which such affidavit is annexed, and that, to the best of his knowledge, information and belief, such last-mentioned account doth contain and is a true and faithful account of all and every sum and sums of money received or charged by or for such proprietor or company or other person aforesaid for the hire, fare or conveyance of passengers on any railway during the period comprised in such account, and of all other matters and things required by this act to be contained in such account; and such proprietor or company or other person shall, at the time of delivering every such account, pay, or cause to be paid, to the Receiver General of Stamps and Taxes, or to the officer authorized by the said Commissioners to receive the same, for the

use of Her Majesty, the duties chargeable under this act or in respect of all and every the sum and sums of money so received or charged as aforesaid, and contained, or which ought to be contained, in such account."

Section 5. "Provided always, and be it enacted, that it shall be lawful (where there shall be no express contract or agreement between the parties to the contrary) for any such proprietor or company to deduct from and retain out of the monies to be paid over to any such other proprietor or company as aforesaid the amount of the duties by his act chargeable thereon, and which such proprietor or company receiving such monies shall have paid or be liable to pay."

The duties granted by this act continue to be payable, except so far as they are remitted by the provisions of the Cheap Traffic Act (7 & 8 Vict. c. 85), which was passed in 1844, and the material sections of which are the 6th, 7th, 8th and 9th, which are as follows: "Section 6. And whereas it is expedient to secure to the poorer class of travellers the means of travelling by railway at moderate fares, and in carriages in which they may be protected from the weather:—be it enacted, that on and after the several days hereinafter specified all passenger railway companies which shall have been incorporated by any act of the present session, or which shall be hereafter incorporated, or which by any act of the present or any future session have obtained or shall obtain, directly or indirectly, any extension or amendment of the powers conferred on them respectively by their previous acts, or have been or shall be authorized to do any act unauthorized by the provisions of such previous acts, shall, by means of one train at the least to travel along their railway from one end to the other of each trunk, branch or junction line belonging to or leased by them, so long as they shall continue to carry other passengers over such trunk, branch or junction line, once at the least each way on every week day, except Christmas Day and Good Friday (such exception not to extend to Scotland), provide for the conveyance of third-class passengers to and from the terminal and other ordinary passenger stations of the railway, under the obligations contained in their several acts of parliament, and with the immunities applicable by law to carriers of passengers by railway; and also under the following conditions: (that is to say,) such train shall start at an hour to be from time to time fixed by the directors, subject to the approval of the Lords of the Committee of Privy Council for Trade and Plantations: such train shall travel at an average rate of speed not less than twelve miles an hour for the whole distance travelled on the railway, including stoppages: such train shall, if required, take up and set down passengers at every passenger station which it shall pass on the line: the carriages in which passengers shall be conveyed by such train shall be provided with seats, and shall be protected from the weather in a manner satisfactory to the Lords of the said Committee: the fare or charge for each third-class passenger by such train shall not exceed 1d. for each mile travelled: each passenger by such train shall be allowed to take with him half a hundredweight of luggage, not being merchandise or other articles carried for hire or profit, without extra charge; and any excess of luggage shall be charged by weight, at a rate not exceeding the lowest rate of charge for passengers' luggage by other trains: children under three years of age accompanying passengers by such train shall be taken without any charge, and children of three years and upwards, but under twelve years of age, at half the charge for an adult passenger. And with respect to all railways subject to these obligations which shall be open on or before the 1st of November next, these obligations shall come into force on the said 1st of November; and with respect to all other railways subject to these obligations, they shall come into force on the day of opening of the railway, or the day after the last day of the session in which the act shall be passed by reason of which the company will become subject thereunto, which shall first happen."

Section 7. "And be it enacted, that if any railway company shall

refuse or wilfully neglect to comply with the provisions of this act as to the said cheap trains within a reasonable time, or shall attempt to evade the operation of such order, such company shall forfeit to Her Majesty a sum not exceeding 20*l.* for every day during which such refusal, neglect or evasion shall continue."

Section 8. "Provided always, and be it enacted, that, except as to the amount of fare or charge for each passenger by such cheap trains, which shall in no case exceed the rates hereinbefore in such case provided, the Lords of the said Committee shall have a discretionary power, upon the application of any railway company, of dispensing with any of the conditions hereinbefore required, in regard to the conveyance of passengers by such cheap trains as aforesaid, in consideration of such other arrangements, either in regard to speed, covering from the weather, seats, or other particulars, as to the Lords of the said Committee shall appear more beneficial and convenient for the passengers by such cheap trains under the circumstances of the case, and shall be sanctioned by them accordingly; and any railway company which shall conform to such other conditions as shall be so sanctioned by the Lords of the said Committee shall not be liable to any penalty for not observing the conditions which shall have been so dispensed with by the Lords of the said Committee in regard to the said cheap trains and the passengers conveyed thereby."

Section 9. "And be it enacted, that no tax shall be levied upon the receipts of any railway company from the conveyance of passengers at fares not exceeding 1*d.* for each mile by any such cheap train as aforesaid."

Some time after the Midland Railway Company had begun to make use of the loop-line for passenger traffic, to the exclusion of their old route, the Board of Trade withdrew their approval of the Midland Railway Company's cheap traffic trains, so far as they were trains for the conveyance of passengers over the loop-line.

An application having been made to the Oxford and Worcester Company for payment of the duty hereinbefore mentioned in respect of fares received by them for the conveyance of passengers by cheap traffic trains of the Midland Railway Company from stations on the loop-line to stations on the Midland Company's line, they refused to pay the same, and denied their liability in respect thereof. Hence the information in the Court of Exchequer.

Coleridge and Bere, for the appellants.—The Midland Railway Company are bound to run a cheap train from Birmingham to Gloucester over the whole of their line, including the loop-line, and therefore are entitled to exemption from duty in respect of such train. There is an absolute enactment that the company shall run such a train, with a penalty for not doing so; and though the approval of the Board of Trade is made requisite, the Board is not to be allowed vexatiously to withhold its approval, which was only intended to apply to the hours of starting and the general rate of travelling. The payment of the duty (if payable at all) can only be enforced against parties who are themselves carriers, and the appellants are not the carrying company: they receive the fares only as the agents and servants of the Midland Company, who, if there be any liability to duty at all, are the proper company to pay such duty. The appellants have no control over the trains which belong entirely to the Midland Company. Both companies cannot be the carrying company. In the case of two passengers, one getting into a train on the Midland main line, and the other on the loop, it is clear they would both be carried by the same company. The decree of the Court of Exchequer is erroneous.

The Attorney General, The Solicitor General, and E. Leigh Pemberton, for the respondents, were not called upon.

The LORD CHANCELLOR.—I think we need not trouble the Attorney General to address the House in this case, for it seems to me to be a perfectly

clear one. By the act of parliament 5 & 6 Vict. c. 79, a duty is imposed upon passenger traffic, and that duty is to be ascertained and accounted for in the following manner.—Certain accounts are to be kept; the company over whose line the trains are run, or the company running the trains, is to keep an account of all money that it has received. That is all that is important to the present question. There are two other accounts to be kept, but they are for collateral objects: one of all money which the company receive for leasing their line, or giving a right of running over their line to other companies; and the other of all sums which they pay for having the right of running over other companies' lines. Those powers are immaterial to the present purpose. It is sufficient to say that the company are bound to keep an account of all monies which they receive for passengers.

It is enacted by the 14th section of the act, that every proprietor of a railway, or company, or other person who conveys passengers on a railway, shall deliver the accounts I have mentioned once a month, and at the time of the delivery of such accounts "pay, or cause to be paid to the Receiver General of Stamps and Taxes, or to the officer authorized by the said Commissioners to receive the same for the use of Her Majesty, the duties chargeable under this act, for or in respect of all and every the sum and sums of money so received or charged as aforesaid." It seems to me to be utterly unimportant for whom they receive it. It may be that they have to account for the whole of it, but that is quite immaterial. They are the hands that receive it; it is received in respect of passenger traffic, and is, therefore, to be accounted for, and the duty paid to Her Majesty.

That, indeed, was not the point mainly relied upon by the appellants, but what was relied upon was, that although by the statute of the 5 & 6 Vict. c. 79, this duty is imposed, the subsequent statute of the 7 & 8 Vict. c. 85, passed two years afterwards, made an exemption in respect of the money that was received from passengers travelling by this particular train. That exemption depends upon this fact: The legislature, in order to provide for the poorer class of travellers, enacted, that on and after several days thereafter specified, all passenger railway companies "shall, by means of one train at the least, to travel along their railway from one end to the other of each trunk, branch, or junction line belonging to or leased by them, so long as they shall continue to carry other passengers over such trunk, branch or junction line, once, at the least, each way on every week day, except Christmas Day and Good Friday (such exception not to extend to Scotland), provide for the conveyance of third-class passengers to and from the terminal and other ordinary passenger stations of the railway, under the obligations contained in their several acts of parliament, and with the immunities applicable by law to carriers of passengers by railway, and also under the following conditions." One of these conditions is, that "such train shall start at an hour to be from time to time fixed by the directors, subject to the approval of the Lords of the Committee of Privy Council for Trade and Plantations." Another is, that "such train shall, if required, take up and set down passengers at every passenger station which it shall pass on the line."

Now, without going in detail into the reasons which have been very clearly stated as bearing on the case, (though we did not quite understand them at first,) it is plain that the Midland Railway Company, in running their trains from Birmingham into Gloucester, had not the power of stopping at every station on the portion of the line which is situate between Abbott's Wood and Stoke Prior; and therefore they could not comply with the latter condition. Whether it is technical or not I do not know, but it is perfectly obvious that they cannot bring themselves within the former condition, as the Board of Trade have refused to give them their sanction.

It appears to me, therefore, on these very short grounds (and the grounds appear to be very clearly stated, so far as I have been able to gather from a cursory inspection of the judgment given by the Lord Chief Baron), that the

case was rightly decided, and that this appeal is entirely unfounded. I shall, therefore, move your Lordships that this appeal be dismissed, with costs.

LORD CHELMSFORD.—The two points are perfectly clear; and I entirely agree with what has fallen from my noble and learned friend on the woolsack.

LORD KINGSDOWN.—My Lords, I am of the same opinion.

Decree affirmed, and appeal dismissed with costs.

[IN THE COURT OF EXCHEQUER.]

Jan. 25, 1866.

DIAMOND v. SUTTON.

35 L. J. Ex. 129; L. R. 1 Ex. 130; 13 L. T. 800; 14 W. R. 374; 12 Jur. N.S. 319.

Referred to, *Jackson v. Spittall*, [1870] E. R. A.; 39 L. J. C.P. 321; L. R. 5 C.P. 542; 22 L. T. 755; 18 W. R. 1162 (C.P.). Followed, *Arrowsmith v. Chandler*, 1872, 27 L. T. 242 (Ex.). See *Thomas v. Hamilton*, [1886] E. R. A.; 55 L. J. Q.B. 555; 17 Q.B. D. 592; 55 L. T. 385; 35 W. R. 22 (C. A.).

Practice—Writ issued for Service on British Subject residing out of the Jurisdiction—Setting aside Writ—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 18.

PRACTICE.—The defendant resided in Jersey, and was the editor, but not the publisher or proprietor, of a periodical which was printed in Jersey, registered for transmission abroad, purported to be published in England, and was extensively circulated in England; and he was the writer of certain libels published in the periodical respecting the plaintiff. The plaintiff having served the defendant with a writ, indorsed for service on a British subject residing out of the jurisdiction, the defendant, without appearing, applied to have the writ set aside on the ground that there was no cause of action arising in England:—Held, that the application was not premature, and that the writ must be set aside, unless the plaintiff undertook to confine his declaration to causes of action arising in England.

Semble, *per* Martin, B., that the facts shewed a wrong committed by the defendant in England.

J. O. Griffiths moved to set aside the writ, in this case, which had been issued under section 18. of the Common Law Procedure Act, 1852, for service out of the jurisdiction, and had been served on the defendant, a British subject residing at Jersey.

The affidavits shewed that the action was brought by the plaintiff to recover damages for alleged libels written by the defendant, and published in certain numbers of a periodical called *Photographic Notes*, of which the plaintiff was editor. The periodical was printed and published in Jersey, but it was registered for transmission abroad, and it purported on its title-page to be published by Sampson Low & Co., of 14, Ludgate Hill, London. It was stated by the plaintiff that the circulation was very small in Jersey, but large in England. It was stated by the defendant that he was not the publisher nor the proprietor of the journal, but merely the editor, and that he resided wholly in Jersey. The defendant had not appeared.

This application is quite regular, and is made because by appearance the defendant would admit the jurisdiction of the Court—*Binet v. Picot* (4 Hurl. & N. 365; s. c. 28 Law J. Rep. (N.S.) Exch. 244) and *Forbes v. Smith* (10 Exch. Rep. 717; s. c. 24 Law J. Rep. (N.S.) Exch. 167). No cause of action here has

arisen in England. The defendant has no control over the publication of the periodical, nor is he concerned in transmitting it to England. He supplies certain manuscripts to the publisher, and, having done so, his connexion with them is at an end. The publisher is not bound to insert them.

[PIGOTT, B.—This is just as if the defendant had published a libel in the *New York Times*, and the publisher had sent it to England.]

A person who utters slander in England is not responsible for its repetition by other persons.

[MARTIN, B.—This matter was before me at chambers, and I thought that the facts shewed a publication of the libel in England, and that the writ ought to stand, if an undertaking were given to confine the action to the publication in England.]

J. C. F. S. Day shewed cause in the first instance.—This application is premature. The defendant is not obliged to appear, and he should have waited till the plaintiff applied for leave to proceed under section 18. of the Common Law Procedure Act, 1852. The plaintiff would then have been obliged to satisfy the Court, or a Judge, that there was a cause of action which arose within the jurisdiction. Here there is internal evidence in the libels themselves, and on the title-page of the *Photographic Notes* that they were written for publication in England.

[MARTIN, B.—I think that the defendant has done an act which is a wrong in England, and in respect of which the law sanctions an action here; but causes of action may be joined now, and if under the pretence of suing the defendant for the cause of action which arose in England the plaintiff were to get the means of suing him for other matters, it would be an abuse of the act of parliament. CHANNELL, B.—The words of the act are that a Judge is to be satisfied that there is a cause of action which arose in England. It would appear from that, that he may have a discretion, and I do not think that he is bound to be satisfied without the undertaking.]

Per Curiam.¹—The writ must be set aside, unless the plaintiff, within a week, undertakes to confine the action to causes of action arising in England.

Judgment accordingly.

[IN THE COURT OF EXCHEQUER.]

Nov. 8, 1865; Feb. 26, 1866.

RICHARDS v. HARPER.

35 L. J. Ex. 180; L. R. 1 Ex. 199; 4 H. & C. 55; 14 W. R. 648; 12 Jur. N.S. 770.

Referred to, *Wakefield v. Duke of Buccleuch*, [1867] E. R. A.; 36 L. J. Ch. 763; L. R. 4 Eq. 613; 16 L. T. 475 (V.C.): reversed, [1870] E. R. A.; 39 L. J. Ch. 441; L. R. 4 H.L. 377; 23 L. T. 102 (H.L.).

Mine—Covenant running with Land—Right to Support—Copyholds.

COPYHOLD.—The owner of freehold and copyhold lands adjoining each other surrendered the copyhold lands to a grantee, who covenanted for himself, his heirs and assigns, with the grantor, his heirs and assigns, that the grantor should have full power to mine under his own freehold lands without paying compensation for any injury which might be sustained by the copyhold portion and buildings erected thereon, in consequence of the removal of the support. The plaintiff was the assignee of the grantee; and the defendant was the assignee

(1) Pollock, C.B., Martin, B., Channell, B., and Pigott, B.

of the grantor, and compensation was sought by the plaintiff for damage resulting from the sinking of his land, in consequence of the mines excavated under the defendant's land:—Held, that the grantee had no power to disclaim the right to compensation so as to bind the lord of the manor without his consent, and that the covenant did not run with the land.

Semble, per Pollock, C.B., if the land had not been copyhold the grantee's covenant would have run with the land.

Per Martin, B. and Pigott, B. secus.

Action for undermining the plaintiff's land.

The first count of the declaration stated that the plaintiff was possessed of land, with a house, outbuilding and wall standing thereon, called the Ethringshall Parsonage, and was entitled to have the same supported by the land adjacent; that the defendants wrongfully, carelessly and improperly, and without leaving any proper or sufficient support, made underground excavations, and removed the land adjacent, whereby the ground on which the plaintiff's house, wall and buildings stood subsided and gave way; and alleged special damage.

The second count was for so wrongfully and negligently digging and working mines adjoining land and buildings of the plaintiff, that the same gave way and sank.

The third plea, as to so much of the declaration as related to the injury to the house, outbuildings and wall in the first count, and to the buildings in the second count, alleged that before and at the time &c., Benjamin Bickley was seised in fee of certain freehold lands adjoining the land in the declaration mentioned, in which freehold lands were mines and minerals, and was also seised in fee at the will of the lord of the manor of Sedgley (according to the custom of the manor), of the plot of land, being the land of the plaintiff mentioned in the declaration; and that on the 6th of May, 1834, he surrendered the copyhold plot to Charles Girdlestone, his heirs and assigns, at the will of the lord, according to the custom of the manor, but subject and liable as expressed in a deed made on the said 6th of May, 1834, between Bickley and Girdlestone, containing, *inter alia*, the following covenants entered into by Girdlestone, for himself, his heirs, executors, administrators and assigns, with Bickley, his heirs and assigns. The first covenant was, that Bickley, his heirs, assigns or lessee for the time being, should have full power of mining under lands coloured red¹ on a plan annexed to the indenture, for the purpose of getting the minerals under any other lands belonging to Bickley, or draining away water, or any other reasonable purpose, without making any compensation to Girdlestone, his heirs, &c., for the privilege reserved, and notwithstanding any damage or injury which might be sustained by him or them, in the exercise of such privilege; and also that for the purpose of laying dry the said mines and minerals and those under any lands belonging to Bickley, it should be lawful for him, his heirs, &c., at all times to drive levels, through the coal and ironstone under the plot of land so surrendered, for the purpose of draining away water from all the mines and minerals under land belonging to him, without making any compensation to Girdlestone, his heirs, &c., for the privilege reserved, or for any damage which he or they might sustain in the exercise of the said privilege, either to the surface of the land surrendered, or to any buildings erected thereon by Girdlestone, his heirs, &c. The other covenants were, that Girdlestone, his heirs, &c., should only erect on the land surrendered a church or chapel, house for the use of the minister, school-rooms and house, stable and gig-house; that if Bickley, his heirs, &c., should, in working mines under lands then belonging to him, do damage to any buildings authorized by the indenture to be built upon the land surrendered, he or they should not

(1) It was assumed throughout the argument that this description included the freehold lands subsequently conveyed to the defendant.

be compelled or compellable, either at law or in equity, to make any compensation to Girdlestone, his heirs, &c.; and that Girdlestone should indemnify Bickley, his heirs, &c., from all claims for such compensation which might be set up, and from costs incidental thereto.

The plea then stated divers mesne assignments, by which the said freehold lands belonging to Bickley adjoining the plaintiff's land became vested in the defendant, and alleged that the house, outbuildings and wall, in the first count mentioned, and the buildings in the second count mentioned, were part of the premises erected on the land in the declaration mentioned, in pursuance of the stipulation in the deed that Charles Girdlestone, his heirs and assigns, should only erect thereon a church or chapel and house for the use of a minister, school-rooms, with proper appurtenances, house for a master, and a stable and gig-house; and that the damage in the declaration mentioned happened solely in consequence of the defendants working in the adjoining freehold lands, and not from any working under the land in the declaration mentioned, nor elsewhere, and that such adjoining freehold lands were the lands mentioned in the first count of the declaration, as adjacent and near to the land, house, outbuildings and wall of the plaintiff, and were the lands which contained the mines in the second count mentioned.

The second replication to the third plea set out *in extenso* the deed mentioned in the plea. It recited that Bickley had on the day of the date of the indenture surrendered the land described therein to Girdlestone, his heirs, &c., but subject and liable as therein expressed, and that on the treaty for the purchase of the land it had been agreed that the covenants thereafter contained should be entered into; and after the operative part of the conveyance, contained ordinary covenants for quiet enjoyment, &c., and the covenants set out in the pleas. The replication next set out the surrender and admittance of Girdlestone, which were in the ordinary form. It then stated that the deed was not entered upon the rolls of the court of the manor, nor brought to the knowledge of the lord of the manor, or of the Commissioners for building New Churches, before the execution of the deed next mentioned, which was a deed executed by Girdlestone after his admittance, and by the lords of the manor, under the Church Building Acts, 58 Geo. 3, 59 Geo. 3. and 3 Geo. 4, and by which the copyhold land was enfranchised, and with the chapel, parsonage-house and school recently erected thereon, conveyed to the Commissioners for the purpose of being devoted to ecclesiastical purposes. The replication then stated that the Commissioners thereupon became seised in fee of the land mentioned in the declaration; that the church was afterwards consecrated, and the plaintiff in due form presented to the benefice and instituted and inducted, and became the lawful incumbent thereof, and was in lawful possession of the land with the house, outbuildings and wall erected thereon. It alleged finally that the sinking of the land in the declaration mentioned was not caused by the weight of the house, outbuildings, wall and buildings, or any of them, but solely by the wrongful acts of the defendant.

Demurrer.—The ground of demurrer stated was, that the covenant in the deed set out in the plea ran with the land thereby demised, and that the plaintiff held the same subject thereto.

The demurrer was argued in the spring of the year 1865, before Pollock, C.B., Martin, B. and Pigott, B. A written judgment was prepared by Martin, B., to which Pigott, B. assented, in the plaintiff's favour, on the ground that the covenants set out in the plea were not such as to run with the land, so as to bind the assignee of Girdlestone, and that it was immaterial that the lands conveyed to him were of copyhold and not freehold tenure. Pollock, C.B., dissented from this judgment, being of opinion that if the land had been freehold, the covenants would have run with the land. The case was directed to be re-argued on the question whether such covenants could run with copyhold tenements.

Gray (Staveley Hill with him) (Nov. 8, 1865), for the defendant, supported

the plea.—This plea was originally pleaded generally, but on the argument I felt that it ought to be restricted to the buildings only, and it has been amended accordingly.

[MARTIN, B.—No objection was raised to it on that ground. I thought the plea bad, but that a Court of equity might treat the covenant as a trust, and that the proper amendment would have been to have pleaded it as an equitable plea.]

We could not have pleaded an equitable plea. It is not a case of a trust. My contention is that the covenant acts as a re-grant by Girdlestone to Bickley of a right to get the minerals. The authorities on the point are collected in the note to *Spencer's case* (1 Smith's Lead. Cas. 43, 5th ed.). It is said that *Keppel v. Bailey* (2 Myl. & K. 517) is an authority against the defendant; but that was a case of a mere covenant. This is, in effect, a re-grant. The case, put simply, is this. A man who has a field conveys part of it to a grantee, who covenants that in the event of the vendor making works on his own portion so as to damage the land sold, he shall not be obliged to make compensation for it. The question is, whether such a privilege can be a subject of grant or not.

[MARTIN, B.—*Ackroyd v. Smith* (10 Com. B. Rep. 164; s. c. 19 Law J. Rep. (N.S.) C.P. 315) and *Keppel v. Bailey* (2 Myl. & K. 517) say that such a grant cannot be made.]

Those are decisions only on the particular circumstances then existing. *Rowbotham v. Wilson* (8 El. & B. 123; s. c. 8 H.L. Cas. 348; 30 Law J. Rep. (N.S.) Q.B. 49) was a case in which Inclosure Commissioners, by their award, had allotted the surface of lands to one commoner and the mines to another. The allottee of the surface signed the award, which contained a covenant that persons working the mines should not pay compensation for injury to the surface. After houses had been built on the surface and the minerals had been extracted from the mines for more than twenty years the ground gave way, and it was held that the assignee of the surface-owner could not recover compensation from the assignee of the mine-owner. That was a decision of the House of Lords in a similar case to this, and is in the defendant's favour.

[MARTIN, B.—In that case in the Exchequer Chamber Mr. Baron Watson and Mr. Justice Cresswell differed from the rest of the Court. I founded my opinion on some passages in *Sheppard's Touchstone*, and thought that the principles applicable to easements and servitudes did not apply.]

This is clearly not a case of a servitude.

Macnamara (Mellish with him), for the plaintiff, supported the demurrer.—The facts in this case take it out of the decision in *Rowbotham v. Wilson* (8 El. & B. 123; s. c. 8 H.L. Cas. 348; 30 Law J. Rep. (N.S.) Q.B. 49), where all the parties had notice of the award. The surrender to Girdlestone was absolute in its terms, and no notice of the deed was given to the lord of the manor. A surrender may be conditional, no doubt; but a lord is not bound to receive a surrender clogged with a trust—*Watkins on Copyholds*, p. 116, *Flack v. Downing College* (13 Com. B. Rep. 945; s. c. 22 Law J. Rep. (N.S.) C.P. 229). The lord of the manor had an interest in the preservation of the land, and Girdlestone could not bind him by his covenant.

[POLLOCK, C.B.—Has the lord of the manor such an interest in the copyhold land as would enable him to bring an action against a person who irremediably injured it or wholly destroyed it?]

Yes; for he is interested in the fines.

[POLLOCK, C.B.—Then your argument will be, that no tenant could, by covenant with another person, disclaim the right to compensation for irremediable injury done to the land, so as to bind the lord.]

He could not give another person a right to do that which, if he did it himself, would be a ground of forfeiture. There is another point. The land was enfranchised after the deed and before any injury was sustained. The lord of the manor was a party to the enfranchisement and gave his title to the plaintiffs. It has been decided, in the case of *Brabant v. Sir Thomas Wilson*

(1 Law Rep. Q.B. 44; s. c. 35 L. J. Q.B. 49), that the effect of enfranchisement is to put an end to all servitudes.—He also referred to *Peachey v. the Duke of Somerset* (1 Str. 447) and *Watkins on Copyholds*, pp. 332, 362.

Gray replied.

Cur. adv. vult.

On the 26th of February—

MARTIN, B. said: This case was argued more than a year ago, and an elaborate judgment was prepared, which is now in my hand, and to which my Brothers Channell and Pigott agreed, but from which the Lord Chief Baron dissented. After the second argument the Lord Chief Baron thinks that the fact that the plaintiff's land was copyhold makes a difference; and therefore there is the unanimous judgment of the Court that on the demurrer to this plea the plaintiff is entitled to judgment. As the Lord Chief Baron differs from the prepared judgment, it will not be delivered.

Judgment for the plaintiff.

[IN THE COURT OF EXCHEQUER.]

April 17, 1866.

PEARCE AND ANOTHER v. BROOKES.

35 L. J. Ex. 134; L. R. 1 Ex. 213; 14 L. T. 288; 14 W. R. 614; 12 Jur. N.S. 342.

See *Waugh v. Morris*, [1873] E. R. A.; 42 L. J. Q.B. 57; L. R. 8 Q.B. 202; 28 L. T. 265; 21 W. R. 438 (Q.B.). Referred to, *Scott v. Brown*, [1892] E. R. A.; 61 L. J. Q.B. 738; [1892] 2 Q.B. 724; 67 L. T. 782; 41 W. R. 116 (C. A.); *Saxby v. Fulton*, [1909] E. R. A.; 78 L. J. K.B. 781; [1909] 2 K.B. 208; 101 L. T. 179 (C. A.); *Affill v. Wright*, [1911] E. R. A.; 80 L. J. K.B. 254; [1911] 1 K.B. 506; 103 L. T. 834 (K.B. D. Div.).

Contract—Illegality—Ex Turpi causa, &c.—Contract in Aid of Prostitution.

CONTRACT.—*It is a good defence to an action for the hire of a brougham that the defendant was a prostitute, and that the plaintiffs at the time of hiring knew it, and that the brougham was for the purpose of display; and it is not necessary to prove that the brougham was supplied in the expectation that the defendant would pay for it out of her earnings as a prostitute.*

The declaration set out an agreement between the plaintiffs and the defendant, whereby the plaintiffs agreed to supply the defendant with a new *miniature brougham* on hire until the whole of the purchase price (135 guineas) was paid (the period not to exceed twelve months), the defendant to have the option to purchase it, and to pay down 50*l.*, and the balance, with 5*l.* per cent. interest thereon, by instalments periodically, so as to complete the purchase within the twelve months; and in case the brougham should be returned on the plaintiffs' hands before a second instalment was paid, a forfeiture of fifteen guineas to be paid in addition to the 50*l.*, and also any damage beyond that occasioned by fair wear. The declaration then averred that the plaintiffs supplied the defendant with a carriage accordingly, and that, before a second instalment was paid and before action, the defendant returned the brougham on the hands of the plaintiffs, damaged otherwise than by fair wear, and the plaintiffs incurred certain expenses in repairing such damage; and all things happened, &c. to entitle them to bring and maintain this action, &c.

There were also common *indebitatus* counts.

The defendant pleaded *inter alia* that at the time of making the supposed

agreement she was, to the knowledge of the plaintiffs, a prostitute; and that the supposed agreement was made for the supply of a brougham to be held by her as such prostitute, and to assist her in carrying on her said immoral vocation, as the plaintiffs when they made the said agreement well knew, and in the expectation by the plaintiffs that the defendant would pay the plaintiffs the money to be paid by the said agreement out of her receipts as such prostitute. Issue thereon.

The action was tried at the London Sittings after Michaelmas Term, 1865, before Bramwell, B., when the jury found that the plaintiffs at the time of the hiring knew that the defendant was a prostitute, and that the brougham was for the purposes of display.

Montagu Chambers, in Hilary Term, obtained a rule to enter the verdict for the plaintiffs for the fifteen guineas penalty, on the ground that the third plea was not proved, and that the evidence did not support the finding of the jury.

W. D. Scymour (with whom was *Beresford*) shewed cause against the rule.—The defendant having proved that she was a prostitute, and that the plaintiffs knew it, there was no necessity to prove the further allegation in the plea that they expected to be paid out of the defendant's professional gains. The only authority in support of the plaintiffs' view on this point is a *dictum* of Lord Ellenborough at *Nisi Prius*, in *Bowry v. Bennett* (1 Campb. 348).

[BRAMWELL, B.—The manner of payment is quite beside the question.]

Crisp v. Churchill (1 Bos. & P. 340; s. c. 1 Campb. 348, n.) and *Lloyd v. Johnson* (1 Bos. & P. 341; s. c. 1 Campb. 348, n.) shew that a line is to be drawn between articles of necessary attire and articles of luxury, such as this carriage certainly was to a person in the defendant's position. After the finding of the jury that the brougham was for the purpose of display, it must be taken that the plaintiffs were acting in direct furtherance of immorality, and, therefore, the maxim *ex turpi causa non oritur actio* applies, and prevents them from recovering.

Montagu Chambers and *J. O. Griffiths*, in support of the rule.—The allegation in the plea as to the method of payment was necessary, and ought to have been proved by the defendant, according to *Bowry v. Bennett* (1 Campb. 348) and *Girardy v. Richardson* (1 Esp. 13), and the plea would have been demurred to if it had not contained this allegation. By finding that the brougham was used for the purposes of *display*, the jury have waived the real question. In these days, a brougham cannot be said to be a mere luxury, nor can the Court draw any line between necessities and luxuries in a case like this. If the article supplied can be used for any purpose whatever other than an immoral purpose, then the plaintiffs ought to succeed, according to *Crisp v. Churchill* (1 Bos. & P. 340; s. c. 1 Campb. 348, n.) and *Lloyd v. Johnson* (1 Bos. & P. 341; s. c. 1 Campb. 348, n.), in which latter case Buller, J. said, that "it is impossible for the Court to take into consideration which of the articles (*i.e.* expensive dresses, and gentlemen's nightcaps, washed by the plaintiff for the defendant, who was a prostitute,) were used by the defendant for an improper purpose, and which were not."

POLLOCK, C.B.—Since the case of *Cannan v. Bryce* (3 B. & Ald. 179), cited by Lord Abinger in *M'Kinnell v. Robinson* (3 Mee. & W. 434), I take the rule to be, that any person who contributes to the performance of an illegal act, with a knowledge that the subject-matter of his contract is intended to be illegally applied, cannot recover upon the contract; and that the old notion that, in order to bar the plaintiff from succeeding, it must be shewn that the price was to be paid out of the fruits of the illegality, has ceased to be part of the law, if it ever was part of the law, and I do not think that we should now make a distinction between that which is illegal and that which is immoral. The rule now is, *ex turpi causa non oritur actio*, whether the turpitude consist in immorality or illegality. If, therefore, this carriage was furnished for the purpose of enabling the defendant to make that display which was favourable

to her immoral views, it appears to me that no cause of action can arise out of the contract. For certain purposes in criminal law, certain matters must be proved distinctly and absolutely; but I do not think that is at all necessary for the purpose of the administration of civil justice. If enough be given in evidence to satisfy a jury of the nature of the defendant's profession, and that the plaintiffs knew it, and were aware that the article supplied was to facilitate her success in her profession, I think that is quite sufficient, and I agree with my Brother Bramwell that the verdict of the jury expressed all that was necessary for the purposes of this defence.

MARTIN, B.—This plea really contains three averments; but in my judgment it is a good plea without the last averment, and there was therefore no necessity to prove that averment. When it was proved that the defendant was, to the knowledge of the plaintiffs, a prostitute, and that the brougham was hired for the purpose of *display* (which is a very intelligible word), *i. e.* to aid and assist her in acting successfully as a prostitute—then the substance of the plea was proved. If it be a portion of a contract between lender and borrower that the money is to be applied to an illegal purpose, that is one thing; but if the money be simply lent to the borrower, the borrower having the intention of so applying it, and the lender merely knowing that he may so apply it, that is another matter; and I have a very strong impression *Cannan v. Bryce* (3 B. & Ald. 179) has been commented upon and dealt with upon that principle.¹ But upon the simple ground on which the plea in this case was founded, I think this rule should be discharged.

PIGOTT, B.—The principle of law is contained in the legal maxim, and there is no doubt that where persons engage to be parties to immoral contracts, they must not come to Courts of justice and seek to enforce them. The only question here is, whether the plea is proved. The jury are entitled to call in aid their knowledge of the usages of society; and if this woman was a prostitute, and was known to be such, and wanted an ornamental brougham, there is very little doubt that she wanted it for the purpose of plying her illicit trade. That was so found in effect by the jury, and I think there was sufficient evidence to support that finding. Then as to the other question, whether it was necessary that the plaintiffs should look to the profits of the business carried on by means of this brougham in order to constitute a *turpis causa*, I have no doubt whatever that the plaintiffs knew very well that the defendant's only means of paying would arise out of her trade; and Lord Ellenborough (as it seems to me) only makes use of the expression in *Bowry v. Bennett* (1 Campb. 348) as to "expecting to be paid from the profits" as an illustration of what amounts to appearing to do something in furtherance of the prostitution.

BRAMWELL, B.—There is no doubt this woman was a prostitute, and that the plaintiffs knew it. At any rate the jury found that they did. Then the only other fact in dispute was, for what purpose did she hire the brougham, and for what purpose did they let the brougham? As to the purpose with which she hired it, there was no other means of knowing, excepting that the jury might, as they did, apply their knowledge of the affairs of life to this unlawful transaction. For that reason, it seems to me, they might infer that this woman was hiring the brougham for the purpose for which they said she did hire it, and of which the jury shewed their intelligent appreciation by using the expression "for display." I take it, therefore, that she was a prostitute; that the plaintiffs knew it; and that she hired this brougham for the purpose of display, that is to say, for the purpose of pursuing and following her calling. The difficulty I had was this,—although she hired it for that purpose, can it be truly said the plaintiffs let it for that purpose? I should continue to feel this difficulty, as a matter of reasoning, were it not for *Cannan v. Bryce* (3 B. & Ald.

(1) See *Hodgson v. Temple*, 5 Taunt. 181; *Gas Light and Coke Company v. Turner*, 5 Bing. N.C. 666, per Tindal, C.J., affirmed in error, 6 Bing. N.C. 324; *Feret v. Hill*, 15 Com. B. Rep. N.S. 207; s. c. 23 Law J. Rep. (N.S.) C.P. 185; and per Lord Lyndhurst, C., in *Quarrier v. Colston*, 1 Phill. 151.

179) and *M'Kinnell v. Robinson* (3 Mee. & W. 434), where the Court decided that it is not necessary that it should be part of the bargain that the subject-matter of the supposed unlawful contract should be unlawfully used, but that it is enough that it was handed over to the borrower or hirer, and that he should apply it or have the purpose or intent of applying it to an illegal use. It seems to me then that we are precluded by authority in this case; and it being made out that the defendant was a public prostitute, that the plaintiff knew it, and that she hired the brougham for the purpose of her prostitution, these cases seem to shew that the defendant had a good defence to the action. As to the allegation in the plea, which I said at the trial need not be proved, namely, that the plaintiffs expected to be paid out of the receipts of prostitution, it must not be supposed we are overruling anything decided by Lord Ellenborough. It is manifest to me that Lord Ellenborough could not have meant to lay down that the thing could not be illegal, unless there was a stipulation that the payment was to be out of the proceeds of the illegal matter, because, if so, he would have said in *Bowry v. Bennett*, that the bargain was that the money was to be paid out of the proceeds. If a man and woman had both been engaged in hiring this carriage, and the man had hired the brougham for the woman, then although she put it to the same purpose, yet, inasmuch as he was to pay from his own funds, the transaction would be perfectly lawful according to the plaintiff's argument. But how can it be that, if the same thing be done with the same purpose, it should be lawful when done by the man and not lawful when done by the woman? It seems to me that this allegation was not a necessary part of the plea, and that it was, therefore, not necessary to prove it.

POLLOCK, C.B.—As to *Cannan v. Bryce* (3 B. & Ald. 179), if money be lent with a doubt as to whether it is to be applied to an illegal purpose or not, the question must be left to the jury. If it be borrowed generally, but afterwards applied to an illegal purpose by the borrower, the case of *Cannan v. Bryce* (3 B. & Ald. 179) would not apply. That case rests on this, that the money was borrowed for the especial purpose of satisfying an illegal design.

Rule discharged.

[IN THE COURT OF EXCHEQUER.]

April 17, 1866.

BOLINGBROKE AND WIFE, *administratrix, &c.*, v. KERR.

35 L. J. Ex. 137; L. R. 1 Ex. 222; 14 L. T. 365; 14 W. R. 657.

Distinguished, *Moseley v. Rendell*, [1871] E. R. A.; 40 L. J. Q.B. 111; L. R. 6 Q.B. 338; 23 L. T. 774; 19 W. R. 619 (Q.B.). Reviewed and explained, *Abbot v. Parfitt*, [1871] E. R. A.; 40 L. J. Q.B. 115; 24 L. T. 469; 19 W. R. 718 (Q.B.).

Practice—Misjoinder of Plaintiffs—Administrator—Assets.

EXECUTOR AND ADMINISTRATOR.—*B. and his wife, who was administratrix of her father, carried on the father's business together for the benefit of his estate; and two years after the intestate's death goods were supplied to the defendant, which were made of materials purchased with money received by the wife from the estate:—Held, that the debt due from the defendant was not "assets," and that the wife could not sue in her representative character to recover the price of the goods.*

This action was brought by Edward Bolingbroke and Harriet Ann, his wife, the said Harriet Ann being administratrix of James Augustus Heavens,

deceased; and the declaration was for goods sold and delivered and work done, &c., "by the said Harriet Ann, as such administratrix as aforesaid."

At the trial, before Bramwell, B., at the Middlesex Sittings in Hilary Term, 1866, it appeared that the plaintiff Harriet Ann married the plaintiff Edward Bolingbroke in 1860, shortly after the death of her father, the intestate; and that she and her husband carried on the father's business together for the benefit of the deceased's estate, and that the goods, &c., which were the subject-matter of the action, had been made from materials purchased with money which the wife had received from the estate, and were supplied to the defendant in September, 1862.

Bramwell, B. thereupon ruled that the wife was improperly joined as a plaintiff, and directed a nonsuit, reserving leave to the plaintiffs to move to set it aside, and enter a verdict for 73*l.*, the Court to make such amendments as the Judge had power to make at Nisi Prius.

Holl having obtained a rule accordingly,

E. C. Willoughby now shewed cause.—The goods were not sold by the wife in her capacity as administratrix, but merely as agent for her husband. They never were the goods and chattels of the intestate "whilst living and at the time of his death" within the meaning of the ordinary grant of letters of administration.¹ The contract here arose two years after the intestate's death, and was therefore entirely personal to the administratrix. The case differs from *Werner v. Humphreys* (2 Man. & G. 853; s. c. 10 Law J. Rep. (N.S.) C.P. 214; 1 Williams on Executors, 788), where the work had been partly done in the intestate's lifetime. The rule deduced from that case and *Edwards v. Grace* (2 Mee. & W. 190; s. c. 6 Law J. Rep. (N.S.) Exch. 68; 1 Williams on Executors, 787) is, that the executor can only sue in his representative character when the money recovered would be *assets*. *Gibbett v. Read* (9 Mod. 459; s. c. 2 Williams on Executors, 1498) may seem at first sight in favour of the plaintiffs, but it does not really touch the point; for the goods supplied to the defendant Kerr never were the intestate's goods, and could not be assets.

[He also contended that this was not a case for amendment, under the 35th section of the Common Law Procedure Act, 1852, citing *Bradworth v. Foshaw* (10 W. Rep. 760; and Day's Common Law Procedure Acts, p. 165) and *Garrard v. Giubilei* (31 Law J. Rep. (N.S.) C.P. 181, 270).]

Holl, in support of the rule.—According to *Gibbett v. Read* (9 Mod. 459; s. c. 2 Williams on Executors, 1498) and other cases in *Williams on Executors* (Vol. 2, pp. 1496, et seqq.), the money recovered here would be "assets"; and therefore the wife may maintain the action in her representative capacity—*Cowell v. Watts* (6 East, 405).

[*POLLOCK, C.B.*—The money might be "assets" in equity, without giving the administratrix the legal right to sue.]

Holl also contended that an amendment could be made under the 222nd section of the Common Law Procedure Act, 1852.

The COURT, however, intimated very clearly that in their opinion the wife ought not to have been joined as plaintiff, and that the nonsuit was right; and the plaintiff thereupon, at the suggestion of the COURT, accepted an offer made by the defendant, and the case ended in a

Stet processus.

(1) For this form, see 1 Williams on Executors, 5th edit. 392.

[IN THE COURT OF EXCHEQUER.]

April 21, 1866.

THE ATTORNEY GENERAL *v.* UPTON AND OTHERS.

35 L. J. Ex. 138; L. R. 1 Ex. 224; 14 L. T. 334; 14 W. R. 732; 12 Jur. N.S. 489.

Distinguished, *Attorney-General v. Charlton*, [1877] E. R. A.; 46 L. J. Ex. 750; L. R. 2 Ex. D. 398; 37 L. T. 211; 26 W. R. 154 (C. A.): affirmed, [1880] E. R. A.; 49 L. J. Ex. 86; L. R. 4 App. Cas. 440; 40 L. T. 760; 27 W. R. 921 (H.L.). Referred to, *Grenfell v. Inland Revenue Commissioners*, [1876] E. R. A.; 45 L. J. Ex. 465; L. R. 1 Ex. D. 242; 34 L. T. 426; 24 W. R. 582 (Ex. D.). Not applied, *Attorney-General v. Mitchell*, [1881] E. R. A.; 50 L. J. Q.B. 406; L. R. 6 Q.B. D. 548; 44 L. T. 580; 29 W. R. 683 (Q.B. D.).

Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 2, 4, 10.—*General Power of Appointment*—"Succession"—"Predecessor."

DEATH DUTIES.—*H*, by will dated in 1851, left certain real estate to his wife *C*, for life, giving her a general power of appointment. He died in 1856. *C* exercised her power of appointment in 1858, in favour of *E*, the wife of the testator's nephew:—Held (dubitante Martin, B.), that *E*'s interest in the annuity was a "succession" within the meaning of the *Succession Duty Act*, 1853, and that she took from *C* as "predecessor," and was therefore liable to pay a duty of 10l. per cent.

In re Barker (30 Law J. Rep. (N.S.) Exch. 404) commented upon.

Rear-Admiral Henry Fanshawe, by his will, dated the 14th of April, 1851, limited certain real estate to the use of his wife, Caroline Fanshawe, for life, with remainder to such uses as she should appoint; and in default of appointment, to certain uses for the benefit of his nephews, Charles Simon Faithful Fanshawe and John Faithful Fanshawe, and their respective issue male.

Rear-Admiral Fanshawe died on the 9th of August, 1856, after the time appointed for the commencement of the *Succession Duty Act*, 1853, without having revoked or altered the before-stated disposition of his real property; and upon his death, his widow by reason of such disposition became beneficially entitled in possession to the said real property during her life, and afterwards, in exercise of her power of appointment, by a certain deed-poll, dated the 3rd of August, 1858, she limited the lands to the use and intent that the defendants, and the survivors and survivor of them, &c. should, during the lives of Elizabeth Fanshawe, the wife of the said John Faithful Fanshawe, and their children, and the life of the longest liver of them, receive yearly an annuity of 200l. free from deduction, to be charged upon the same lands, upon trust to pay the same to the said Elizabeth Fanshawe during her life for her separate use.

Caroline Fanshawe, the admiral's widow, died in 1863, leaving the said Elizabeth Fanshawe surviving her; and the defendants on her behalf became entitled to the receipt of the annuity of 200l.

The Crown claimed duty in respect of the annuity, on the ground that the interest of Elizabeth Fanshawe in the annuity was a "succession" within the meaning of the *Succession Duty Act*, 1853; and, further, that the proper duty was 10l. per cent., inasmuch as the interest was derived from Caroline Fanshawe (the widow and appointor) as "predecessor," a stranger in blood to both Elizabeth Fanshawe and her husband.¹

(1) The 2nd section of the *Succession Duty Act* is as follows: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying *after* the time appointed for the commencement of this act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death

The defendants resisted, on the ground that the interest of Elizabeth Fanshawe in the annuity was not a "succession" within the meaning of the Succession Duty Act, 1853; and, further that if it were, her interest was not derived from Caroline Fanshawe, but from the testator Rear-Admiral Fanshawe, and that therefore the proper rate of duty was 3l. per cent. only.

The Attorney General and The Solicitor General (Locke and Pemberton with them), for the Crown.—Caroline Fanshawe the widow and the donee of the power would have been liable to succession duty, but that she stood in the relation of wife to the testator; and by exercising her power of appointment she created a new succession, by virtue of which she must be regarded as the "predecessor" of Elizabeth Fanshawe. Had the widow given the property *de suo*, Elizabeth would have had to pay 10l. per cent., being a stranger in blood to the widow; and the same duty must be paid here, notwithstanding that the annuity is given in exercise of a power. To prevent technicality, the legislature says that, though there be apparently only one operation, there are in fact two operations constituting the succession. And this is clearer still from the analogy to the Legacy Duty Acts, which form the foundation of the Succession Duty Act and are *in pari materia* with it. Under the 36 Geo. 3. c. 52. ss. 7, 18, legacy duty is payable both by the donee of the power and by the appointee—*Drake v. the Attorney General* (10 Cl. & F. 257); and the 4th section of the Succession Duty Act¹ has an effect corresponding to that of the 18th section of the Legacy Duty Act—*The Attorney General v. Gardner* (32 Law J. Rep. (N.S.) Exch. 84) and *In re Wallop's Trusts* (33 Law J. Rep. (N.S.) Chanc. 351).

[MARTIN, B. referred to the 33rd section.²]

That section would have applied if the testator and Caroline Fanshawe had not been husband and wife. This case is not like *Lovelace's case* (28 Law J. Rep. (N.S.) Chanc. 489), *The Attorney General v. Lord Braybrooke*³ and *Barker's case* (30 Law J. Rep. (N.S.) Exch. 404), which were not within the 4th section at all, and have therefore nothing to do with this. In *Barker's case* (30 Law J. Rep. (N.S.) Exch. 404) there was a power subsisting in 1850, three years *before* the passing of the act, and the 2nd section¹ applied; whereas this is the case of a person having a power of appointment taking effect *after* the passing of the Succession Duty Act, and therefore clearly within the 4th section.

Bovill and Hannen, contra.—Caroline Fanshawe had no "property" in anything but the life estate which her husband gave her, and the exercise of the power by her was not a "disposition" within the meaning of the Succession Duty Act. It could not be the intention of the legislature that two duties should be payable in respect of one interest. The Legacy Duty Acts have nothing to do with the case, their language being entirely different from that of

of any person dying *after* the time appointed for the commencement of this act, to any other person, in possession or expectancy, *shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession';* and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponent, testator, obligor, ancestor or other person *from whom the interest of the successor is or shall be derived.*"

The 4th section is: "Where any person shall have a *general* power of appointment, under any disposition of property *taking effect upon the death of any person dying after* the time appointed for the commencement of this act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed *as a succession derived from the donor* of the power; and where any person shall have a *limited* power of appointment, under a disposition taking effect, upon any such death, over property, *any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor.*"

(2) This section enacts, that "where the donee of a general power of appointment shall become chargeable with duty in respect of the property appointed by him under such power, he shall be allowed to deduct from the duty so payable any duty he may have already paid in respect of any limited interest taken by him in such property."

(3) 5 Hurl. & N. 488; s. c. 29 Law J. Rep. (N.S.) Exch. 283: and in error, 31 Law J. Rep. (N.S.) Exch. 177.

the Succession Duty Act. The whole scope of the act is not to create a property, but simply to define a "succession" for the purpose of imposing a duty on successions, and the duty here (if any) is not imposed on the person taking under the appointment. The effect of the 4th section is, that in the case of a *general* power of appointment, the person *exercising* the power is to pay the duty; whereas when the power is *limited*, the *appointee* pays; and in both cases the succession is to be deemed a succession from the creator of the power—*The Attorney General v. Lord Braybrooke*.³ And in *Lovelace's case* (28 Law J. Rep. (N.S.) Chanc. 489) Lord Justice Turner says, that "the express provision of the 4th section, that the donee of a power should be a successor, would in the cases in which it applied override the provision in the 2nd section, placing the appointee in that position." Again, if any duty at all be payable by Elizabeth Fanshawe, then the Court is bound by the *ratio decidendi* in *Barker's case* (30 Law J. Rep. (N.S.) Exch. 404), which shews that the rate must be 3l. per cent. The act is constructed on the hypothesis that there may be several successions, and the 4th section is merely intended to hit the case where a donee might have escaped duty but for that section. It says that the donee takes a succession—from whom he takes it is not the question. The first part of the 4th section deals with the succession acquired by the *donee of a general* power when he exercises that power. The second branch deals with the succession of the *appointee of a limited* power; but the case of an *appointee under a general* power acquiring a succession by the exercise of that power—even if that be the case of Elizabeth Fanshawe—is not at all touched by the 4th section, but is left to the operation of the 2nd, and therefore according to the ordinary fundamental rule of construction, the appointee takes as through the limitation in her favour created by the exercise of the power had been introduced into the instrument conferring the power.

The Attorney General, in reply, was stopped by the Court.

[The following cases were also mentioned during the argument—*In re Capdevielle* (33 Law J. Rep. (N.S.) Exch. 306), *The Attorney General v. Brackenbury* (32 Law J. Rep. (N.S.) Exch. 108), *The Attorney General v. the Earl of Sefton* (32 Law J. Rep. (N.S.) Exch. 230), *The Attorney General v. Floyer* (31 Law J. Rep. (N.S.) Exch. 404) and *The Attorney General v. Partington* (33 Law J. Rep. (N.S.) Exch. 281).]

POLLOCK, C.B.—I am of opinion that in this case the Crown is entitled to duty at the rate of 10l. per cent. I think that *In re Barker* has nothing to do with the present case. In that case the power was created *before* the act came into operation, and therefore the 4th section had no effect, and we had nothing to do with it at all; whereas on the present occasion we have.

The act of parliament appears to me to have been remarkably well drawn. I think very few public acts are entitled to so much commendation, in shewing a perfect acquaintance with the subject-matter dealt with, and with the means of producing the results which were obviously in the intention of those who framed the law. The real property law of this country is perfectly well known to be extremely artificial, creating an apparent difference, and professing to create a great difference, where in substance and in reality there is none,—making a difference between an estate left to a man and his heirs, and an estate left to a man for his life, with power by deed to dispose of the reversion, which he might therefore instantly dispose of by himself, giving himself the entire fee simple. The law makes a distinction between the one and the other properly enough, because in the one the man is required to do a certain act before he can take anything but the life estate.

Here the testator left to his widow an estate for life, with power by deed to dispose of the remainder. A person to whom an estate is so left may, no doubt, say, "I want nothing more than the estate for life, and I shall not encumber myself with anything else." A person in that case will be liable to one kind of succession duty, payable on the estate for life. But if the person having the power by deed to dispose of the remainder choose to do so, the act

then says, " You shall be considered, *eo instanti*, as having taken an estate in fee simple, for you have exercised your power in favour of yourself, you have done an act shewing that you meant to take the benefit of being owner in fee simple, and you shall be considered as having taken it as if it had so been given to you; and you shall pay a certain duty accordingly."

It appears to me that, therefore, Caroline Fanshawe became exactly in the same position as if the whole estate had been left to her; for the moment she exercised the right to dispose of the estate, she took it as if she had taken the whole from her husband.

If the case had not fallen within the 4th section, very likely 3l. per cent is all that would have been claimed; but it is within the 4th section, and the consequence is that the wife of the testator in reality and in substance took the whole property; and it is she who gives it, and not the creator of the power; and therefore the appointee takes under Mrs. Caroline Fanshawe, who was no blood-relation to her, and the rate of duty is 10l. per cent.

MARTIN, B.—I am not quite clear that the defendants' contention is not right. But I have not so clear an opinion as to induce me to differ from the rest of the Court.

It seems to me that this question depends upon the definition of the term " succession " in the 1st section of the act of parliament, upon the 2nd section, upon the 4th section, and upon the 33rd section; and that one must examine all these sections for the purpose of ascertaining what the real meaning of this statute is. The difficulty arises from the 33rd section, which points to this, that the donee of a general power of appointment shall, in some instances, be liable to pay some duty in addition to what he has already paid. The 1st section enacts that " the term ' succession ' shall denote any property chargeable with duty under this act." The 2nd is a general enactment. And I apprehend that, if it had stood alone, the person taking under a power would by reason of the 2nd section, be liable to duty as taking from the settlor, and that, too, according to the rule of law, that a person taking under a power takes as if his name were inserted in the instrument creating the power. The 3rd section may be set entirely aside; and the 4th section may be read as if it came in immediately after the 2nd, and as if the two were *in pari materia*.

Now, it is clear that a distinction is to be drawn between a *general* power and a *limited* power, for that is an object of the 4th section, as it points out. The first part of the 4th section relates to the *general* power; and it seems to me, giving that a reasonable construction, that the statute has created a constructive property in the donee of the power equal to that which he gives to the person in whose favour he executes the power. In this instance the donee gives to Mrs. Elizabeth Fanshawe and her children an annuity of 200l., and it seems to me that, reading that with the definition of ' succession,' Mrs. Caroline Fanshawe must be deemed to have had at the moment of her death the property or interest (as property chargeable with duty under this act) from her husband as donor of the power; and that the construction which has been put upon it, that she is to be deemed the owner of the property, and to be disposing of it as a property obtained by her, and creating a new succession in the person in whose favour she exercises it, is not unreasonable. At the same time, the contention of the defendants that a construction might be given to it confining the matter to the donee of the power itself, and leaving any further interest created by her to be dealt with as if it fell under the 2nd section alone, is entitled to great consideration. With respect to *Barker's case*,³ the Attorney General there said that he was content with the 3l. per cent., and judgment was given as if that was clearly the right construction of the act of parliament. If there was anything wrong there, there is no reason why we should not say it was wrong, for there is nothing in it conclusive or binding upon us, so as to induce us to act upon the case. I have stated what appears to me to be a difficulty in the construction of the act of

parliament, although it does not operate so strongly upon my mind as to induce me to differ from my learned Brothers.

BRAMWELL, B.—I am of opinion that the Crown is entitled to judgment. I confess I do not understand the distinction that the then learned Attorney General made in *In re Barker* (30 Law J. Rep. (N.S.) Exch. 404). The ground upon which I proceed, independently of any opinion I may have expressed in that case (though I believe my present opinion is very much in conformity with it), is this, that the Crown is entitled, under the 2nd section; and that the 4th section does not give the Crown its title, but confirms that which it takes under the 2nd section. But if I am wrong in that opinion, then I say the 4th section must give the Crown a title.

It is conceded that if the estate had been devised to Mrs. Caroline Fanshawe, and she had then, out of her own estate, devised this annuity, the Crown would have been entitled to the duty of 10*l.* per cent. But it is said that, because another form of proceeding is used, (although in substance the same,) the Crown is not entitled to 10*l.* per cent.; the difference arising, not out of any matter of substance, but out of a mere matter of words. Now Lord Campbell, in *Lord Braybrooke's case*,³ reminded the House of Lords that "this statute, which by the same enactments imposes a tax on successions in every part of the United Kingdom, is to be construed not according to the technicalities of the law of real property in England or in Scotland, but according to the popular use of the language employed"; and Lord Kingsdown said in the same case, that "it was always more satisfactory to deal with the case on the substance and real effect of the transaction." Bearing those general considerations in mind, let us look at the 2nd section of the act. I know perfectly well that, as a matter of legal expression an appointee takes under the creator of the power, and not under the donee of the power. If there were any necessity for applying that technical rule to the interpretation of the 2nd section of the act, we must so apply it. But no technical words are used. Does any one mean to say that the legatees in this case will take their annuity "by reason of the disposition" which Admiral Fanshawe made of this property? I say, certainly not, in point of law. The "disposition" whereby the legatees take is the disposition which Mrs. Caroline Fanshawe made of the property. Then the word "succession" is not a word of art, nor a technical term, but a new word introduced into the law for the first time in this case. Again "the term 'predecessor' shall denote the settlor, disponent, testator, obligor, ancestor or other person"—not using again a term of art of any sort or kind—"from whom the interest of the successor is or shall be derived." From whom is the interest of these annuitants derived? Can it be said that it is derived from the Admiral, and not from Mrs. Caroline Fanshawe? These are ordinary English words, and ought to be construed by lawyers as ordinary Englishmen and not as lawyers would construe them. There is not one man in a hundred thousand who would not say that, in this case, the property was derived from Mrs. Caroline Fanshawe, and not from the Admiral. Let it be understood, as far as my opinion is of any importance, that I do not deny, or cast any doubt upon the rule of law, that where there is an appointment, the appointee comes in under the donor of the power, and not under the donee; but I say that that rule is not applicable here. I think this view of the case is corroborated by the 4th section, and not that the 4th section is in itself an intrinsic ground of reliance for the Crown in this case.

But supposing I am wrong, and that under the 2nd section alone the Crown would not have been entitled, then I think that inevitably, from the effect of the 4th section, the Crown must be entitled, because, although I fully appreciate the argument for the defendants that the object of the 4th section, together with other sections, was simply to shew what were "successions" and who were "predecessors," and what duty should be paid,—yet, when I find it here stated that the person exercising the general power of appointment "shall be deemed to be entitled at the time of his exercising such power to the property or interest thereby appointed, as a succession

derived from the donor of the power," it seems to me to follow that from that time he must create a new succession. Having got the property or interest as a succession derived from the donor of the power, it seems to me to follow that after that time he would be the new person from whom the succession is derived. It may be put in this way: devise by A. B. with power of appointment to C. D.; C. D. appoints to himself for life, and to E. F. in remainder in fee. In that case, at the time of his exercising such power, C. D. is to be deemed entitled to the property or interest as a succession derived from the donor of the power by virtue of which he operates. It must be so, as it seems to me. He is operating on all the interest he possessed, or rather all the interest which he operates upon is an interest taken to be derived *by him* from the donor of the power. But a portion of that interest is the estate in fee in remainder; and it cannot be said to *come to E. F.* from the original creator of the power.

With respect to the distinction that was made in *Barker's case* (30 Law J. Rep. (N.S.) Exch. 404) that the 4th section would make the granting of a general power of appointment when the power came into effect, take effect *after* the passing of the act, I cannot think that can have been the intention of the 4th section, and for these reasons: I cannot at all see why a different duty should be paid, or a different provision should be made with respect to those powers which come into effect *after* the passing of the act and those which came into effect *before*. If the legatees there were to take under the original power and pay a small or large sum, I see no reason why the statute should have contemplated such a case as that, and made a difference—either for or against them—between that case and this. Another difficulty I see in the way of it is this,—that the last part of the 4th section is, that "where any person shall have a *limited* power of appointment under a disposition taking effect upon any such death"; now it is perfectly manifest that that does not mean the power taking effect upon the death; and if it does not mean that in the *latter* part of the section, no more does it, to my mind, in the *former* part of the section. It seems to me, therefore, that the distinction under which the then Attorney General gave up the point in *In re Barker* (30 Law J. Rep. (N.S.) Exch. 404), although it may have been a very prudent distinction for him to take, is in reality an unfounded one; and I am compelled to say that, in my opinion, the Crown is in this case entitled under the 2nd section. But if I am wrong in that, then I think the Crown is entitled under the 4th section.

FIGOTT, B.—I am also of opinion that the Crown is entitled to 10l. per cent.; and I come to that conclusion from the construction which I put upon the two sections, the 2nd and the 4th, taken together, and being read as part of the same act. If it stood on the 2nd section alone, I should be of opinion that the Crown was only entitled to 3l. per cent., because it would appear to me then that Elizabeth Fanshawe would take by the operation of law from the Admiral, he being the person who created the power. It is not necessary to discuss that, because in my judgment the 4th section clearly gives the person who exercised this power the interest in the estate. That seems to me to have been the effect of the section, when Mrs. Caroline Fanshawe exercised her power of appointment. She was a person entitled, under the Admiral's will, to a general power of appointment; and the 4th section says that, "in the event of such person making an appointment thereunder, that person shall be deemed to be entitled at the time of exercising that power, to the property of interest thereby appointed." I take that to mean, "deemed to be entitled for all purposes." It is true the act goes on to say, "as a succession derived from the donor of the power." I apprehend that those words are added for the purpose of shewing that she shall be liable to pay duty as upon a succession from the donor of the power; but it still leaves the property vested in her, for all purposes; and being vested in her, she by the same act, it is true—though I do not see that that makes any difference—namely, by the same power of appointment, gives the estate, or a portion of

it, to Elizabeth Fanshawe. Then, from whom does the latter take it? I cannot see how it can be consistent to say that she takes it from the Admiral. She takes it, as it seems to me, from the Admiral's widow, under that appointment, and the word "predecessor," as defined in the 2nd section, may be properly so construed. Who but Caroline Fanshawe is "the person from whom," in this instance, "the interest of the successor" is derived? Those words ought to have had something appended to them, if they were to be construed otherwise; because, although according to the 2nd section alone, the predecessor would be the Admiral, yet, with what follows in the 4th section, Caroline's predecessor is the widow, who took *her* succession from the Admiral; and in the 2nd section there is no exception as to anything that follows, and that is because, as it seems to me, the 2nd and 4th are to be read together.

In fact, the widow took the estate when she exercised the power of appointment, and having taken the estate herself, then by appointing in favour of Elizabeth, she gave the latter the succession.

Judgment for the Crown.

[IN THE COURT OF EXCHEQUER.]

April 23, 1866.

BLUMBERG AND OTHERS v. ROSE AND ANOTHER.

35 L. J. Ex. 144; 4 H. & C. 311; L. R. 1 Ex. 232; 14 L. T. 365; 14 W. R. 657;
12 Jur. N.S. 378.

Debtor and Creditor—Composition Deed—Bankruptcy Act, 1861.

BANKRUPTCY.—A composition deed was expressed to be made between the debtors of the first part, a trustee of the second part, and the persons whose names were in the schedule thereto, thereafter called the creditors, of the third part. The deed recited a proposal to pay the creditors a composition by giving them promissory notes, "which the creditors had agreed to take in full satisfaction and discharge of their debts;" and recited also that the composition to be secured by the notes was payable to the non-assenting and non-executing creditors, and "such promissory notes had been deposited with the trustee to be held in trust for such last-mentioned creditors":—Held, that there was in this deed no inequality other than that which is necessarily incident to a deed where assenting creditors can bind non-assenting creditors; and that the deed was not bad by reason of its containing no provision compelling the trustee to tender the notes to the non-assenting creditors.

Declaration on a bill of exchange.

Plea, setting out a composition deed, executed in conformity with the Bankruptcy Act, 1861, and averring performance of all the necessary statutable conditions, &c.

Demurrer and joinder.

The deed was in the following terms: "This indenture, made the 30th day of August, 1865, between the debtors (the defendants) of the first part, a trustee of the second part, and the several persons whose names or firms are set forth in the schedule hereto, hereinafter styled creditors, of the third part. Whereas the said debtors, being unable to meet their engagements with their creditors, have proposed to pay them a composition of 12s. 6d. in the pound, by giving them respectively three joint and several promissory notes, payable at six, nine and twelve months from the date hereof, signed by the debtors respectively, which said several promissory notes the said creditors have agreed to take in full satisfaction and discharge of their respective debts;

and whereas the said composition to be secured by the said promissory notes is payable to creditors who have not executed or assented to these presents, and such promissory notes have been deposited with the said trustee, to be held by him in trust to deliver the same respectively to such last-mentioned creditors respectively on demand, as the said trustee doth hereby acknowledge: Now this indenture witnesseth, that, in consideration of the premises, each of the said creditors of the said debtors who shall have executed or otherwise assented to, or who shall be bound by these presents, for himself and his partners, and his and their respective heirs, &c., and so far only as may be done without prejudice to any security or suretiship, or any rights or remedies against any person other than the said debtors, and each of them, their and each of their heirs, &c., hereby release and discharge the said debtors, and each of them, their and each of their estate and effects, from all and every debts and debt and sums and sum of money due and owing by the said debtors to such creditors respectively, either alone or jointly with any partner or partners as aforesaid, of and from all judgments, executions, actions, suits, claims and demands whatsoever on account thereof; provided always that nothing herein contained shall discharge or prejudice any lien or security, or any suretiship held by any of the said creditors, and that the creditors who shall have executed or otherwise acceded to, or who shall be bound by, these presents, shall retain all their rights and remedies against any person other than the said debtors as if these presents had never been executed. And it is hereby declared that these presents are intended to operate as a composition deed, or deed of arrangement, executed by a debtor within the 192nd section of the Bankruptcy Act, 1861; and that all questions relating to the same, or any of the premises, shall be decided and determined according to the provisions of that act, with respect to composition deeds executed by a debtor in conformity with that section; and that these presents shall enure for the benefit of, and be effectual against, and binding in all respects upon all now-existing creditors of the said debtors; and that if there is anything herein not authorized by the said provisions of the said act to be introduced into a composition deed executed by a debtor in conformity with the said section, such unauthorized thing shall be considered as expunged as if it had never been inserted therein."

Holl, in support of the demurrer.—There is that inequality here between the scheduled and the non-scheduled creditors which makes the deed bad as against the latter. The scheduled creditors are parties to the deed, and had their promissory notes actually in hand at the time of the execution of the deed; whereas the non-scheduled are not parties to the deed, and only have their notes deposited in the hands of a trustee, who is under no obligation whatever to tender them the notes; and they may not even know that any deposit of the notes has been made for their benefit. A provision, making it obligatory on the trustee to tender to the non-scheduled creditors their notes, might easily have been inserted in the deed; and debtors are bound to take all reasonable means for the protection of *all* their creditors.

[BRAMWELL, B.—Does the rule as to the inequality apply where the debtor does the best he can for all?—*Scott v. Berry* (34 Law J. Rep. (N.S.) Exch. 193—per Bramwell, B. 197).]

Though the non-assenting creditors are not bound to execute the deed, the debtors are bound to make its provisions as fair to them as they can. It is consistent with this plea that the non-assenting creditors never heard of the deed, or knew there was a trustee.

Joyce appeared for the defendants, but was not called upon to support the plea.

POLLOCK, C.B.—I am very clearly of opinion that the inequality complained of here is not that kind of inequality which the statute contemplates. It is not possible, where there are two sets of creditors so essentially different, the one in the condition of having actually assented, and the other

of not having assented, and perhaps in entire ignorance of the deed, but that there should be a certain degree of inequality. The inequality insisted on in respect of this deed, which is in principle perfectly equal, affords no objection whatever. The deed is perfectly good, and is an answer to the action.

MARTIN, B.—This inequality is necessarily incident to a case where a person not executing is to be bound by persons executing; it is not possible to avoid it; and there is not a word in the act of parliament requiring that to be done which the plaintiffs wish to insist upon.

BRAMWELL, B.—That is my difficulty. It may be that the non-assenting creditor may have never had an opportunity of assenting or dissenting, because he never heard of the deed; and, no doubt, that constitutes an inequality in one sense; but it is not the sort of inequality which the statute has contemplated; for there is not one word in the statute as to all the creditors having notice of the deed. If a man gets the assent of the requisite proportion of his creditors, he need say nothing to anybody else about it. On the part of the plaintiffs, it is said that he ought to give notice to every one; but if we were to hold that the deed is bad because notice was not given, we should be indirectly compelling a man to do, in certain cases, that which the statute has not obliged him to do. Therefore we must hold that this deed is a good one, and not unequal.

PIGOTT, B.—I also think that this is a good deed under the 192nd section of the act, and that the inequality suggested is only that kind of inequality which is inherent to deeds of this nature.

Judgment for the defendants.

[IN THE COURT OF EXCHEQUER.]

April 25, 1866.

MANNING v. TAYLOR AND OTHERS.

35 L. J. Ex. 145; L. R. 1 Ex. 235; 14 W. R. 771.

Will—Construction—Devise of undivided Fourth Part.

WILL.—*A testator, being seised in fee of two undivided fourth parts of land under lease to different persons, devised one of them by the following words, "I give unto Joseph Manning all my undivided quarter of three fields in the parish of Plympton Maurice, and are at lease to Miss Elizabeth Palmer on three lives; conventional rent, 13s. 4d.; heriot, 10s. on each life dying; known and commonly called Castle Hayes; to be received by the said Joseph Manning or his father for him":—Held, that Joseph Manning took an estate in fee, and not an estate for life merely.*

Doe d. Atkinson v. Fawcett (3 Com. B. Rep. 274; s. c. 15 Law J. Rep. (N.S.) C.P. 244) *followed*.

Ejectment to recover possession of an undivided fourth part of lands called Castle Hayes, in the county of Devon. By consent and by an order of Bramwell, B., the facts were stated in a special case.

Previously to the year 1799 the lands called Castle Hayes were held in undivided fourth parts, and in that year John Hellyer purchased the fee simple of two of the said undivided fourth parts, subject to certain leases for lives then subsisting, but since determined.

His will, dated the 23rd of April, 1801, contained the following clause: "I give unto Joseph Manning, son of my daughter Elizabeth Manning, all my undivided quarter of three fields in the parish of Plympton Maurice, and

are at lease to Miss Elizabeth Palmer on three lives; conventional rent, 13s. 4d.; heriot, 10s. on each life dying; known and commonly called Castle Hayes; to be received by the said Joseph Manning or his father for him."

The contention of the plaintiff was, that this clause gave an estate in fee simple to Joseph Manning; that of the defendants was, that it gave a life interest only.

In a previous portion of the will the testator had given the other undivided quarter of Castle Hayes, describing it as "now rented by Mr. Benjamin Trickey at 20l. 16s. 8d. per year," to his daughter for life, and after her death to Joseph Lane, her son, without any words of limitation. With respect to some other tenements, the testator, after disposing of the rent bequeathed the fee expressly, and it was argued from this that he mentioned the fee whenever he intended it to be devised; but the Court held, that the context of the will did not throw any light on the meaning of the clause in dispute, and therefore the words of the other clauses of the will are not set out in this report.

John Lane and Richard Manning, the father of Joseph Manning, were nominated executors of the will, and were directed to receive the rents of all that the testator had given to their children till they should each attain the age of twenty-one years.

The testator died in 1802. Joseph Manning entered into possession of the premises bequeathed to him, and died in 1846, devising all his real and personal estate to his wife, who died intestate in 1864. Upon the death of Joseph Manning, the heirs-at-law to John Hellyer gave notice to the tenants of the undivided fourth part of Castle Hayes devised to him to pay the rents to them, and the rents were ever after received by them and by the defendants, who had succeeded to their rights. The plaintiff was the son of Joseph Manning, and he issued the writ in this action in November, 1864.

The question for the opinion of the Court was, whether Joseph Manning took an estate in fee or for life in the premises, the verdict being to be entered for the plaintiff or the defendants accordingly.

Joshua Williams (*Anstie* with him), for the plaintiff.—Although previously to the Wills Act, 7 Will. 4. & 1 Vict. c. 26, a devise of real estate to A. B. without words of limitation gave him only an estate for life, yet a devise of an undivided moiety in land, where the testator was seised in fee of such moiety, was held to give an estate in fee because the testator was considered to use the word "moiety" as a description of his estate in the land, and not as a description of the land itself. The rule is thus laid down in 2 *Jarman on Wills*, p. 264, 3rd edit.: "It was at one time a question whether under a devise by a testator of his 'moiety,' 'part' or 'share,' the devisee would take an estate in fee, but it seems now settled that he will. The force of such words, however, applies solely where the moiety, part or share belongs as such to the testator himself." The cases on which that statement is based are *Bebb v. Penoyre* (11 East, 160) and *Paris v. Miller* (5 M. & S. 408), and it was followed by Lord St. Leonards in *Montgomery v. Montgomery* (3 Jones & Latouche (Irish), 47). An express authority in the plaintiff's favour is *Doe d. Atkinson v. Fawcett* (3 Com. B. Rep. 274; s. c. 15 Law J. Rep. (N.S.) C.P. 244), where the words, "I give and bequeath to my son Richard Atkinson my moiety of the house which he now lives in," was held to give the moiety in fee.

[MARTIN, B.—It seems an extraordinary rule, that if a man says, "I devise all my three fields to A. B.," it should be construed to give only an estate for life, but that if he says, "I give all my moiety of three fields," it should give an estate in fee. It probably results from a desire on the part of the Courts to seize hold of any pretext to enable them to escape from the rule that a gift of land simply merely gives an estate for life. BRAMWELL, B.—And as to that rule, the act of 7 Will. 4. & 1 Vict. c. 26. is a legislative admission that the decisions which established it were wrong.]

The distinction is, however, well settled, and it was observed by Vice Chancellor Kindersley in *Green v. Marsden* (1 Drew. 646).—He also contended that there was nothing in the context of the will from which an intention to

give a life estate only could be inferred; but this portion of the argument is omitted.

Mellish (*Lopes* with him), for the defendants.—If the testator had intended to pass the fee, why did he mention the lease and rent? The rent is to be received by Joseph Manning, or his father for him, which shews that benefit to Joseph Manning during his life was alone contemplated. There is no provision for the receipt of rent after the death of Joseph Manning. The words "undivided quarter" are merely used to describe the subject-matter of the devise, not the interest to be conveyed, which is subsequently done. In *Doe d. Atkinson v. Fawcett* (3 Com. B. Rep. 274; s. c. 15 Law J. Rep. (N.S.) C.P. 244) the devise was of the testator's moiety, the testator having nothing else but the moiety; but here he had two undivided fourth parts, and in this devise only disposed of one of them; so that the principle upon which that case was decided, that the testator intended to dispose of the whole of his estate in the subject-matter, cannot apply here.

[PIGOTT, B.—The case states that he had "two undivided fourth parts," not "a moiety."]

But two undivided fourth parts are, in fact, a moiety (3 Com. B. Rep. 274; s. c. 15 Law J. Rep. (N.S.) C.P. 244).—He also referred to *Vin. Abr.* tit. 'Devise,' L. a, paragraph 11.

MARTIN, B.—I quite agree with what has been said by my Brother Bramwell, that nothing can be more unsatisfactory than having to deal with cases of this sort. In 2 *Jarman on Wills*, p. 247 (3rd edit.), the fundamental rule is laid down in these words: "Nothing is better settled than that a devise of messuages, lands, tenements, or hereditaments (not estate), without words of limitation, occurring in a will which is not subject to the newly-enacted rules of testamentary construction, confers on the devisee an estate for life only"; and this is stated to be the rule notwithstanding that, from a variety of circumstances, examples of which are there given, a contrary intention might have been surmised. The author continues: "This rule of construction is entirely technical, as, according to popular notions, the gift of any subject simply comprehends all the interest therein. A conviction that the rule is generally subversive of the actual intention of testators always induced the Courts to lend a willing ear whenever a plausible pretext for a departure from it could be suggested. Hence have arisen the various cases in which indefinite devises have been, by implication, enlarged to a fee simple." Now, in this case I think that there is nothing in the rest of the will throwing light on what the testator intended by these words. He had, when he made his will, a reversion in an undivided fourth part of these lands expectant on the termination of three lives. If he had said, "I give all my reversion in my undivided fourth part," it would have clearly passed the fee. I consider that the case falls exactly within the rule laid down in *Doe v. Fawcett* (3 Com. B. Rep. 274; s. c. 15 Law J. Rep. (N.S.) C.P. 244), and even without that authority, I think that I should have arrived at the same conclusion.

BRAMWELL, B.—I am entirely of the same opinion. The testator directs that the rent shall be received by Joseph Manning, or his father for him, because the lands were under lease; and he probably thought that the bequest of the land would not carry with it a bequest of the rent. He, no doubt, wished to make it clear that the devisee was to have both rent and reversion. Besides, the case cited is conclusive.

PIGOTT, B. concurred.

Judgment for the plaintiff.

[IN THE COURT OF EXCHEQUER.]

May 1, 1866.

KRAMER v. WAYMARK.

35 L. J. Ex. 148; 4 H. & C. 427; L. R. 1 Ex. 241; 14 L. T. 368; 14 W. R. 659;
12 Jur. N.S. 395.

*Practice—Death of Plaintiff after Verdict and before Judgment signed—Judgment signed by Next Friend—*17 Car. 2. c. 8. s. 1.—*Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 139.*

INFANT. PRACTICE.—*The plaintiff, an infant, by his next friend, brought an action to recover damages for injuries which he had sustained from the defendant's negligence. Having obtained a verdict, the plaintiff died within fifteen days after the trial, and before judgment had been signed. The next friend, after the plaintiff's death, gave notice of taxation of costs to the defendant, and signed judgment for the amount of damages and taxed costs:—Held, upon a motion to set aside the judgment, that it was properly signed.*

The plaintiff, an infant of the age of seven years, sued by his next friend to recover damages for injuries which he had sustained, on the 4th of July, 1865, from the kick of a horse, which was being led by a servant of the defendant, owing, as was alleged, to the negligence of the servant.

The case was tried, on the 28th of March, 1866, at Kingston, before Erle, C.J., and a verdict was found for the plaintiff for 150*l.* Evidence was given at the trial that the plaintiff had suffered permanent injury, and that he was not out of danger. The plaintiff died from the effects of the injury on the 6th of April, 1866, within fifteen days after the day of trial, and before judgment signed. Judgment was afterwards signed for the amount of damages and taxed costs.

A rule having thereupon been obtained to stay proceedings, upon payment by the defendant of the costs of the trial and costs since incurred in the action, or to set aside the verdict and judgment, or for a new trial, on the ground of the plaintiff's death after trial and before judgment signed,—

J. P. Murphy and Besley shewed cause.—The judgment was properly signed. It is enacted by the 17 Car. 2. c. 8. s. 1, "That in all actions, personal, real or mixed, the death of either party between the verdict and the judgment shall not hereafter be alleged for error so as such judgment be entered within two terms after such verdict." In the case of *Ireland v. Champneys* (4 Taunt, 884), which was an action for libel, judgment having been allowed to go by default, and the jury upon a writ of inquiry having given 1,500*l.* damages, the plaintiff died and his executors entered up judgment. The Court of Common Pleas set the judgment aside, on the ground that the suit had abated by the death of the plaintiff. But that case was wrongly decided; and in *Palmer v. Cohen* (2 B. & Ad. 966), which was also an action for libel, and was similar in its circumstances, the Court of Queen's Bench refused to disturb the judgment which had been entered up by the plaintiff's executor. The enactment of the 17 Car. 2. c. 8. is confirmed by section 139. of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), which enacts, that "the death of either party between the verdict and the judgment shall not hereafter be alleged for error so as such judgment shall be entered within two terms after such verdict."

Montagu Chambers, Ribton and Beasley supported the rule.—The case is not within the 17 Car. 2. c. 8, nor the Common Law Procedure Act, 1852. The plaintiff is dead, and the proper person to proceed would be his executor or administrator; but judgment has been signed here by the next friend, who is nothing more than an attorney to the plaintiff. The authority of an attorney is determined by the death of the party. *Bac. Abr. tit. 'Authority,' E, Palmer v. Reiffenstein* (1 M. & G. 94). The next friend gave the defendant

the notice of taxation, which he had no right to do. The statute 17 Car. 2. c. 8. was not intended to meet the case of a purely personal action like the present. As to the Common Law Procedure Act, in *Flinn v. Perkins* (32 Law J. Rep. (N.S.) Q.B. 10) Mr. Justice Crompton held, that section 135. only applies to cases where representatives could have brought the action, and that the old maxim, *actio personalis moritur cum persona*, was not interfered with by that act, which applies only to procedure. Here, if the plaintiff had died before the commission day no trial could have taken place. *Griffith v. Williams* (1 Cr. & J. 47) is an authority that a new trial may be granted upon the application of a defendant after the death of the plaintiff.

MARTIN, B.—Judgment was regularly signed in this case under section 139. of the Common Law Procedure Act, 1852, which is a repetition of the enactment in 17 Car. 2. c. 8. s. 1. I concur in wondering how the Court of Common Pleas could give the judgment which they did in *Ireland v. Champneys* (4 Taunt, 884). The case of *Palmer v. Cohen* (2 B. & Ad. 966) is expressly in point. If the child had died four days later than he did, there would have been no pretence for this application; and, as it is, public interest is against a new trial. The rule will be discharged.

BRAMWELL, B.—If the defendant is right in his contention, he can raise the question by a writ of error. Section 139. of the Common Law Procedure Act, 1852, seems to apply to all actions whether surviving to the representatives or not; and it is stronger against the defendant than the enactment of the 17 Car. 2. c. 8.

PIGOTT, B. concurred.

*Rule discharged.*¹

[IN THE COURT OF EXCHEQUER.]

May 8, 1866.

In the matter of an arbitration between JOSEPH WHITWORTH AND
WILLIAM WILSON HULSE.

35 L. J. Ex. 149; L. R. 1 Ex. 251; 14 L. T. 445; 14 W. R. 736;
12 Jur. N.S. 652.

Arbitration—Necessity for separate Findings on Matters in Difference.

ARBITRATION, REFERENCE AND AWARD.—Where certain specified matters in dispute and all matters in difference are referred to arbitration, the arbitrator is not bound to award separately what sum is to be paid in respect of any specific matter in dispute, unless it clearly appears from the submission that the parties intended that he should so find.

A submission to arbitration, after reciting that disputes had existed between W. and H, and that it had been agreed that W. should purchase H.'s shares in an incorporated company, and that an arbitrator should determine what sum W. should pay to H. upon the balance of accounts between them for the transfer of the shares, and should decide and determine all matters in difference between them, submitted to the arbitrator "the claims of the said H. against the said W. in respect of the said differences and matters aforesaid, and all other matters in dispute between them, and the amount to be paid for the said shares." The arbitrator in his award directed that a lump sum should be paid by W. to H. in respect of all the matters in difference, including the

(1) Those portions of the argument and judgment which related to the excessive amount of the damages are omitted. The rule was discharged as to that point also.

amount to be paid for the purchase of the shares:—Held, upon an application to set aside the award, or send it back to the arbitrator, that he was not bound to find the sum to be paid in respect of the shares separately from that to be paid in respect of other matters in difference.

A submission to arbitration, dated the 3rd of February, 1865, recited that Joseph Whitworth and William Wilson Hulse had carried on business as engineers, and had since been shareholders in the incorporated company of Joseph Whitworth & Co. and the Manchester Ordnance and Rifle Company; that differences had arisen, and that by a memorandum in writing, dated the 13th of July, 1864, they had agreed to refer all matters in dispute to the arbitration of certain persons therein mentioned; that the period within which the award was to be made had expired; that an application had been made by Whitworth for a Judge's order, under the Common Law Procedure Act, 1854, for an extension of the time, and that a bill in Chancery had been filed by Hulse, praying for an account, and for an injunction to prevent Whitworth from proceeding in the reference. It then recited that by a memorandum of agreement, dated the 15th day of December, 1864, and made between Whitworth and Hulse, it was agreed that all matters in difference between them should be referred to an accountant named; and that a formal agreement, containing all proper recitals, conditions and agreements, should be forthwith prepared and signed, and that the bill in Chancery and proceedings at Judge's chambers should be dismissed. Then followed a recital that at the time of the execution of that agreement it was understood between the parties that Hulse should retire from the company by the sale of his shares to Whitworth, and that the arbitrator should determine what sum Whitworth should, upon the balance of accounts between him and Hulse, pay to Hulse, *for the transfer of the said shares*; and should finally decide and determine all matters in dispute between them. It further recited that it had since been agreed that Hulse should assign all his interest in patents, &c. in which he was jointly interested with Whitworth to the latter, and that mutual releases should be executed of all claims and demands. Then followed the operative part of the agreement, the first clause of which was as follows:

"The claims and demands of the said W. W. Hulse against the said J. Whitworth in respect of the said differences and matters aforesaid, and all other matters in dispute between them, and the amount to be paid for the said shares, shall be and the same are hereby referred to the award," &c. of the said arbitrator.

Then followed the clauses usually contained in submissions to arbitration, concluding with a clause that the arbitrator should direct Hulse to assign his interest in the patents, and that mutual releases should be executed.

The award of the arbitrator, after reciting that by the agreement of reference, the claims and differences therein mentioned, and all matters in dispute between the parties, were referred to the award of the arbitrator, stated that he thereby made his award "of and concerning all and every the differences, disputes and matters referred," and continued as follows:

"I award and direct that the said J. Whitworth shall and do, on or before the 1st of January, 1866, pay to the said W. W. Hulse the sum of 22,978*l.* 2*s.* 9*d.* sterling, in full satisfaction and discharge of all claims and demands of the said W. W. Hulse against the said J. Whitworth in respect of the differences and matters in the said agreement mentioned, and of all other matters in dispute between them, including the amount to be paid by the said J. Whitworth to the said W. W. Hulse for the purchase of the shares in the incorporated company in the said agreement particularly mentioned."

The award also contained a clause providing for the assignment of Hulse's interest in the patents and the execution of mutual releases.

The submission having been made a rule of Court, a rule was obtained, calling on Hulse to shew cause why the award should not be set aside or referred back to the arbitrator, on the ground that he had not sufficiently

determined all the matters in difference, and had not settled the amount to be paid for the shares.

Edward James, Milward and Baylis shewed cause, and contended that the arbitrator was justified in finding in one sum the amount to be paid to Hulse.

The COURT then called on

The Solicitor General and *T. Jones* to support the rule.—They urged that the award ought to be sent back, because it was essential that the amount to be paid for the shares should be specified. The stamp duty to be paid upon the transfer was *ad valorem*, and therefore the value should be stated. Besides, the intention of the parties, as appeared from the submission, was, that the value of the shares should be stated. It was clear that it never was intended that one lump sum should be awarded, and they were entitled to have it divided. *Randell v. Randell* (7 East, 81), *Rider v. Fisher* (3 Bing. N.C. 874), *Richards v. Browne* (9 Ir. Com. Law Rep. 199).

MARTIN, B.—I am of opinion that this rule should be discharged. We are asked, in the first place, to set the award aside; but we ought not to do that unless it is perfectly clear that we have the right to do so. Any real objection to it can be raised in the action now pending on the award. Then we are asked to send it back to the arbitrator, and if Mr. Hulse consented we might do so; but his counsel does not consent, and we must therefore decide whether or not this award is bad. I am of opinion that it is perfectly good, and that the objection to it is unfounded. The cases referred to by the Solicitor General were correctly decided; and there is no doubt that if several matters are referred to an arbitrator he must decide on all of them; and the rule, that where an award is expressed to be made *ita quod de præmissis*, it is to be taken to decide everything which has been referred, will not prevail if it is a condition imposed on the arbitrator that he should decide on the matters referred to him separately. But in the present case, it does not appear from the submission that the parties intended the arbitrator to state separately what was to be paid in respect of the shares. It is recited that it had been agreed that he should determine what should be paid upon the balance of the account for the transfer of the shares. Then comes the actual submitting clause of the agreement, and under it I think that the arbitrator was perfectly justified in stating a lump sum to settle all matters in difference. If there were anything to shew that the arbitrator was to separate the sum to be paid for the shares from that to be paid in respect of the other matters, the Solicitor General would be right; but I think that there is not.

BRAMWELL, B.—If the submission made it necessary for the arbitrator to find a separate sum for the price of the shares, then the award is bad, and we ought to set it aside or refer it back to the arbitrator. All I say about it is, that it is not clear that it is necessary, and therefore we ought not to send it back without the consent of the party in whose favour it is made.

PIGOTT, B.—I concur in thinking that the parties never intended that the arbitrator should find separately on the items of the matters referred. If such had been their intention, they would have expressed it in much clearer terms.

Rule discharged with costs.

[IN THE COURT OF EXCHEQUER.]

May 3, 1866.

TANNER v. THE EUROPEAN BANK (LIMITED).

BOWEN v. THE SAME.

35 L. J. Ex. 151; L. R. 1 Ex. 261; 14 L. T. 414; 14 W. R. 675;
12 Jur. N.S. 414.

See *Attenborough v. St. Katharine's Dock Co.*, [1878] E. R. A.; 47 L. J. C.P. 763; L. R. 3 C.P. D. 450; 38 L. T. 404; 26 W. R. 583 (C. A.). Approved, *Robinson v. Jenkins*, [1890] E. R. A.; 59 L. J. Q.B. 147; L. R. 24 Q.B. D. 275; 62 L. T. 439; 38 W. R. 360 (C. A.); *Ex parte Mersey Docks*, [1899] E. R. A.; 68 L. J. Q.B. 540; [1899] 1 Q.B. 546; 80 L. T. 143; 47 W. R. 306 (C. A.).

Interpleader—Count in assumpsit—Interpleader Act (1 & 2 Will. 4. c. 58), s. 1.—*Common Law Procedure Act*, 1860 (23 & 24 Vict. c. 126), s. 12.

INTERPLEADER.—A policy of insurance was handed over by T. to bankers, for them to collect monies due to him under the policy, which they failed to do. While the policy was in their custody B. gave them notice that he claimed it, and that they were not to return it to T. T. commenced an action against the bankers, his declaration containing a count in assumpsit claiming special damage for an alleged breach of duty in not collecting the monies due under the policy and re-delivering the policy to him, and counts in trover and detinue claiming the policy itself. B. also brought an action against the bankers, to recover the policy. An interpleader order having been made staying proceedings in T.'s action, and giving him leave to defend the action brought by B. against the bankers on indemnifying them against the costs,—Held, upon an application to rescind the order, that it was a just and reasonable one, and that the existence of the count in assumpsit, claiming special damage, was not a ground for rescinding the order.

This was a rule to rescind an interpleader order, made by Bramwell, B., at chambers.

It appeared from the affidavits that, in the month of January, 1866, the plaintiff Tanner delivered a policy of assurance on two vessels, the *Alliance*, and the *Duchess of Sutherland*, to the defendants, the European Bank, that they might collect for him a sum of money due under the policy from a person at Havre. This they did not succeed in doing. While the policy was still in their custody, they received notice from the plaintiff Bowen, that he claimed the policy under an assignment made to him by Tanner in May, 1863, of all policies on the *Duchess of Sutherland*, and that they were not to part with it to anybody but himself. The defendants, in consequence, declined to give the policy back to Tanner, who thereupon commenced an action against them. The declaration contained a count in assumpsit, alleging a bailment upon the terms that the defendants would collect the monies due and re-deliver the policy in a reasonable time, and special damage arising from their default, and counts in trover and detinue. Bowen also commenced an action to recover the policy. The defendants took out an interpleader summons at chambers, and Bramwell, B. made the order complained of in the following terms: "I do order that all further proceedings in the first-mentioned action (*Tanner v. the European Bank, Limited*), be stayed until further order. And I do further order, that the plaintiff in the first-mentioned action be at liberty to defend the action, by Bowen against the defendants, in the second-mentioned action (*Bowen v. the European Bank, Limited*); the plaintiff in the said first-mentioned action giving the said defendants an indemnity. And that the said plaintiff Bowen give security for costs to the said defendants to the satisfaction of the master. All other matters adjourned."

A rule *nisi* having been obtained by the plaintiff Tanner to rescind the order,

Talfourd Salter, for the defendants, shewed cause.—This order was perfectly regular, and the Judge had power to make it, both under the Interpleader Act (1 & 2 Will. 4. c. 58. s. 1.) and the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126. s. 12).

[BRAMWELL, B.—The difficulty is this. The plaintiff Tanner, in his action, claims special damage for the defendant's breach of duty in not collecting the money due to him under the policy, and he also claims the policy itself. I thought that the question as to the right to the policy was within the act, and that Tanner ought to be allowed to go on with his action as to the claim for damages. But I made the order upon the authority of *Best v. Hayes* (1 H. & C. 718; s. c. 32 Law J. Rep. (N.S.) Exch. 129).

No cause was shewn by the plaintiff Bowen, who consented to the order at chambers.

H. T. Cole, for the plaintiff Tanner, supported the rule.—A Judge has no power to make an interpleader order when there is a claim for breach of contract besides the claim for the chattel the right to which is disputed. The order deprives Tanner of his damages for the breach of contract, and if Bowen does not go on with his action Tanner will not be able to recover the policy. *Crawshay v. Thornton* (2 Myl. & Cr. 1; s. c. 6 Law J. Rep. (N.S.) Chanc. 179) shews that, according to the practice in Equity, this order ought not to be made.

MARTIN, B.—We are all of opinion that this rule should be discharged. The power given to the Court or a Judge under the Interpleader Act (1 & 2 Will. 4. c. 58) was to dispose of the merits of the claims and “make such other rules and orders therein as to costs and all other matters as may appear to be just and reasonable.” Mr. Cole is quite right in saying that when this statute was first enacted the Judges did, especially in this Court, act upon the idea that they were bound by the decisions of the Courts of Equity upon Bills of interpleader. Gradually, however, we have got out of that idea, and in the last case, *Best v. Hayes* (1 H. & C. 718; s. c. 32 Law J. Rep. (N.S.) Exch. 129), this Court stated that Judges were to do their best to do what was just and reasonable between the parties, without being fettered by the technical decisions of a Court of Equity. Now, in this particular case, I am by no means certain that had I been in my Brother Bramwell's position, I should have done exactly as he did; but I think, nevertheless, that this is a just and reasonable order, and that we ought not to interfere with it, unless we see that there is something wrong in it.

BRAMWELL, B.—I acted in this case upon the last Common Law Procedure Act, and the authority of *Best v. Hayes* (1 H. & C. 718; s. c. 32 Law J. Rep. (N.S.) Exch. 129), and I confess I did so with some misgiving as to the reasonableness of it, because the argument used by Mr. Cole for his client is a very cogent one. I thought, however, upon the authority which I have mentioned, that I ought to make the order, and, that being so, that I ought to put the plaintiff Tanner as nearly as possible in the same situation as that in which he would be in suing the defendants. I therefore made him defendant in Bowen's action, in which Bowen could only succeed by proving that he had an absolute title to the policy. The situation of a bailee is something like the situation of a tenant. He ought not to be permitted to deny the title of the person from whom he derives possession. But just as there may be an eviction as to land, so there may be an eviction as to chattel; and if the bailee is evicted by a third person, he ought to be relieved from an action brought against him by the bailor. Then the order which I made in this case is, that Bowen shall go on with his action, and shew, if he can, that he is entitled to evict the defendant of this chattel, and get it from him. If he is able to do that, clearly the defendants ought to be able to set that up as a good answer to the action by Tanner. That was my view of the matter.

I do not say that the order may not be subject to revision, and if Mr. Cole's client were to take out a summons at chambers, and say, "I want to go on with the special count alone, not for the purpose of recovering the policy, but for the purpose of recovering special damage," I should be inclined to say that he might go on if he struck out all but the count for damages. However, it is not necessary for us to answer that question here; and he has a right to say "I do not want my action split into two in that way." As to whether Bowen had a title or not, that will be a matter to be ascertained; but, according to my recollection, without saying that a sufficient title was made out, enough was shewn to make me think it reasonable to make the order; and I am satisfied that no injustice has been done.

PIGOTT, B.—I am also satisfied that no injustice has been done, and that the order was quite right. My Brother Bramwell took great pains to protect the plaintiff Tanner, when he called upon Bowen to give security for costs. If Bowen does not go on with his action in a reasonable time he will be barred of his claim. The special count clearly was not relied on by the plaintiff, otherwise the order would not have been made; though the existence of that count may afford ground for an application at chambers to revise the order, it is not a ground for this application to rescind it. As to the contention that the case does not come within the Interpleader Acts, however it might have been under the 1 & 2 Will. 4. c. 58, I am sure that it is a case within the Common Law Procedure Act of 1860, and I am glad that the Courts have not endeavoured to limit the powers given to them by that act of parliament. The case of *Best v. Hayes* (1 H. & C. 718; s. c. 32 Law J. Rep. (N.S.) Exch. 129) was rightly decided. In my judgment a man is placed in a very difficult position where he is an innocent bailee and has taken goods from a bailor and the person lawfully entitled to those goods claims them of him, as he subjects himself to an action at the suit of the first man under the contract, and an action at the suit of the second man, who has a right to the goods. That is a very unequal way of doing justice.

[IN THE COURT OF EXCHEQUER.]

April 30, 1866.

RAYMENT v. MINTON.

35 L. J. Ex. 153; L. R. 1 Ex. 244; 4 H. & C. 371; 12 Jur. N.S. 435; 14 L. T. 367; 14 W. R. 675 (*Raymond v. Minton*).

Principle applied, *Learoyd v. Brook*, [1891] E. R. A.; 60 L. J. Q.B. 373; [1891] 1 Q.B. 431; 64 L. T. 458; 39 W. R. 480 (Q.B. D.).

Condition Precedent—Apprentice Deed—Covenant to Teach—Readiness to be Taught.

APPRENTICE.—*It is a condition precedent to the liability of a master, on a covenant to teach an apprentice his trade, that the apprentice should be ready and willing to be taught by the master.*

The declaration stated that, by an indenture of apprenticeship, one H. Page, therein described as the son-in-law of the plaintiff, of his own free will and accord, and by and with the consent and approbation of the plaintiff, did put himself apprentice to the defendant, to learn the trade of an ornamental painter and decorator, and with him, the defendant, after the manner of apprentice, to serve for the term of five years; and that the defendant, by the said indenture, covenanted and agreed with the plaintiff

to teach the said apprentice in the said trade by the best means in his power, the defendant finding unto the said apprentice good and sufficient meat, &c., during the said term of five years, and the plaintiff paying &c.; and that, after the making of the said indenture, the said H. Page entered into the service of the defendant, with him, after the manner of an apprentice, to serve for the term and in the manner aforesaid, and that he, the said apprentice, had always performed all things in the said indenture contained on his part to be performed, and had not done anything in the said indenture forbidden him to do; and all conditions were performed, &c., both by the plaintiff and by the said apprentice, necessary to entitle the plaintiff to have the said apprentice taught by the defendant as aforesaid, yet the defendant did not nor would, after the making of the said indenture, and during the said term or the part thereof already elapsed, teach the said apprentice in the said trade; but wholly failed, neglected, and refused so to do.

Third plea—that, at the time of the alleged breach, the said apprentice *would not be taught*, and by his own wilful acts hindered and prevented the defendant teaching him in the said trade of an ornamental painter and decorator, by the defendant used, and then by his said acts caused the breach to which this plea is pleaded.

Demurrer and joinder.

Goddard, for the plaintiff.—The plea really makes the covenant to teach dependent on the apprentice's covenant to serve faithfully, whereas these covenants are quite independent of each other—*Winstone v. Linn* (1 B. & C. 460), per Bayley, J., and *Philps v. Clift* (4 Hurl. & N. 168; s. c. 28 Law J. Rep. (N.S.) Exch. 153), per Watson, G. For all that appears on the plea, there may have only been that sort of misconduct on the part of the apprentice for which the master might have lawfully punished him. The plea should at least have stated that the apprentice wilfully and against orders absented himself from the place of instruction.

[*MARTIN*, B. referred to *Mercer v. Whall* (5 Q.B. Rep. 447; s. c. 14 Law J. Rep. (N.S.) Q.B. 267).]

Grantham, for the defendant, cited *Hughes v. Humphreys* (6 B. & C. 680), but was not called upon to argue.

MARTIN, B.—There can be no doubt as to how this case should be decided. The master says, "I will teach this young man the business of an ornamental painter and decorator by the best means in my power"; and even if there were no covenant at all by the apprentice, common sense points out that, if the apprentice will not be taught, but by his own wilful act hinders and prevents the contracting party from teaching him the business, there can be no cause of action against the master. In the words of Mr. Addison,¹ "The capability of the apprentice to be instructed by the master is naturally a condition precedent to the liability of the latter upon his covenant" to teach. And how can it be said that the master is liable for a breach of covenant, when the person, on whose behalf the apprentice fee is paid, will not obey his orders as he has agreed to do? Reason points out that it must be a condition precedent that the apprentice will allow himself to be taught.

POLLOCK, C.B. and *BRAMWELL*, B. concurred.

Judgment for the defendant.

(1) Addison on Contracts, 4th edit. p. 440.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Exchequer.)

Feb. 8, May 14, 1866.

FLETCHER v. RYLANDS AND ANOTHER.*

35 L. J. Ex. 154; L. R. 1 Ex. 285; 4 H. & C. 263; 12 Jur. (N.S.) 603;
 14 W. R. 799: affirmed, [1868] E. R. A.; 37 L. J. Ex. 161; L. R. 3 H.L.
 330; 19 L. T. 220 (H.L.).

Trespass—Negligence—Escape of Water from Artificial Reservoir—Consequential Damage.

The plaintiff's colliery was flooded by water, which escaped from the defendants' reservoir down some old mine-shafts under the site of the reservoir, and through old coal workings under the land intervening between the plaintiff's and the defendants' land. There was no personal negligence on the part of the defendants; but the people who were employed by them in the construction of the reservoir had not exercised reasonable skill and care (with reference to the shafts) to provide for the pressure which the reservoir was to bear:—Held, reversing the judgment of the majority of the Court of Exchequer, that the defendants were liable for the damage sustained by the plaintiff.

Tenant v. Goldwin (1 Salk. 21, 360; s. c. 2 Ld. Raym. 1089) examined.

This was an appeal, by the plaintiff, against the decision of the majority of the Court of Exchequer upon a special case which was stated for their opinion (34 Law J. Rep. (N.S.) Exch. 177).

The material parts of the special case are given in the report below (34 Law J. Rep. (N.S.) Exch. 177), and are also set out in the judgment of the Court of Exchequer Chamber. They were shortly these: the defendants employed competent persons to select a site for, and to construct, a reservoir on their land. During the construction, the work-people met with some old vertical mine-shafts. The defendants were not guilty of negligence themselves; but, in point of fact, their agents did not exercise reasonable skill and care (with reference to these shafts) so as to provide for the pressure the reservoir would have to bear. The water from the reservoir escaped down these shafts through certain old coal-workings under the defendants' land, and under land between the defendants' land and the plaintiff's, into the plaintiff's colliery, which was thereby flooded. Neither the defendants nor their agents knew of the existence of these old coal-workings. The question for the Court was, whether the plaintiff was, under these circumstances, entitled to recover damages from the defendants.

The arguments of *Manisty* (with whom was *J. A. Russell*), for the appellant, and of *Mellish* (with whom was *T. Jones*), for the respondents, were substantially the same as the arguments in the Court below; and the points made on either side are discussed in the following judgment.

In addition to the authorities cited below, these were now cited for the plaintiff: *Lambert v. Bessey* (Sir T. Raym. 422), *Aldred's case* (9 Rep. 58 a), *Scott v. the London Dock Company* (3 H. & C. 596; s. c. 34 Law J. Rep. (N.S.) Exch. 17, 220), *Cox v. Burbidge* (13 Com. B. Rep. N.S. 438; s. c. 32 Law J. Rep. (N.S.) C.P. 89), and *Barber v the Nottingham and Grantham Railway Company* (33 Law J. Rep. (N.S.) C.P. 193; s. c. 15 Com. B. Rep. N.S. 726).

Cur. adv. vult.

BLACKBURN, J. (May 14), delivered the judgment of the Court as follows: This was a special case stated by an arbitrator under an order of *Nisi Prius*,

* Coram Willes, J., Blackburn, J., Mellor, J., Keating, J., Montague Smith, J. and Lush, J.

in which the question for the Court is stated to be, "whether the plaintiff is entitled to recover any—and if any what—damages from the defendants by reason of the matters thereinbefore stated."

In the Court of Exchequer, the Chief Baron and Martin, B. were of opinion that the plaintiff was not entitled to recover at all; Bramwell B. being of a different opinion. The judgment in the Court of Exchequer was consequently given for the defendants, in conformity with the opinion of the majority of the Court.

The only question argued before us was, whether this judgment was right, nothing being said about the measure of damages in case the plaintiff should be held entitled to recover. We have come to the conclusion that the opinion of Bramwell, B. was right, and that the answer to the question should be that the plaintiff was entitled to recover damages from the defendants by reason of the matters stated in the case, and, consequently, that the judgment below should be reversed; but we cannot at present say to what damages the plaintiff is entitled.

It appears from the statement in the case that the plaintiff was damaged by his property being flooded by water, which, without any fault on his part, broke out of a reservoir constructed on the defendants' land by the defendants' orders, and maintained by the defendants.

It appears from the statement in the 12th paragraph of the case, that the coal under the defendants' land had, at some remote period, been worked out, but that this was unknown at the time when the defendants gave directions to erect the reservoir; the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' sub-soil. And it further appears from the 17th and 18th paragraphs that the defendants selected competent engineers and contractors to make their reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the sub-soil; but that these persons employed by them, in the course of the work became aware of the existence of ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings. It is found that the defendants personally were free from all blame, but that in fact proper care and skill was not used by the persons employed by them to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was, that when the reservoir was filled, the water burst into the shafts, and flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief.

The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law therefore arises: What is the obligation which the law casts upon a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours; but the question arises, whether the duty which the law casts upon him under such circumstances is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more.

If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect, which ordinary prudence and skill could not detect.

Supposing the second to be the correct view of the law, a further question

arises, subsidiary to the first, namely, whether the defendants are not so far identified with the contractors whom they employed as to be responsible for the consequences of their want of care and skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts led to.

We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and that, if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali-works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this, we think, is established to be the law, whether the thing so brought be beasts or water, or filth or stench.

The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of the cattle which he brought on his land to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is, with regard to tame beasts, for the grass they eat and trample upon, although not for any injury to the person of others; for our ancestors have settled that it is not the general nature of horses to kick or of bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too.

As early as the *Year Book*, 20 Edward IV. 11, 10, Brian, C.J. lays down the doctrine in terms very much resembling those used by Lord Holt in *Tenant v. Goldwin* (1 Salk. 21, 360; s. c. 2 Ld. Raym. 1089), which will be referred to afterwards. It was trespass with cattle; plea, that the plaintiff's land adjoined a place where the defendant had common; that the cattle strayed from the common, and the defendant drove them back as soon as he could. It was held a bad plea. Brian, C.J., says, "It behoves him to use his common so that it shall do no hurt to another man, and if the land in which he has common be not inclosed, it behoves him to keep the beasts in the common and out of the land of any other." He adds—when it was proposed to amend by pleading "that they were driven out of the common by dogs,"—that although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went.

In the recent case of *Cox v. Burbidge* (13 Com. B. Rep. N.S. 438; s. c. 32 Law J. Rep. (N.S.) C.P. 89), Williams, J., says, "I apprehend the law to be perfectly plain. If I am the owner of an animal, in which by the law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and

for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." So in *May v. Burdett* (9 Q.B. Rep. 112; s. c. 16 Law J. Rep. (n.s.) Q.B. 64), the Court, after an elaborate examination of the old precedents and authorities, came to the conclusion that "a person keeping a mischievous animal is bound to keep it secure *at his peril*." And in 1 *Hale P.C.*, 430, Lord Hale states that where one keeps a beast, knowing that its nature or habits are such that the natural consequence of its being loose is that it will harm men, the "owner must at his peril keep him up safe from doing hurt; for *though he use his diligence* to keep him up, if he escapes and do harm, the owner is liable to answer damages,"—though, as he proceeds to shew, he will not be liable criminally, without proof of want of care. In these latter authorities, the point under consideration was damage to the person; and what was decided was that, where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt; though where it was not known to be so the owner was not responsible for such damages; but where the damage is—like eating grass and other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same.

In *Com. Dig.*, tit. 'Droit,' M. 2, it is said that "if the owner of 200 acres in a common moor enfeofs B. of 50 acres, B. ought to inclose *at his peril*, to prevent damage by his cattle to the other 150 acres, for if his cattle escape thither they may be distrained damage feasant. So the owner of the 150 acres ought to prevent his cattle from doing damage to the 50 acres *at his peril*." The authority cited is *Dyer*, 372, b, where the decision was that the cattle might be distrained; the inference from that decision that the owner was bound to keep in his cattle *at his peril* is, we think, legitimate, and we have the high authority of *Comyns* for saying that such is the law.

In the note to *Fitzherbert's Natura Brevium*, 128, which is attributed to Lord Hale, it is said, "If A. and B. have lands adjoining, where there is no inclosure, the one shall have trespass against the other on an escape of their beasts respectively, *Dyer*, 372, *Rast. Entr.*, 621, and the 20 Edw. IV, c. 10, although wild dogs, &c., drive the cattle of the one into the lands of the other."

No case is known to us in which in replevin it has ever been attempted to plead in bar to an avowry for distress damage feasant that the cattle had escaped without any negligence on the part of the plaintiff; and surely if that could have been a good plea in bar, the facts must often have been such as would have supported it. These authorities, and the absence of any authority to the contrary, justify *Williams, J.* in saying, as he does in *Cox v. Burbidge* (13 Com. B. Rep. N.S. 438; s. c. 32 Law J. Rep. (n.s.) C.P. 89), that "the law is clear that in actions for damage occasioned by animals that have not been kept in by their owners, it is quite immaterial whether the escape is by negligence or not."

As has been already said, there does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth or stench, or any other thing which will if it escape naturally do damage, to prevent their escaping and injuring his neighbour; and the case of *Tenant v. Goldwin* (1 Salk. 21, 360; s. c. 2 Ld. Raym. 1089) is an express authority that the duty is the same, and is to keep them in at his peril.

As *Martin, B.* in his judgment below, appears not to have understood that case in the same manner as we do, it is proper to examine it in some detail. It was a motion in arrest of judgment, after judgment by default; and, therefore, all that was well pleaded in the declaration was admitted to be true. The declaration is set out at full length in the report in 6 *Mod.* It alleged that the plaintiff had a cellar which lay contiguous to a messuage of the defendant and used (*solebat*) to be separated and fenced from a privy

house of office, parcel of the said messuage of the defendant, by a thick and close wall, which belonged to said messuage of the defendant, and by the defendant of right ought to have been repaired (*de jure debuit reparari*) yet he did not repair it, and for want of repair filth flowed into plaintiff's cellar.

The case is also reported by *Salkeld*, who argued it, and by *Lord Raymond*, whose report is the fullest. The objection taken was that there was nothing to shew that the defendant was under any obligation to repair the wall, that, it was said, being a charge, not of common right, and the allegation that the wall *de jure debuit reparari* by the defendant being an inference of law which did not arise from the facts alleged. *Salkeld* argued that this general mode of stating the right was sufficient in a declaration, and also that the duty alleged did, of common right, result from the facts stated. It is not now material to inquire whether he was or was not right on the pleading point. All three reports concur in saying that *Lord Holt* during the argument intimated an opinion against him on that; but that after consideration the Court gave judgment for him on the second ground.

In the report in 6 *Mod.* it is stated, "And at another day *per totam Curiam*, 'the declaration is good, for there is a sufficient cause of action appearing in it, but not upon the word *solebat*. If the defendant has a house of office inclosed with a wall which is his, he is, of common right, bound to use it so as not to annoy another.'—The reason here is that one must use his own so as thereby not to hurt another, and as, of common right, one is bound to keep his cattle from trespassing on his neighbour, so he is bound to use anything that is his, so as not to hurt another by such user.—Suppose one sells a piece of pasture lying open to another piece of pasture which the vendor has, the vendee is bound to keep his cattle from running into the vendor's piece; so of dung or anything else." There is here an evident allusion to the same case in *Dyer* as is referred to in *Com. Dig.*, tit. 'Droit,' M. 2.

Lord Raymond in his report says: "The last day of term, *Holt*, C.J., delivered the opinion of the Court that the declaration was sufficient. He said that upon the face of this declaration there appeared a sufficient cause of action to entitle the plaintiff to have his judgment; that they did not go upon the *solebat* or the *jure debuit reparari*, as if it were enough to say that the plaintiff had a house, and the defendant had a wall, and he ought to repair the wall; but if the defendant has a house of office, and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is of common right bound to repair it. The reason of this case is upon this account, that every one must so use his own as not to do damage to another. And as every man is bound so to look to his cattle as to keep them out of his neighbour's ground, that so he may receive no damage; so he must keep in the filth of his house of office that it may not flow in upon and damnify his neighbour. So if a man has two pieces of pasture which lie open to one another, and sells one piece, the vendee must keep in his cattle so as they shall not trespass upon the vendor. So a man shall not lay his dung so high as to damage his neighbour; and the reason of these cases is because every man must so use his own as not to damnify another." *Salkeld*, who had been counsel in the case, reports the judgment much more concisely but to the same effect. He says, "The reason he gave for his judgment was, because it was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and that it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's.—He must repair the wall of his house of office, for he whose dirt it is must keep it that it may not trespass." It is worth noticing how completely the reason of *Lord Holt* corresponds with that of *Brian*, C.J., in the case already cited in the 20 *Edw. IV. Martin*, B. in the Court below, says that he thinks this

was a case without difficulty, because the defendants had, by letting judgment go by default, admitted their liability to repair the wall, and that he cannot see how it is an authority for any case in which no such liability is admitted. But a perusal of the report will shew that it was because Lord Holt and his colleagues thought (no matter, for this purpose, whether rightly or wrongly) that the liability was *not* admitted, that they took so much trouble to consider what liability the law would raise from the admitted facts, and it does therefore seem to us to be a very weighty authority in support of the position that he who brings and keeps anything, no matter whether beasts, or filth, or clean water, or a heap of earth or dung on his premises, must at his peril prevent it from getting on his neighbour's, or make good all the damage which is the natural consequence of its doing so.

No case has been found in which the question as to the liability for noxious vapours escaping from a man's works by inevitable accident has been discussed, but the following case will illustrate it: Some years ago, several actions were brought against the occupiers of some alkali-works at Liverpool for the damage alleged to be caused by the chlorine fumes of their works. The defendants proved that they had at great expense erected a contrivance by which the fumes of chlorine were condensed and sold as muriatic acid, and they brought a great body of scientific evidence to prove that this apparatus was so perfect that no fumes possibly could escape from the defendants' chimneys. On this evidence, it was pressed upon the jury that the plaintiff's damage must have been caused by some of the numerous other chimneys in the neighbourhood. The jury, however, being satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants' works somehow, and in each case found for the plaintiff. No attempt was made to disturb these verdicts on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless negligence were shewn; yet, if the law be as laid down by the majority of the Court of Exchequer, it would have been a very obvious defence. If it had been raised, the answer would probably have been, that the uniform course of pleading in actions for such nuisances is to say that the defendants caused the noisome vapours to arise on their premises and suffered them to come on the plaintiff's, without stating that there was any want of care or skill on the part of the defendants, and that the case of *Tenant v. Goldwin* (1 Salk. 21, 360; s. c. 2 Ld. Raym. 1089) shewed that this was founded on the general rule of law that he whose stuff it is must so keep it that it may not trespass.

There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching and the other by drowning; and he who brings them there must, at his peril, see that they do not escape and do that mischief. What is said by Gibbs, C.J., in *Sutton v. Clarke* (6 Taunt. 44), though not necessary for the decision of the case, shews that that very learned Judge took the same view of the law that was taken by Lord Holt.

But it was further said by Martin, B. that when damage is done to personal property, or even to the person, by collision either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible, and this is, no doubt, true; and, as was pointed out during the argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as for instance, where an unruly horse gets on the footpath of a public street and kills a passenger—*Hammack v. White* (11 Com. B. Rep. N.S. 558; s. c. 31 Law J. Rep. (N.S.) C.P. 129), or where a person in a dock is struck by the falling of a bale of cotton which the defendants' servants are lowering—*Scott v. the London Dock Company* (3 H. & C. 596; s. c. 34 Law J. Rep. (N.S.) Exch. 17, 220); and many other similar cases may be found. But we think these cases are distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property

are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so, subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who, by the licence of the owners, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident, and it is believed that all the cases in which inevitable accident has been held an excuse for what *prima facie* was a trespass, can be explained on the same principle, namely, that the circumstances were such as to shew that the plaintiff had taken the risk upon himself.

But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what there might be, nor could he in any way control the defendants or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.

The view which we take of the first point renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them under the circumstances stated in the 17th and 18th paragraphs of the case.

We are of opinion that the plaintiff is entitled to recover, but as we have not heard any argument as to the amount, we are not able to give judgment for what damages. The parties probably will empower their counsel to agree on the amount of damages; should they differ on the principle, the case may be mentioned again.

Judgment for the appellant.

[IN THE COURT OF EXCHEQUER.]

April 30, 1866.

MANGAN v. ATHERTON.

35 L. J. Ex. 161; 4 H. & C. 388; L. R. 1 Ex. 239; 14 L. T. 411; 14 W. R. 771 (sometimes *Mangan v. Atterton*).

Commented on and distinguished, *Clark v. Chambers*, [1878] E. R. A.; 47 L. J. Q.B. 427; L. R. 3 Q.B. D. 327; 38 L. T. 454; 26 W. R. 613 (Q.B. D.).

Negligence—Dangerous Machine—Injury to Infant.

INFANT. NEGLIGENCE.—*The defendant having placed a crushing-machine in a public market for exhibition, a child was injured by putting his fingers between the cogwheels while another child was turning the handle:—Held, that the defendant was not liable for negligence in leaving the machine unguarded where it was; and that the injury sustained by the child was the direct result of the improper meddling with the machine.*

This action was brought in the Lichfield County Court. The plaintiff alleged that the defendant negligently and carelessly exposed, for a considerable length of time, in a public street, in the city of Lichfield, a crushing-machine unprotected, and without ordinary and reasonable precaution and care, whereby Michael Mangan, an infant, was much hurt and injured.

The cause was heard on the 7th of August, 1865, when it was proved that the machine, which was for the purpose of crushing oilcake, had on one

side a set of cogwheels to work the rollers, through which the oilcake to be crushed passed, and on the other side a handle, by which the wheels were set in motion. The machine was standing as usual, during the market hours, in the place where the defendant displayed on market days the articles which he had for exhibition or sale, being part of the ordinary market area in Lichfield. The axle of the handle was at the height of 2 feet 9 inches from the ground, and was not in any way fastened up. The cogwheels, which were put in motion by the handle, were, at the point where they met, at a height of 2 feet 6 inches from the ground. The machine was not under the care of any person.

The plaintiff was four years old; and, while returning from school with his brother (who was seven years old), he and other lads stopped at the machine; and whilst one of the other boys was turning the handle, the plaintiff, on being told to do so by his brother, put his hand in the cogs, and three of his fingers were crushed so severely as to require amputation.

The Judge in summing up told the jury that, if they agreed with him in thinking that the machine was dangerous, and one that should not have been left unguarded in the way of ignorant people, and especially of children, without at all events the handle being removed or fastened up and the cogs thrown out of gear, then they would hold the defendant liable for such damages as they might think right.

The jury having inspected the machine, gave a verdict for the plaintiff, damages 10l., whereupon the defendant appealed to this Court.

Macnamara, for the appellant, the defendant.—First, there was no negligence on the part of the defendant; and secondly, even if there were, he is not liable, because the plaintiff brought about the accident by his own negligent act. In *Lynch v. Nurdin* (1 Q.B. Rep. 29; s. c. 10 Law. J. Rep. (N.S.) Q.B. 73) the defendant negligently left a horse and cart unattended in the street, and was held liable for injury received by one boy in falling from the cart when it was put in motion by another boy; but the decision proceeded on the ground that the plaintiff was blameless, as explained by Parke, B. in *Lygo v. Newbold* (9 Exch. Rep. 302; s. c. 23 Law J. Rep. (N.S.) Exch. 108), and it was not followed in *Singleton v. the Eastern Counties Railway Company* (7 Com. B. Rep. N.S. 287); nor did this Court regard it in *Abbott v. M'Fie* (2 H. & C. 744; s. c. 33 Law J. Rep. (N.S.) Exch. 177). Here there was no negligence, and ordinary care on the part of the plaintiff or his protector would have prevented the accident. The mere placing of the machine where it was would not have caused the accident but for the negligent act of the boys in meddling with it, and the defendant therefore is not liable—*Murphy v. Caralli* (34 Law J. Rep. (N.S.) Exch. 16), per Bramwell, B.

A. S. Hill, for the respondent, the plaintiff, contended that as the jury had found their verdict for the plaintiff, they must be taken to have found that there was no contributory negligence on his part; and that *Hughes v. M'Fie* (2 H. & C. 744; s. c. 33 Law J. Rep. (N.S.) Exch. 177) was distinguishable, because here there was not, as in that case, any joint action between the plaintiff and the boy who turned the handle of the machine.

[BRAMWELL, B.—If the machine had been of a delicate construction, and had been damaged by the boy, could not the defendant have had an action against him?]

POLLOCK, C.B.—There is no foundation for this action, and there must therefore be judgment for the appellant.

MARTIN, B.—The plaint states that the defendant permitted the machine to remain in the street unprotected, “whereby the plaintiff was injured.” Now that is not so, for the injury was directly caused by the act of the other boy. Whatever negligence there was in leaving the machine as it was, and giving the other boy an opportunity of turning the handle, was far too remote to impose any liability on the defendant for the injury done to the plaintiff.

The Judge ought to have told the jury there was no negligence on the part of the defendant.

BRAMWELL, B.—If the machine had been painted with poisonous paint, and the plaintiff had sucked the paint, would the defendant have been liable? Would it not have been the fault of those who allowed the child to be there unprotected? Suppose the defendant again to place the machine as it was before, could he be said to be wilfully doing wrong? He had a perfect right to exhibit his goods, and is not liable for the effects of an accident caused by the improper meddling of the plaintiff and his companion. The word "negligence" has been very much misused in cases like this.

Judgment for the appellant

[IN THE COURT OF EXCHEQUER.]

April 30, 1866.

CAVELL AND ANOTHER v. PRINCE.

35 L. J. Ex. 162; L. R. 1 Ex. 246; 15 L. T. 83; 14 W. R. 968;
12 Jur. N.S. 475.

Contract — Consideration — Marriage — Equitable Plea — Impotence of Husband.

HUSBAND AND WIFE.—*To a declaration on a covenant in a deed executed in anticipation of marriage, whereby the defendant covenanted to pay an annuity during the life of his intended son-in-law, the defendant pleaded on equitable grounds that the marriage was null and void by reason of the husband's impotence, and that the consideration for the deed had wholly failed:—Held, a bad plea.*

Declaration on a deed executed in anticipation of the marriage of J. S. C. and the defendant's daughter, wherein the defendant covenanted to pay the plaintiffs (who were trustees under the deed), in consideration of the marriage, an annuity of 200*l.* by half-yearly payments, during the life of the said J. S. C. or until he should become bankrupt or an insolvent debtor within the meaning of any act of parliament. There were averments "that the said intended marriage was afterwards solemnized, and that the said J. S. C. was still living and had not become bankrupt or an insolvent debtor within the meaning of any act of parliament for the relief of insolvent debtors; and that of the said annuity the sum of 200*l.*, being the amount of two half-yearly payments thereof, was due and unpaid by the defendants to the said J. S. C."

Fourth plea,—upon equitable grounds—that the deed was made by and between the defendant and the plaintiffs, as trustees for the said J. S. C. and the defendant, in consideration of the marriage of the said J. S. C. with the defendant's daughter, and of such marriage being a valid marriage, and of the said J. S. C. being competent to contract the same, whereas in truth and in fact the said marriage was not a valid marriage, nor was the said J. S. C. competent to contract the same, but the *said marriage was always null and void by reason of the impotence* of the said J. S. C. of which the defendant had no notice at the time of the making of the said deed, and that the defendant's daughter had never been able to cohabit with the said J. S. C. by reason of his said impotence and the consideration for the deed had wholly failed.

Demurrer and joinder.

Keane (with him Haselfoot), in support of the demurrer, contended that

the marriage, even if voidable, was at any rate not void on the ground stated in the plea. It could only be declared void by a competent Court; besides, its validity could be impugned on the ground of impotence by one of the parties only, and not by a third person. He cited *Boehmer's Principia Juris Canonici*, edit. 1785, par. 384.¹

Beresford, in support of the plea.—The Court must look to the real contract between the parties. It was not the mere solemnization of the marriage that was to make the defendant liable to pay the annuity during the life of J. S. C. Consummation of the marriage was the real consideration.

[POLLOCK, C.B. referred to *Hall v. Wright* (El. B. El. 746; 29 Law J. Rep. (N.S.) Q.B. 43).]

In such a case as this mere consent cannot make the marriage valid.

The Court held that the plea was bad.—They referred to *H.*, *falsely called C. v. C.*, (29 Law J. Rep. (N.S.) Pr. M. & A. 81, per Bramwell B. 92), where Bramwell, B. said, "There seems some uncertainty whether such marriages are absolutely null or only voidable. The difference may be this, that they are valid at common law unless avoided—null by the law ecclesiastical." They also observed that it did not appear that the marriage had been declared void by a Court of competent jurisdiction; and that impotence could not be set up by a third party as a reason for the marriage being null and void, when neither husband nor wife had elected to treat it so.

Judgment for the plaintiffs

[IN THE COURT OF EXCHEQUER.]

May 1, 1866.

BRIGGS v. OLIVER.

35 L. J. Ex. 163; 4 H. & C. 403; 14 L. T. 412; 14 W. R. 658.

Negligence—Prima facie Evidence—"Res ipsa loquitur"—Nonsuit.

NEGLIGENCE—*The plaintiff going to the doorway of a house in which the defendant had offices, was pushed out of the way by a servant of the defendant, who was watching a packing-case which belonged to the defendant, and was leaning against the wall of the house. The plaintiff fell, and the packing-case fell on his foot and injured him. There was no evidence as to who placed the packing-case against the wall or what caused its fall:—Held, by Bramwell, B. and Pigott, B. (dissentiente Martin, B.), that there was a prima facie case against the defendant to go to the jury, the fall of the packing-case being some evidence that it had been improperly placed against the wall.*

This action was brought to recover damages for injuries sustained by the plaintiff in consequence of the alleged negligence of the defendant's servant.

(1) This paragraph is as follows: *Impedimenta dirimentia privata descendunt (i.) ex metu, (ii.) ex dolo (iii.) ex errore circa personam, vel circa statum ejus civilem, (iv.) ex impotentia coeundi antecedenti absoluta et perpetua. Hujus probatio non peragitur confessione conjugis, sed inspectione oculari per peritos instituenda: ex qua si definiri satis nequit perpetuumne an temporarium impedimentum, medicamentis vel mora tollendum, tum ad triennii experimentum est excurrendum, ut si per id tempus, a contractis nuptiis computandum nullo successu ad Venerem nitantur, post triennium matrimonium dissolvatur, dummodo impotentia confirmetur juramento conjugis, vel utriusque si impotens eam non diffitetur vel saltim actoris, si impotens contradicit. Ceterum ob impedimentum dirimens privatum non nisi ei cujus interest jus agendi competit: eoque juri suo renunciante matrimonium convalescit et subsistit.*

At the trial, before the Recorder of the Manchester Court of Record, it was proved that the plaintiff went to the door of a house in Manchester to call at the office of a person named Gregory. The defendant occupied premises in the same house, and a packing-case belonging to him was leaning against the wall of the house close to the door. A servant of the defendant gave the plaintiff a push, no reason for which was assigned, but it was suggested that it was done to push him out of the way of the falling packing-case. The plaintiff fell into the road, and the packing-case fell on his foot and injured it. There was no evidence at all given to account for the fall. It was proved, however, that the defendant's servant was watching the case. The Recorder nonsuited the plaintiff, on the ground that there was no evidence of negligence.

A rule *nisi*, pursuant to leave reserved to set aside the nonsuit and enter a verdict for 30l. if the Court should think that there was evidence to go to the jury, having been obtained,—

C. Pollock shewed cause.—There was no evidence of negligence on the part of the defendant or his servant, and the accident itself was no proof of negligence. This fact distinguishes the case from *Byrne v. Boadle* (2 H. & C. 722; s. c. 33 Law J. Rep. (N.S.) Exch. 13) and *Scott v. the London Dock Company* (34 Law J. Rep. (N.S.) Exch. 17: affirmed in Exchequer Chamber, *ibid.* 220). The rule is rightly laid down by Williams, J., in *Cotton v. Wood* (8 Com. B. Rep. N.S. 568; s. c. 29 Law J. Rep. (N.S.) C.P. 333), that where the evidence is equally consistent with either view,—the existence or non-existence of negligence,—it is not competent for the Judge to leave the matter to the jury.

Prentice supported the rule.—This case is stronger than either of those cited, and, as was said in those cases, *res ipsa loquitur* to prove negligence. The plaintiff was lawfully on the highway, and was injured by the defendant's packing-case, which there was sufficient evidence to shew was under the control of the defendant's servant.

Pigott, B.—In my judgment there was evidence to go to the jury of the defendant's negligence. The packing-case was the defendant's, and it was lodged against the wall, and there was some evidence that the defendant's servant was watching it. It fell from its own weight and, as I infer, from having been improperly placed against the wall, for there is no evidence of its having been disturbed in any way so as to fall. I think that upon those facts there was evidence of negligence; for they are not equally consistent with the existence or non-existence of negligence, packing-cases not being in the habit of falling unless there has been some negligence in the way in which they have been propped up.

Bramwell, B.—I am entirely of the same opinion; and I quite agree that we should be overruling the cases of *Byrne v. Boadle* (2 H. & C. 722; s. c. 33 Law J. Rep. (N.S.) Exch. 13) and *Scott v. the London Dock Company* (34 Law J. Rep. (N.S.) Exch. 17: affirmed in Exchequer Chamber, *ibid.* 220) if we held that there was no evidence of negligence in this case. Every case must, no doubt, depend upon its own particular circumstances. Now, there was abundant evidence that the defendant was responsible for this packing-case. It was close to his premises, belonged to him, and his servant, as was not denied, was watching it; and therefore if it was in an unsafe position and did anybody damage he was responsible. Then, was there any evidence that it was in an unsafe position? To my mind, there was; and, as has been said, *res ipsa loquitur*. Packing-cases do not fall naturally and of their own accord when they are carefully placed in a proper position; and we have no right to assume that something was done to this packing-case by somebody else, not the defendant's servant, so as to cause its fall. Therefore there was a *prima facie* case of negligence, just as in the other cases cited, in one of which it was said that casks of flour do not roll out of window naturally, and therefore that if one is being handed out and falls, it is owing to the

negligence of the persons handing it out; and in the other, that if a bag of sugar is being let down in a sling and it falls out, it is *prima facie* owing to its having been put in the sling in a negligent manner. The substance of this case is, that a packing-case, for which the defendant was responsible, fell on the plaintiff and injured him; and it seems to me that, in reason as well as according to authority, there was a *prima facie* case against the defendant to go to the jury; and it would be for them to say whether they were or were not satisfied that there was negligence on the defendant's part.

MARTIN, B.—I am of opinion that the Recorder was right, and that there was no evidence to go to the jury in this case. A man went to a house for the purpose of making an inquiry of a person who was standing in the doorway, and he was pushed aside and fell, and in his falling a packing-case fell on his foot. That is the whole of the evidence. How the packing-case was placed there, and how it came to be knocked down, there was no evidence whatever. I do not think I am overruling any decided case. Every case must depend on its own facts, and it is idle to say that this case is governed by a decision in a case where a bag of flour fell from a doorway at the top of a building. The declaration alleges that by reason of the defendant's negligence the matter complained of occurred. What possible evidence is there of that? It is all surmise and imagination. The fallacy that, as it seems to me, lies at the bottom of all these cases is, that the plaintiff is excused from proving negligence on the defendant's part, because the person who knows whether there was, in fact, negligence or not, is the defendant's servant. The plaintiff might have called him; and it is not to be assumed that he would have told an untruth about it. But he was not called; and it was said, as has been said in many of these cases, that it was for the defendant to disprove negligence. I think that that is bad reasoning and bad law. My view of the matter is that stated by Mr. Justice Williams in the case of *Cotton v. Wood* (8 Com. B. Rep. N.S. 568; s. c. 29 Law J. Rep. (N.S.) C.P. 333). It is a matter of the first importance that, where the existence or non-existence of negligence is equally consistent with the facts, the Judge ought not to leave the case to the jury. It may be that there was negligence in this case; but it was consistent with the evidence that there was none. I find it said by Chief Justice Erle in the same case, that a plaintiff is not entitled to have his case left to the jury unless he give some affirmative evidence of negligence. I entirely concur in that; and therefore I think that in this case the plaintiff was rightly nonsuited.

Rule absolute.

[IN THE COURT OF EXCHEQUER.]

May 2, 1866.

PRICHARD v. TIMOTHY AND ANOTHER.

35 L. J. Ex. 165; 14 L. T. 443.

Debtor and Creditor—Bankruptcy Act, 1861, ss. 192, 194.—Registration of Deed.

BANKRUPTCY.—A deed of assignment, made between a debtor of the first part, "trustees for themselves and the rest of the creditors parties thereto" of the second part, and "the other persons whose names and seals were thereto subscribed and set, being creditors," of the third part, contained an assignment of all the debtor's estate and effects to the trustees, in trust to pay the trustees and the other persons parties thereto of the third part "who should execute the deed within twenty-one days from the date thereof" their several debts; with a provision that such creditors as did not assent within such further

time, not exceeding thirty days, as the trustees should declare, should be excluded from all benefit thereunder:—Held, that this was a deed professing to be for the benefit of all the creditors; and that, according to the 194th section of the Bankruptcy Act, 1861, it could not be received in evidence before registration.

This was an appeal from the decision of the Judge of the Anglesey County Court.

The action was brought to recover 40*l.* for half a year's use and occupation of the Railway Hotel at Llanfair, in the county of Anglesey. The plaintiff sought to prove at the trial that one Lloyd was tenant of the hotel to the plaintiff, and that half a year's rent was due on the 13th of May, 1864. It appeared that on the 16th of March, 1864, Lloyd executed an assignment to the defendants of all his personal estate and effects "for (according to the case stated by the Judge) the equal benefit of his creditors"; and immediately after the execution of the deed the defendants entered into possession of Lloyd's effects in the hotel.

The solicitor who prepared the deed of assignment was called upon to produce it at the trial; and on its production it was found not to be registered under the provisions of the 192nd and the 194th sections of the Bankruptcy Act, 1861, whereupon the defendant's counsel objected to the deed being admitted in evidence.

The Judge held that the deed was inadmissible in evidence because it was not registered, and gave a verdict for the defendants.

The question for the Court was, whether the Judge was right or wrong in ruling that the deed was inadmissible in evidence.

The deed (which was appended to the case stated by the Judge) was expressed to be made between Lloyd of the first part; the defendants, "trustees for themselves and the rest of the creditors parties thereto," of the second part; and, "the several other persons whose names and seals were thereunto subscribed and set, being respectively creditors of Lloyd," of the third part. After reciting that Lloyd was indebted to the parties of the second and third parts in the several sums set opposite their respective names in the schedule, and that he was unable to pay in full, &c., the deed witnessed that the debtor assigned all his estate and effects, &c. to the trustees, upon trust to collect and receive, &c., and out of the monies to be received to pay the expenses of the deed, "and in the next place to pay, retain and satisfy, ratably and proportionably, and without any preference or priority to themselves, the trustees and their partners, and the other persons, parties thereto of the third part who should execute the deed within twenty-one days from the date thereof the several debts or sums set opposite to their respective names in the schedule thereto." There was also a provision that "such of the creditors as should not execute or assent in writing to take the benefit of the deed on or before the 16th of April next, or within such further time, not exceeding thirty days, as the trustees shall declare, should be excluded from all benefit under the deed."

Joseph Brown, for the appellant.—This deed is not within the 192nd or the 194th sections of the Bankruptcy Act, for it is clearly only for the benefit of certain creditors, and cannot be regarded as a deed for the equal benefit of all of them—*Dewhurst v. Kershaw* (32 Law J. Rep. (N.S.) Exch. 146).

[BRAMWELL, B.—If all were to subscribe in time, would it not be for the benefit of all?]

It may become for the benefit of all, if all subscribe within the time limited. But that should have been found as a fact in the case. Whether the deed be for the benefit of all or not must be determined from the terms of the deed itself. That is really the effect of the decision of this Court in *Hodgson v. Wightman* (32 Law J. Rep. (N.S.) Exch. 147), where Wilde, B. said that, "the 194th section applied to all deeds which are, or which profess

to be, or are obviously on the face of them deeds of arrangement between the debtor and the whole body of his creditors." Now this deed, on the face of it, is for the benefit of those only of the creditors who sign within the time limited. In *Berridge v. Abbot* (13 Com. B. Rep. N.S. 507) a deed like this was virtually held not to be for the benefit of all the creditors.

Macnamara (with whom was *Robins*) contended for the respondents that, according to *Hodgson v. Wightman* (32 Law J. Rep. (N.S.) Exch. 147), the Judge was right in excluding the deed; and cited *Ex parte Wensley* (32 Law J. Rep. (N.S.) Bankr. 23), where the Lord Chancellor said that the deed, as the act of the bankrupt, and as against the bankrupt, even if not registered, might always be received in evidence to undo the deed itself, but that it could not, without registration, be received as proof of any title or release under it.

MARTIN, B.—We are all of opinion that the learned Judge was right in excluding this deed from evidence. It seems to me that the case of *Hodgson v. Wightman* (32 Law J. Rep. (N.S.) Exch. 147) is directly in point, and that, if the Judge had ruled otherwise, he would have overruled that case. We are to look at what this deed professes to be on the face of it. Now, the deed professes to be a deed between the debtor of the first part; the defendants, trustees for themselves and the rest of the creditors, of the second part; and the several other persons whose names and seals are thereunto subscribed as being creditors, of the third part. Now, according to the authorities, this may not have been a good deed to bar a dissenting creditor from setting up his debt; but that is not the test under the 194th section; there the test is, whether or not the deed professes to be an agreement between the debtor and the whole of his creditors. Now, I think the object of the debtor was to bar the whole of the creditors by giving them a composition according to the terms comprised in this deed. If *Hodgson v. Wightman* (32 Law J. Rep. (N.S.) Exch. 147) is not to be overruled, the defendants are entitled to our judgment. We must give a construction to the 194th section according to what we can perceive was the object of the act of parliament. When we can see the object, we must carry the act out according to its spirit; but when we can hardly say what was the object of the legislature, then we must give a literal construction to the words used; we can only say the legislature have thought fit to say so-and-so, and it is our duty to carry out whatever the legislature have enacted. As I have had occasion to say before, I have never given or read, to my mind, a satisfactory judgment upon these sections of the act of parliament.

BRAMWELL, B.—I will only say that, as the case stands, the learned Judge was quite right. The case states, that on a given day Lloyd executed an assignment to the defendant of all his personal estate and effects for the equal benefit of his creditors: that means all his creditors. We are told that we must look at the deed itself, to see whether it is for their benefit. I think the deed shews the same thing, because any one of the creditors might have executed it if he thought fit, so that it was for the benefit of all the creditors if they had thought fit to execute it.

PICOTT, B.—I am of the same opinion. If the 194th section applied only to deeds under the 192nd, the legislature would have said so. It extends beyond deeds under the 192nd section, and it includes such deeds as the present one. I may say that, if we were to adopt the plaintiff's construction, it is impossible to conceive what the difficulties of the Judges would be; for whenever one of these deeds was offered in evidence, the Judge at the trial would have to examine all the cases in point, and see if the deed was good under the 192nd section, and then say whether it was admissible or not. It was this very difficulty which, in my opinion, the legislature intended to avoid.

Judgment for the respondents.

[IN THE COURT OF EXCHEQUER.]

May 8, 1866.

COOMBS v. DIBBLE.

35 L. J. Ex. 167; 4 H. & C. 375; L. R. 1 Ex. 248; 14 L. T. 415; 14 W. R. 676;
12 Jur. N.S. 456.

Gaming and Wagering—Horse Racing—8 & 9 Vict. c. 109. s. 18.

GAMING AND WAGERING.—*An agreement between two persons, each of whom is possessed of a horse, to ride a race, the winner to have both horses, is null and void, being an agreement by way of wagering, within the meaning of 8 & 9 Vict. c. 109. s. 18, and not an agreement to contribute towards a prize to be awarded to the winner of a lawful game, within the meaning of the proviso in that section.*

The declaration contained counts in trover and detinue for a horse.

The pleas were not possessed and *non detinet*, pleaded to the whole declaration.

At the trial, before Byles, J., at the last assizes at Taunton, it was proved that the plaintiff and the defendant, being each possessed of a horse, agreed to ride a race, the winner to have both horses. The race was ridden, and the defendant won. He thereupon came to the plaintiff's house and took away the horse. There was some evidence that the plaintiff voluntarily gave up the horse when the defendant demanded it, but no question as to this was left to the jury, who were asked, first, whether the agreement was made; secondly, whether the race was fairly won by the defendant. They answered both questions in the affirmative; and a verdict was thereupon entered for the defendant, the plaintiff having leave to move to enter a verdict for him for 14*l.*, the value of the horse, if the Court should be of opinion that the property in the horse remained in him, notwithstanding the agreement and the result of the race.

A rule having been obtained accordingly,

Edlin shewed cause. It is contended by the plaintiff that this agreement was null and void, as being by way of wagering; but that is not so, for it is within the proviso of the 8 & 9 Vict. c. 109. s. 18, being an agreement to contribute towards a prize to be awarded to the winner of a lawful game.¹ The parties, being each possessed of a horse, agree to put the two together, so as to make a prize for the winner; and the fact that the only persons who contribute to the prize are the two persons who are to race, does not take the case out of the proviso—*Batty v. Marriott* (5 Com. B. Rep. 818; s. c. 17 Law J. Rep. (N.S.) C.P. 215).

[POLLOCK, C.B.—But there each party put 10*l.* into the hands of a stakeholder. The act contemplated contributions of money, not of horses.]

The contributions mentioned are to any "plate, prize or sum of money." There may be a prize of horses just as much as of money.

[MARTIN, B.—I should have thought that the proviso applied to something totally different from a case of two men racing for a stake contributed between them, but Mr. Justice Cresswell, in his judgment in *Batty v. Marriott* (5 Com. B. Rep. 818; s. c. 17 Law J. Rep. (N.S.) C.P. 215), distinctly laid

(1) 8 & 9 Vict. c. 109. s. 18. is as follows: "And be it enacted, that all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

it down that such a case was within the proviso. POLLOCK, C.B.—But his judgment only speaks of a contribution in money.]

There is no doubt now that horse-racing is a lawful game—*Evans v. Pratt* (3 M. & G. 759; 11 Law J. Rep. (N.S.) C.P. 87).

Prideaux, for the plaintiff, was not heard.

POLLOCK, C.B.—I entertain a clear opinion upon this point in favour of the plaintiff. Two gentlemen agree to ride a race, the winner to have both horses. There is no deposit of the stake, and I think that unless a very constrained force is put on the words of the statute, it cannot be said that this was an agreement to “subscribe or contribute for or toward any plate, prize or sum of money to be awarded to the winner of a lawful game.” To hold that those words apply to a contribution of horses would be to confound barter and sale.

MARTIN, B.—I think that this case falls within the first part of 8 & 9 Vict. c. 109. s. 18, and not within the proviso in it. The contract was a wager of one horse against another, and the horse was a “valuable thing alleged to be won upon a wager.” As to the proviso, I should be content to take the judgment in *Batty v. Marriott* (5 Com. B. Rep. 818; s. c. 17 Law J. Rep. (N.S.) C.P. 215) as law; and certainly we ought not to overrule the judgment of a Court of co-ordinate jurisdiction. But I do not think that this case falls within that decision. There was no contribution or fund subscribed in this case. The contract was a void one, and no suit could have been maintained by the winner to recover the horse, and he would not have been justified in taking it by force and keeping it. It ought, however, to have been left to the jury to say whether the horse was not given up by the plaintiff to the defendant, for if it was, I am clearly of opinion that he cannot recover it back.

BRAMWELL, B.—This agreement is clearly within the first part of this section, and the question is, whether it is within the proviso. I accept the case in the Common Pleas as law, and see no reason to be dissatisfied with it as at present advised. I do not say that there may not be a prize of horses, and that parties could not contribute to such a prize so as to be within the meaning of the proviso. But, as my Brother Martin says, there was no contribution of horses here. The winner did not contribute in any way. And on a minute verbal criticism of the words of the act, the case might be held not to come within the proviso. But it was clearly the intention of the legislature that such a case as the present should come within the section and not within the proviso. Therefore, on this view of the question, our judgment will be in the plaintiff's favour. But, at the worst, this was a void contract, and not an illegal one, and if the plaintiff let the defendant take the horse he cannot get it back.

*Judgment for the plaintiff.*²

(2) On the point reserved at the trial, and on which the plaintiff had leave to move to enter a verdict, the judgment of the Court was in the plaintiff's favour; but an opinion having been expressed that the jury ought to have been asked whether the horse was given up by the plaintiff to the defendant, it was directed that the case should be mentioned again next term, an intimation being given that the value of the horse being small, it would be better for the parties to come to some arrangement so as to render a new trial unnecessary. No such arrangement having been come to, a rule for a new trial was ultimately made absolute.

[IN THE COURT OF EXCHEQUER.]

April 20, May 3, 1866.

HUBBARD v. LEES AND PURDEN.

35 L. J. Ex. 169; 4 H. & C. 418; L. R. 1 Ex. 255; 14 L. T. 442; 14 W. R. 694;
12 Jur. N.S. 435.

Ejectment—Power of Appointment by Will—Requisite Number of Attesting Witnesses—Wills Act (1 Vict. c. 26.) s. 10.—Evidence—Pedigree—Entries of Births, &c. in New Testament—Certificates.

WILL.—A power to appoint by will attested by three witnesses, given since the passing of the Wills Act, 1 Vict. c. 26, is well exercised by means of a will attested by two witnesses in the ordinary way in conformity with the provision of the Wills Act; section 10. of that act applying to powers created subsequently to the coming into operation of the act as well as to powers previously in existence.

EVIDENCE.—In cases where a family pedigree has to be proved, entries of births, deaths and marriages of members of the family made in a New Testament, which is produced by a member of the family and proved to have been in the possession of the family for a considerable time, are admissible in evidence without proof of the handwriting.

The question of identity of a person named in a certificate of birth, death, or marriage with the person to whom the name is alleged to refer, is for the jury, and proof of such identity is not essential to the admissibility in evidence of the document.

Ejectment to recover one undivided fourth part of Shelmore Farm, in the county of Stafford. The defendant Lees, who was tenant to the other defendant, Purden, did not appear; but Purden defended as landlord. The case was tried, before Montague Smith, J., at the last Spring Assizes for Stafford.

Thomas Johnson, of Chebsey, was seised of Shelmore Farm and other real estate, and died intestate leaving two daughters. One of them, Elizabeth, married George Hewitt Landor, in 1838. Previous to the marriage, by a deed of settlement dated the 26th of June, 1838, her real estate, including her moiety of this farm, was conveyed to a trustee to uses, the limitations being to her mother, Mary Johnson, for life; remainder (after certain limitations in favour of herself and intended husband, and the issue of the intended marriage which did not take effect), to such uses as she, Elizabeth Johnson, should, notwithstanding coverture, appoint or devise "by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by her legally executed, or by her last will and testament in writing, or any codicil thereto, to be by her signed and published in the presence of and attested by three or more credible witnesses;" remainder, in default of appointment, to the use of herself, her heirs and assigns. There was no issue of the marriage.

By her will, dated the 1st of April, 1852, attested by two witnesses in the manner prescribed by the Wills Act, 1 Vict. c. 26. s. 9. She exercised her power of appointment in favour of her husband and his heirs. She died in 1852, and her husband died in July, 1856, without issue, and intestate as to his real estate. Mary Johnson, the mother of Elizabeth Johnson, died in August, 1856.

Purden took possession as pretended heir-at-law of George Hewitt Landor. The plaintiff now claimed as true heir-at-law of the same George Hewitt Landor, his relationship being traced in the following way: The plaintiff was the grandson of John Moore, who was the youngest son of Elizabeth Moore,

who was the sister of George Hewitt Landor's grandfather. The common ancestor of the plaintiff and George Hewitt Landor was, therefore, the father of Elizabeth Moore.

To prove the births and deaths of the various members of the family, and especially to exhaust the descendants of the elder children of Elizabeth Moore, there were offered in evidence various certificates of births, baptisms, marriages and deaths, to which it was objected that there was no evidence of the identity of the persons named in them with the members of the family of the same name, to whom they were alleged to refer.

There was also tendered in evidence a copy of the New Testament containing entries of the births and deaths of Elizabeth Moore's children. This Testament was produced by Maria Moore, who had received it from her father, James Moore, who was the stepson of Elizabeth Moore. It was further stated by a witness that she had seen the Testament in the possession of Fanny Wells, a daughter of Elizabeth Moore, and that Fanny Wells gave it to her half-brother James Moore, from whom, as mentioned above, it came to the witness who produced it. This book was objected to on behalf of the defendant, on the ground that there was no proof of the handwriting of the entries.

All these documents were admitted in evidence. A verdict was entered for the plaintiff; and the defendant had leave to move to enter a nonsuit or a verdict for himself if the Court should think them, or any of them, inadmissible, and also if the Court should think that the power of appointment was not properly exercised by Elizabeth Johnson by her will, which was attested by two witnesses only.

J. J. Powell (April 20) moved accordingly, and obtained a rule on all the grounds of objection mentioned above, except that which related to the admissibility of the certificates, upon which the Court refused the rule, on the ground that the question of identity between the persons named in them and the members of the family was for the jury.

Gray and Dowdeswell (May 3) shewed cause.—As to the admissibility of the evidence, entries in family Bibles are admissible without proof of handwriting or authorship, they being what are called *quasi* records. All that is necessary is to shew that the books come from the proper custody, and to give some account of the way in which the books have been handed down into the possession of the person who produces them. As to the execution of the power, two witnesses were sufficient, the case being provided for by section 10. of the Wills Act, 1 Vict. c. 26, the operation of which is not confined to powers of appointment, which were in existence at the time of the passing of that act. That act, after prescribing the formalities to be attended to in the execution of wills, enacts, in section 10, "that no appointment made by will in exercise of any power shall be valid unless the same be executed in manner hereinbefore required, and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed, with some additional or other form of execution or solemnity." The judgment of Lord Chancellor Westbury in *Taylor v. Meads* (34 Law J. Rep. (N.S.) Chanc. 203), in which *West v. Ray* (Kay, 385; 23 Law J. Rep. (N.S.) Chanc. 447) is affirmed, is express that this section applies to powers created subsequently to the passing of the act, although the decision is not on the same point, the question there being whether or not an appointment required to be made under seal was properly exercised by a will executed in the ordinary way. Here power to appoint by will is expressly given.

Powell and *H. Matthews*, in support of the rule.—Section 10. of the Wills Act only applies to powers existing before the coming into operation of the act. Before that time real estate could only pass under a will attested by three or more witnesses; and many powers of appointment by will which were

intended to operate on real estate were required to be exercised by instruments attested by three or more witnesses, because the grantors wished that the same solemnities should attend the appointment by will as would have attended an ordinary devise by will. The legislature, therefore, when they enacted that two witnesses should suffice for a will, thought it only reasonable that the same number should suffice for the exercise by will of powers then in existence. But the section does not apply to powers granted subsequently. If a grantor, knowing that two witnesses only are required for a will, grants a power of appointment by will attested by three witnesses, his intention is clearly that some greater amount of attestation should be required than would be required for a will, and the exercise of the power must conform strictly with his directions. The words "shall have been expressly required" shew that this reading of the section is correct. As to the Testament, it was not admissible. The rule admitting entries in books only applies to family Bibles. In the case of a Testament it must be shewn that the entries were made by some member of the family. In none of the reported cases is it stated that such entries were admitted without any evidence of their authorship.—They referred to 1 *Taylor on Evidence*, s. 585. (p. 534, 3rd edit.)

MARTIN, B.—We are both of opinion that this rule should be discharged. I am clearly of opinion that the Testament was admissible in evidence. It was proved by a living witness to have been the book of Fanny Wells, and to have been given by her to her half-brother, who was the father of the witness, as her grandfather's book. It came from the proper custody, and to say that it was not admissible until proof had been given of the handwriting is untenable. If the handwriting can be proved you have no occasion to use the entries in the way in which it is sought to use them here at all. It is where Bibles of this kind contain entries so old that it is impossible to produce proof of handwriting, that the evidence becomes important. They are of the nature of records, and if they come from the proper custody, are assumed to have been adopted by persons cognizant of the facts, and are received in evidence accordingly.

Then, with respect to the question arising on the execution of the power of appointment, it seems to me clear that this case falls expressly within the 10th section of the Wills Act, and within what the legislature intended. What the legislature meant to express by that section was this: "We are aware that various appointments are to be made by will, and that the law requires a power to be exercised in the manner directed by the instrument which created it. But inconveniences and mischiefs have arisen, and probably will arise, in consequence of persons who exercise powers of appointment by will believing the ceremonies required for the execution of a will to be sufficient for the execution of a power by will. We think that we sufficiently protect the execution of the power if we enact that when the power is to be exercised by will, it shall be exercised in the manner required for a will by this act, though some additional ceremony or other form of execution may have been mentioned in the instrument creating the power." That is the simple meaning of the section according to plain language and good sense, and it was calculated to protect all parties, while laying aside mere matters of form, as far as practicable. I am requested by my Brother Montague Smith to say that he did not reserve this matter from any doubt about it, but because the cause was the last cause tried at the assizes, and he was unwilling, through want of time for deliberation, to do anything that might turn out to be an error.

BRAMWELL, B. concurred.

Rule discharged.

[IN THE COURT OF EXCHEQUER.]

May 30, 1866.

PEARSON v. PEARSON.

35 L. J. Ex. 172; L. R. 1 Ex. 308; 14 L. T. 596; 12 Jur. N.S. 589.

See *Latham v. Lafone*, [1867] E. R. A.; 36 L. J. Ex. 97; L. R. 2 Ex. 115; 15 L. T. 627; 15 W. R. 453 (Ex.). Reviewed and not applied, *Ex parte Atkinson*, [1870] E. R. A.; 39 L. J. Bk. 10; L. R. 9 Eq. 736; 22 L. T. 279; 18 W. R. 598 (C. J.). Approved, *Benecke v. Whittall*, [1872] E. R. A.; 46 L. J. P.C. 81; L. R. 2 App. Cas. 602; 37 L. T. 73; 25 W. R. 913 (P.C.).

The Bankruptcy Act, 1861, was repealed by 32 & 33 Vict. c. 83. s. 20.

Debtor and Creditor—*Bankruptcy Act*, 1861 (24 & 25 Vict. c. 134), ss. 192, 194, 197.—*Deed of Assignment*—*Registration*.

BANKRUPTCY.—*Section 197. of the Bankruptcy Act, 1861, applies only to deeds which have been registered in conformity with the regulations contained in section 192. It is not sufficient, therefore, to bring a deed within the operation of section 197, that it has been properly registered under section 194.*

Money had and received, and money due on accounts stated.

Plea—That after the accruing of the plaintiff's claim, and after the 11th of October, 1861, the plaintiff was indebted to divers persons, and thereupon a deed, bearing date the 24th of October, 1865, was made and entered into by and between the plaintiff of the one part and Robert John Wright and Robert Easton, as and being trustees on behalf of the thereunder signed creditors of the plaintiff, of the other part, relating to the debts and liabilities of the plaintiff and his release therefrom. And the plaintiff thereby conveyed all his estate and effects to the said Robert John Wright and Robert Easton absolutely as trustees, to be by them applied and administered for the benefit of the creditors of the plaintiff, in like manner as if the plaintiff had been at the date thereof duly adjudged bankrupt. And all things necessary in that behalf having happened and been done to render the said deed binding on the creditors of the plaintiff under the Bankruptcy Act, 1861, and to vest the debts and causes of action in the declaration mentioned in the said trustees, the said debts and causes of action became, and were, and are, vested in the said Robert John Wright and Robert Easton, as such trustees, for the benefit of the plaintiff's creditors as aforesaid.

Replication—That the said deed was registered under and by virtue of section 194. of the Bankruptcy Act, 1861, and the same was not, under and according to section 192. of the said act, within twenty-eight days from the day of the execution of the said deed, produced and left, having been first duly stamped, at the office of the Chief Registrar of the Court of Bankruptcy, for the purpose of being registered; and together with such deed there was not delivered to the said Chief Registrar an affidavit by the plaintiff or some person able to depose thereto, or a certificate by the said trustees or either of them, that a majority in number representing three-fourths in value of the creditors of the defendant, whose debts amounted to 10l. and upwards, had in writing assented to and approved of the said deed, and stating the amount in value of the property and credits of the plaintiff comprised in such deed.

Demurrer, and joinder therein.

Dowdeswell, in support of the demurrer.—**Section 197. of the Bankruptcy Act, 1861, vests causes of action relating to the debtor's estate in the trustees on registration either under section 192. or section 194.**

[**MARTIN, B.**—In *Ex parte Morgan* (1 De Gex, J. & S. 300; s. c. 32 Law J. Rep. (N.S.) Bankr. 15) Lord Chancellor Westbury said, "In like manner the 197th section, a most important one, plainly relates only to such

deeds as come within the 192nd section, that is, deeds registered in the office of the Chief Registrar. *Ex parte Spyer* (Ibid. 318; s. c. 32 Law J. Rep. (N.S.) Bankr. 62) is to the same effect.]

But the decisions in those cases were on the 198th section, and not on the 197th section, the words of which, "every such deed or instrument," apply equally to the deeds mentioned in section 194. and those in section 192.

[MARTIN, B.—But section 198. begins with the words "after notice of the filing and registration of such deed," and "such deed" was held to be confined to deeds registered under section 192. BRAMWELL, B.—Section 197. speaks of the "debtor and creditors and trustees, parties to such deed," which seems to imply that deeds under section 192. were contemplated.]

On the other hand, the words "debtor and creditors and trustees, parties to such deed, or who have assented thereto, or are bound thereby," shews that the section was intended to apply to creditors who were not bound by the deed, i.e. creditors in cases where the deed, though registered under section 194, was not binding on non-assenting creditors under section 192.

E. L. O'Malley, in support of the replication, was not heard.

POLLOCK, C.B.—The question is, whether section 197. of the Bankruptcy Act, 1861, is to be considered as applying to deeds registered under section 194, but not in conformity with the provisions of section 192. Is the 194th section to be considered as parenthetical only, or as carrying along with it all the provisions from section 190. to section 197, so that if a deed be within section 194. section 197. will apply to it, and transfer the debtor's causes of action to the trustees? Looking to the scope of the act, it appears to me that the latter is not the construction to be put upon it, and that the clause is really parenthetical, the construction put upon it by Lord Chancellor Westbury being the true one. The debt is not transferred to the assignees, and therefore I am of opinion that judgment should be for the plaintiff.

MARTIN, B.—I am of the same opinion. As I had occasion to say before, and as I say now, I have never given a judgment upon this act of parliament which was satisfactory to my own mind. I do trust that in a future act of parliament the provisions made by the legislature will be such that we shall be able to give satisfactory judgments upon them, not founded upon surmises and remote inferences proceeding from very small premises. It seems to me that this 194th section is in the nature of a parenthesis; and I cannot think that it was the intention of the legislature that a debtor, by framing a deed and putting it in his pocket, should be able, without the concurrence of a single creditor, to transfer the whole of his property, including his debts, to his assignee. I think that the judgment of Lord Chancellor Westbury, in a case turning on the 198th section, in which he mentioned a decision of mine given at chambers, and stated it to be correct, concludes this case (*Semble Ex parte Smith*, 10 Law Times Rep. N.S. 551). He held there that the 198th section only applies to a deed under the 192nd, and not to a deed under the 194th. Mr. Dowdeswell suggests that section 198. speaks of "notice of the filing and registration of such deed"; and that as the 192nd section is the only section which requires notice, the 198th section was therefore held to apply only to deeds registered under the 192nd. But I think that the words "such deed" in section 197. and 198. must be taken to have the same meaning.

BRAMWELL, B.—I am of the same opinion. There is no doubt that our present construction of this section 197. is open to the remark, that we read "every such deed," which presumably includes every such deed as is mentioned in the preceding clauses, as if there was a limitation of it to "every such deed as first aforesaid," or, "as in the 192nd section aforesaid." That is the *prima facie* objection to the construction. But if the plaintiff's contention is right, the extraordinary state of things might arise which has been pointed out, that a deed executed by a debtor, without the assent of a single one of his creditors, would have the effect of transferring all his effects to his

own self-elected trustees. Therefore, we start with some ground for such an interposition as I have suggested. Then there is, I think, a very good reason for saying that an interposition of some such words should be made because it is admitted that section 198, which has the words "such deed," does not include deeds registered under section 194. It is admitted therefore that even if we do not insert and interpose such words as I have suggested in section 197, we must do so when we come to section 198. If the interposition must be made in one section, there is no reason why it should not be made in the other; and there is the additional reason for doing it in this case, to avoid the absurdity of property passing in the manner which has been suggested.

Again, section 197. speaks of parties who are bound by the deed. Mr. Dowdeswell has very ingeniously suggested that that may mean "every such deed or instrument as well where parties assenting are bound by it as where there are no such parties." I cannot say it might not have that meaning if all other reasons concurred for putting such a meaning upon it. But here I think that the reasons are all the other way. If that had been intended the more accurate way of expressing it would have been to have said, "From and after the registration of such deed or instrument, as well where parties not executing it are to be bound by it, as where there are no such parties." If this really was the intention of the legislature there is undoubtedly an inaccuracy, or an uncertainty in the mode of expressing it, and the reason of the thing together with the admitted necessity of adding words to section 198, even if they are not added to section 197, concur to make me read the 197th section as though it contained some such words limiting it to deeds registered under section 192, as I have described.

CHANNELL, B.—I agree with the rest of the Court in thinking that our judgment should be for the plaintiff, but not entirely upon the grounds which have been explained. Apart from the Bankruptcy Act of 1861, no effect could be given to an assignment of a debt or chose in action so as to entitle the assignee to sue in his own name; and the defence which is set up by the plea is a defence founded upon this, that in effect the debt had vested in the trustees by operation of the act of 1861, no reference being made to any particular section of the act, so as to entitle them to sue, and to disentitle the original party, the assignor, to sue in his own name. The answer set up in the replication is, that although everything may have been done in the way of registration that is required to satisfy section 194, yet the provisions of section 192. have not been complied with. I do not adopt the argument of the plaintiff, that if section 194, *quoad* registration, is complied with it is unnecessary to consider whether, as regards registration, the 192nd has been complied with. It appears to me that the 192nd section contemplates a certain deed, which is particularly described in that section; and the section goes on to provide, but not completely, for the registration of that deed, the completion of the provisions for registration being continued in the 193rd section. Taking the two sections together, we have two matters; first, a particular description of a certain kind of deed, and then a provision for its registration. The 194th section must, I think, be considered as introduced as it were by way of parenthesis. My decision is not founded at all upon the fact that you may not register if you do it properly, according to the 192nd section, a deed which is not binding on non-assenting creditors under the 192nd section, but comes within the 194th. But the 197th section is one that gives effect to registration, and I apprehend that, although the 194th section may refer to a different deed from that which is described in the 192nd, yet the legislature intended that, unless the deed has complied, *quoad* registration, with the provisions of the 192nd section, the 197th section should have no effect. There is, therefore, nothing to give a right on the part of the trustees to sue, and, consequently nothing to disentitle the original assignor to sue in his own name for the benefit of the assignee.

Judgment for the plaintiff.

[IN THE COURT OF EXCHEQUER.]

June 11, 1866.

LEE v. WILMOT.

35 L. J. Ex. 175; 4 H. & C. 469; L. R. 1 Ex. 364; 14 L. T. 627; 14 W. R. 993.

See *Chasemore v. Turner*, [1876] E. R. A.; 45 L. J. Q.B. 66; L. R. 10 Q.B. 500; 33 L. T. 323; 24 W. R. 70 (Ex. Ch.); *Green v. Humphreys*, [1884] E. R. A.; 53 L. J. Ch. 625; 26 Ch. D. 474; 51 L. T. 42 (C. A.); *Firth v. Slingsby*, 1888, 58 L. T. 481 (Ch. D.); *Cooper v. Kendall*, [1909] E. R. A.; 78 L. J. K.B. 580; [1909] 1 K.B. 405; 100 L. T. 251 (C. A.).

Statute of Limitations—Acknowledgment—Implied Promise to Pay—
9 Geo. 4. c. 14. s. 1.

LIMITATIONS (STATUTES OF).—*A letter written by a debtor before the debt was barred by the Statute of Limitations in the following terms—"It is quite true that I have not sent you any money for years; but really I have none of my own. We just manage to exist on my wife's; at least, on what is left of hers. We have hard work to get on; but I will try to pay you a little at a time, if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send to you a little next week":—Held (per Bramwell, B. and Channell, B., Martin, B. dissentiente), a sufficient acknowledgment to take the debt out of the operation of the Statute of Limitations.*

Declaration on a promissory note, made on the 20th of August, 1859, for 29l.

Plea—The Statute of Limitations.

The writ was issued on the 19th of September, 1866.

At the trial, before Pigott, B., the plaintiff produced in evidence the following letter, written to him by the defendant on the 13th of August, 1863:

"Dear Sir,—Your letter has reached me at last, after having been half over England. It is quite true that I have not sent you any money for years; but really I have none of my own. We just manage to exist on my wife's; at least, on what is left of hers. We have hard work to get on; but I will try to pay you a little at a time, if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week. And I remain, yours truly,

"F. S. Wilmot."

The plaintiff relied on this letter as a sufficient acknowledgment in writing to take the case out of the operation of the Statute of Limitations.

A verdict was entered for the plaintiff for the amount claimed, the defendant having leave to move to enter a nonsuit or verdict for the defendant. A rule having been obtained accordingly,

A. *Wills* shewed cause. The rule is clearly established that to take a debt out of the operation of the statute there must be, in writing, either an express promise to pay or an acknowledgment or admission of the debt, so distinct and unqualified that the law will imply a promise to pay from it—9 Geo. 4. c. 14. s. 1, *Chitty on Contracts*, p. 726, 6th edit., *Tanner v. Smart* (6 B. & C. 603). If there is a conditional promise to pay it is further necessary to shew that the condition has been fulfilled. But as to this the construction depends on whether the acknowledgment or promise was made before or after the debt was barred by the statute. In *Cornforth v. Smithard* (5 Hurl. & N. 13; s. c. 29 Law J. Rep. (N.S.) Exch. 228) the debtor, in a letter written before the debt was barred, said, "I am ashamed the account has stood so long. I must beg to trespass on your kindness a short time longer, till a turn in trade takes place, as for some time things have been very flat." It was held that this was an unqualified acknowledgment and not a conditional promise,

because it was written at a time when the debtor was not in a position to impose any condition on his promise to pay.

[CHANNELL, B.—That was the first case in which a distinction was drawn between acknowledgments given before and after the time when the debt became barred.]

In this case the debt was not barred in 1863 when the letter was written. The cases all shew that an acknowledgment is sufficient, unless its terms are inconsistent with a promise to pay. In *Smith v. Thorne* (18 Q.B. Rep. 145; s. c. 21 Law J. Rep. (n.s.) Q.B. 199) and *Rackham v. Marriott* (2 Hurl. & N. 196; s. c. 26 Law J. Rep. (n.s.) Exch. 315), statements by debtors that they hoped to be able to pay at some future time were held not to take the case out of the statute, for the simple reason that the terms in which they were couched were inconsistent with an unqualified promise to pay. The cases of *A'Court v. Cross* (3 Bing. 328) and *Sidwell v. Mason* (2 Hurl. & N. 306; s. c. 26 Law J. Rep. (n.s.) Exch. 407) establish the same principle.

C. *Crompton* supported the rule.—Lord Tenterden's Act, 9 Geo. 4. c. 14, makes no difference in the law as to what will take a debt out of the operation of the statute; it merely requires that written proof should be required where previously parol evidence would have sufficed. Before that statute a parol acknowledgment without a promise would have been insufficient. This case is not different from *Tanner v. Smart* (6 B. & C. 603). It is not enough for the creditor to produce an acknowledgment which is not inconsistent with a promise to pay. In the recent case of *Cockrill v. Sparke* (1 H. & C. 699; s. c. 32 Law J. Rep. (n.s.) Exch. 118) the letter of a surety for a person named Hilder, "I agree to your receiving the dividend under Hilder's assignment, and do agree that your so doing shall not prejudice your claim against me for the same debt," was held not a sufficient acknowledgment of his own debt as surety to take the case out of the statute, and yet it was not inconsistent with a promise to pay. If in *Rackham v. Marriott* (2 Hurl. & N. 196; s. c. 26 Law J. Rep. (n.s.) Exch. 315) a mere hope, expressed too before the debt was barred, was not sufficient, still less ought a letter like the present to be held sufficient.

[BRAMWELL, B.—Was any objection made to the admission of this letter in evidence, that it was an answer to another letter, which ought to have been produced.]

No. In addition to the cases cited above, reference was made to *Hurst v. Parker* (1 B. & Ad. 93), *Fearn v. Lewis* (6 Bing. 349; s. c. 8 Law J. Rep. (n.s.) C.P. 95), *Collis v. Stack* (1 Hurl. & N. 605; s. c. 26 Law J. Rep. (n.s.) Exch. 138), *Phillips v. Phillips* (3 Hare, 299, 300), and *Cawley v. Furnell* (12 Com. B. Rep. 291; s. c. 20 Law J. Rep. (n.s.) C.P. 197).

CHANNELL, B.—I am of opinion that there was evidence in this case to take the debt out of the operation of the Statute of Limitations, and, therefore, that this rule should be discharged. There must be, according to Lord Tenterden's Act, an acknowledgment or promise in writing. I doubt if the statute meant two different things when it said "acknowledgment or promise." If the acknowledgment is explicit, a promise to pay is inferred from it; but, however distinct it may be if accompanied with a refusal to pay, the inference of a promise is rebutted. I think that this letter does contain an acknowledgment, and that there is nothing in it which fairly excludes the implication of a promise.

BRAMWELL, B.—I also think that this rule should be discharged. It is clear that, if there had been some words omitted from the letter, it would be sufficient to take the case out of the statute, and yet, because the debtor goes on to state his intention to do his best to pay, it is said that the letter is insufficient, not because those words qualify what has gone before, but because it is said that they disprove any promise to pay. I think that, on the ground put by my Brother Channell, this is a sufficient acknowledgment. No objection was raised at the trial to the admissibility of the letter to which

this was a reply, and which might have thrown light on this, and so none can be taken here.

MARTIN, B.—My opinion is, that this letter is not sufficient. The law is sufficiently laid down in 2 *Wms. Saund.* 64, *h, i*,—"To take the case out of the Statute of Limitations the document must either contain a promise to pay the debt, or an acknowledgment in writing, from which such promise can be inferred." In my judgment, the proper mode is not to look at what has been done in the case of other writings, but to look at this one only. The letter must have been in reply to an application for money. If it had stopped after the words "we have had hard work to get on," it would have been impossible to imply a promise to pay, and the words which follow do not contain one. I think that this rule should be made absolute.

Rule discharged.

[IN THE COURT OF EXCHEQUER.]

May 25, 1866.

In the matter of the succession of HENRY RICHARD CHARLES,
EARL COWLEY.

35 L. J. Ex. 177; 4 H. & C. 476; L. R. 1 Ex. 288; 14 W. R. 836;
12 Jur. N.S. 607.

Succession Duty Act (16 & 17 Vict. c. 51), ss. 21, 22, 44.—Value of the Succession—Deduction for Expense of Management and Collection of Rents—Necessary Outgoings—Payments by Trustees.

DEATH DUTIES.—*A testator devised real estate to trustees upon trust out of the rents to pay the interest on certain mortgage debts, and also certain annuities, and to pay the surplus to a cestui que trust for life, with remainder over. Power was given by the will to the trustees to pay certain sums to agents or receivers for collecting the rents:—Held, that in estimating the value of the succession of the cestui que trust no allowance was to be made for these payments for collection.*

In re Elwes (2 Hurl. & N. 719; s. c. 28 Law J. Rep. (N.S.) Exch. 46) extended.

This was an appeal by petition, under the Succession Duty Act, 1853, 16 & 17 Vict. c. 51, s. 50, against an assessment made by the Commissioners of Inland Revenue of the value of the succession of Henry Richard Charles, Earl Cowley, to real estate, under the will of William Richard Arthur, Earl of Mornington.

By his will, dated the 27th of June, 1863, the Earl of Mornington, after bequeathing certain legacies and annuities, and among others an annuity of 4,000*l.*, directed to be paid out of the income of the general residuary estate, devised his real estate to William Bulkeley Glasse and Andrew Alfred Collyer-Bristowe upon trust, out of the rents and profits to pay the interest of the mortgage debts charged thereon, to keep up the mansion-house at Draycot, and such farm-buildings as the lessees were not bound to keep in repair, to pay such portions of the annuities as the annual income of the residuary personal estate should be insufficient to satisfy, and subject and charged as above upon trust for Earl Cowley for life, with remainders over.

The petition set out the following proviso in the will: "Provided always, and I hereby authorize my trustees or trustee for the time being, during such time as my said manors, messuages, lands, tenements and hereditaments, or

such of them as for the time being shall be unsold, shall remain subject to the payment of any mortgage debt charged thereon, at the time of my decease, and during such time as the said annuities hereinbefore bequeathed, or any of them, shall continue payable, to permit and authorize any person who, but for the charges and provisions as to management created and contained by and in this my will, would, under and by virtue of this my will, be, for the time being, entitled to the possession of my said freehold manors, messuages, lands, tenements and hereditaments, personally to occupy my said mansion-house at Draycot, and the offices, outbuildings, orchards, gardens, pleasure-grounds, parks, lands, woods, and plantations thereto belonging. And I expressly direct that, during such time as my said manors, messuages, lands, tenements and hereditaments, or such of them as for the time being shall be unsold, shall remain subject to the payment of any mortgage debt charged thereon at the time of my decease, and during such time as the said annuity of 4,000*l.* to the said Lucile Bruchet shall continue payable, the said William Bulkeley Glasse and Andrew Alfred Collyer-Bristowe, and the survivor of them, and the heirs of such survivor, their or his assigns shall continue in the possession or receipt of the rents and profits of the said hereditaments and premises (but without prejudice always to the trust last aforesaid, as to the occupation of the said mansion-house and premises as last aforesaid), and manage and superintend the management of the same premises, and may cut timber and underwood from time to time in the usual course for sale or repairs, or otherwise, and may erect, pull down and repair houses and other buildings and erections, and drain or otherwise improve all or any of the said premises, and insure houses, buildings and other property against loss or damage by fire, and make allowances to and arrangements with tenants and others, and accept surrenders of leases and tenancies, and generally may deal with the premises as if they or he were the absolute owners or owner thereof, without being answerable for any loss or damage which may happen thereby. And I authorize the said William Bulkeley Glasse and Andrew Alfred Collyer-Bristowe, and the survivor of them, and the heirs of such survivor, their or his assigns, during such times as last aforesaid, to appoint stewards or a steward of any manors or manor for the time being, subject to the trusts aforesaid, and to appoint agents, receivers, surveyors, bailiffs and others for the general letting and management of the manors, messuages, lands, tenements and hereditaments for the time being, subject to the trusts of this my will, and the collecting the rents and profits thereof, *and out of the rents and profits of the said premises to pay or allow to the person or persons so employed such reasonable salaries, wages or other allowances as the said William Bulkeley Glasse and Andrew Alfred Collyer-Bristowe, or the survivor of them, or the heirs of such survivor, or their or his assigns, may think fit*: Provided always, and I hereby declare my will to be, that the aforesaid provision as to management shall, as well after as before the discharge of the mortgage debts which shall be at my decease charged on the said premises, or any of them, and as well after the cesser as during the continuance of the said annuity of 4,000*l.* hereinbefore bequeathed, extend and be applicable to the period of the minority of any male person, or minority and discovery of any female person who, if of full age, would for the time being be entitled under the trust of this my will to the possession or the receipt of the rents and profits, or surplus rents and profits of the said premises as tenant for life, or tenant in tail male, or in tail by purchase.

The testator died on the 25th of June, 1865, without having altered his will, except that by a codicil he charged his real estates with payment of his debts, funeral and testamentary expenses, and certain legacies and annuities. At the time of his death the real estate was subject to mortgage-debts to the amount of 336,000*l.*, which subsisted at the time of the presentation of the petition, and the recipient of the annuity of 4,000*l.* was then alive. The trustees accepted the trust, and necessarily employed resident agents and superintendents of repairs upon the said estates, and paid them out of the respective rents certain annual salaries, being a reasonable remuneration for the services rendered.

They also necessarily employed receivers to receive the rents of the estates, and allowed them a percentage of 4l. on the gross annual receipts, the same being a reasonable remuneration for the services rendered by such receivers.

The petitioner, in making a return to the Commissioners of Inland Revenue of the succession, claimed to have an allowance made to him under the provisions of the Succession Duty Act, 1853, in respect of necessary outgoings, including the salaries of the said resident agents and superintendents of repairs of the estates, and also in respect of the receivers' percentage on the gross amount of rents and receipts. The Commissioners in their assessment refused to make allowance for the salaries and percentage.

The sum in dispute in respect of duty on the assessment amounted to 1,116l. 8s. 9d., or thereabouts.

The petitioner appealed against the assessment.

Bovill and *Hannen*, for the petitioner.—The question to be decided depends on the construction of sections 21. and 22. of the Succession Duty Act (16 & 17 Vict. c. 51), which state the manner in which the interest of a successor to real estate is to be valued, and what necessary outgoings are to be deducted. Lord Cowley is only beneficially interested in the surplus remaining after payment of the interest on mortgage debts, annuities and expense of collecting the rents. He has no power to receive the rents himself, the trustees being expressly authorized to employ receivers. In the case of *In re Elwes* (2 Hurl. & N. 719; s. c. 28 Law J. Rep. (N.S.) Exch. 46) this Court refused to make allowance for salaries for receivers of rents, because they considered it optional with the successor whether he would receive his rents himself, or employ salaried persons to receive them for him.

[*POLLOCK*, C.B.—But there it was strongly urged that it was impossible for the successor to receive the rents himself because he was an infant and resident in India.]

But still they were voluntary outgoings, not necessary outgoings. Here, if a certain sum had been fixed for the remuneration of the trustees, it would clearly have had to be deducted in estimating the value of the succession. Besides, these payments for collection are not made for the benefit of Lord Cowley only, but for the benefit of the annuitants and all persons who receive payments out of the rents. The trustees have power to erect buildings, and there might be no surplus at all coming to him.

The Attorney General (*Sir Roundell Palmer*), for the Crown.—If the gift had been to Lord Cowley without the interposition of trustees, it is clear that the deduction for the expenses of collection of rents could not be made. Then the question simply comes to this, whether things which are not necessary outgoings can be made so by the separation of the legal and equitable estates. The argument for Lord Cowley goes too far, for if the discretion given to the trustees in expending money is so large he might object to be assessed at all. Nothing more is done here than to give the trustees powers of management in a wide form. We protest against this being called an assessment of the value to Lord Cowley. It is an assessment of the value of the property, not of the value to the owner; as is pointed out by Mr. Baron Bramwell in *In re Elwes* (2 Hurl. & N. 719; s. c. 28 Law J. Rep. (N.S.) Exch. 46). If this claim were allowed, a wide door would be opened for obtaining an allowance of outgoings not authorized by the statute. It would only be necessary to interpose trustees and direct them to make the payments. The rule applied to wills would have to be applied to deeds, and it would become simply a matter of conveyancing machinery.

Bovill, in reply.

POLLOCK, C.B.—I believe we are all of opinion that our judgment should be for the Crown. The case of *In re Elwes* (2 Hurl. & N. 719; s. c. 28 Law J. Rep. (N.S.) Exch. 46) is a direct authority on the point, assuming that there is no distinction between cases where expenses such as are here claimed to be deducted are incurred individually by the successor, or by trustees who are

acting for him. It is said that the trustees in this case are not trustees for him only. Properly speaking, they are trustees for the whole estate; but at present they are trustees for him, and it appears to me that the distinction, which, no doubt, is a distinction in point of fact, and may be so speciously stated as for a moment to create a doubt, vanishes altogether when we look at the entire question, and all the elements to be considered in coming to a determination upon it. It is said that if a man is under the absolute necessity of incurring certain expenses before he can get that which is bequeathed to him, he ought to be allowed to deduct them. If that proposition were nakedly stated, it would appear to be not at all unreasonable; but when we come to consider the object of the tax, and the principle upon which the act of parliament is to be administered, it vanishes, I think, in a moment. Certainly the Crown ought not to receive less because a particular individual receives a great deal more. If one man has nothing left to him but 100*l.* a year, the rent of a house in the next street, which he can collect for himself, he pays upon that 100*l.* a year. If instead of the rent being to be collected in the next street it is to be collected 100 miles off, it is quite clear that the act makes no distinction, and that he can make no deduction on the ground that the succession is less valuable to him, because the property is at a greater distance from his residence. He may live there if he pleases, or he may employ an agent; and I think it may be laid down as a clear deduction from the different clauses of the act, that the duty depends on the value of the property, not with respect to the expenses that the individual may have occasion to incur in the collection, but with respect to the property itself. If he has so much that he cannot possibly collect it himself, so much the better for him; but that is no reason why the Crown should get less than it would get if the property were divided among a hundred or two hundred people; and that appears to me to be the real substantial justice of the claim of the Crown. According to the argument on behalf of the petitioner, the more wealthy a man becomes by a large bequest, the more the Crown is to lose in consequence of his inability to collect and deal with the whole. Therefore, it appears to me to be quite clear that what may be called the charges of collection, and the expenses which must be incurred for stewards and collectors of rents, are not deductions to be made from the claim of the Crown in respect of duty. Then, looking at the facts of this case, it is very true that Lord Cowley pays—that is, the trustees pay for him—a certain allowance which they pay at their pleasure; but the case finds that they pay no more than is necessary. It may be taken, therefore, that they pay no more than Lord Cowley would have to pay, if the property had been left directly to him, subject to all these charges. I think, therefore, that this creates no difference in point of fact, though there is an apparent difference in point of name; and for these reasons I think that our judgment should be for the Crown.

MARTIN, B.—I am of the same opinion. There are two questions in this case; one substantial, and the other formal. The substantial question is, whether, when the property comes to a successor encumbered with debts, in ascertaining the amount on which the calculation is to be made for succession duty, the expense of management is to be deducted. It seems to me that the case of *In re Elwes* (2 Hurl. & N. 719; s. c. 28 Law J. Rep. (N.S.) Exch. 46) has substantially decided that question, and is an authority for our judgment in this case. But when one looks at the 44th section of the act of parliament, I apprehend there can be no doubt about it; for that act enacts that “the following persons, besides the successor, shall be personally accountable to Her Majesty for the duty payable in respect of any succession, but to the extent only of the property or funds actually received or disposed of by them;” and it specifies trustees, guardians, &c. “in whom the property, or management of any property subject to duty, shall be vested,” and enacts that persons so made accountable should be debtors to Her Majesty in case of non-payment. If these trustees had been called upon to make a return, instead of Lord Cowley (and in all probability they did, in fact, do it for him), they would not, upon the authority of the case of *In re Elwes* (2 Hurl. & N. 719; s. c. 28 Law J. Rep.

(N.S.) Exch. 46), have been entitled to deduct the 1,100*l*. But I also think that section 21, coupled with section 34, establishes the same thing. By section 21. the interest of every successor is to be considered to be of the value of an annuity equal to the annual value of the property, after making such allowances as thereafter directed. The 22nd section then directs certain allowances; and it is admitted that this allowance claimed is not one of them. But the 34th section goes on to enact what shall be the value of the property and what allowance shall be made in respect of incumbrances, but the allowance is to be made in respect only of the yearly sums payable by way of interest, "as reducing the annual value *pro tanto*." It seems to me, therefore, that there is an express enactment that, in estimating the value of the property in respect of which duty is to be paid, a deduction ought not to be permitted for the expenses of the agent and receiver in the management of the property. I own I think that it is a clear point, and that it cannot be that the mode of estimating this succession duty can depend on the skill with which the conveyance is prepared by the conveyancer who has it in hand; and that we must look (according to what is laid down in the House of Lords in the case of *Lord Saltoun v. the Advocate General of Scotland* (3 Macq. 659) as the proper mode of looking at the act of parliament) at the substantial and general intention of the legislature as expressed. As to the hardship of calling on Lord Cowley to pay duty in respect of this sum, it is enough to say that he takes the property subject to its burdens. In my opinion, the Crown is entitled to our judgment.

BRAMWELL, B.—I am of the same opinion. The question turns on the 21st section, which says, "The interest of every successor, except as herein provided, in real property, shall be considered to be of the value of an annuity equal to the annual value of such property," &c. Now, supposing it stopped there, there can be no doubt that the interest of Lord Cowley would be the value of this property, without this deduction. That is clear. But it goes on to say, "after making such allowances as are hereinafter directed." That was a necessary clause, not, perhaps, with reference to section 22,—as to which I shall have a word to say,—but with reference to the following sections. However, the only section thereby referred to is section 22, and I am strongly inclined to think (though it is not necessary perhaps to say it) that section 22. is of no operation, and that if it had not been there, still all the allowances for which it provides would have had to be made. It is absurd to suppose that you could put down the true annual value of a house without estimating the repairs and the other necessary charges upon it, in the shape of tithes and other matters that must be paid. However, whether it is necessary or not, all that it extends to is an allowance for "all necessary outgoings." Now, what is the meaning of that? Mr. Bovill argues that it means all outgoings which the owner cannot help. I do not think that is the true meaning. It means, not all such outgoings as the predecessor may have thought fit to put on the property, and which, therefore, in that sense, are necessary, but all such as are intrinsically necessary—such outgoings as it was not in the option of the predecessor to put on or not as he pleased. That seems to me to be the meaning of it, and that is a meaning in conformity with the reasoning of my Brother Watson in the judgment in *In re Elwes* (2 Hurl. & N. 719; s. c. 28 Law J. Rep. (N.S.) Exch. 46). Therefore, to my mind, this is not a necessary outgoing; and, on that short consideration, it seems to me that the case ought to be decided. It has been ingeniously argued that the charge must be on Lord Cowley's beneficial interest in the property; but there is nothing in the act to shew that. In sections 21. and 22. you do not find the words "beneficial interest"; you find "annual value of the property," to ascertain which you are to make the abatement of necessary outgoings. Therefore, upon the reason of the thing, it seems to me manifest that the case ought to be decided in favour of the Crown. Then, it is said that this is a hard case, because if the property, instead of being left to trustees, had been left to Lord Cowley directly, it would have been in his option to say whether he would incur the expense of receivers and agents or not, or whether he would pay them as much as the

trustees have done. Possibly it is, to a certain extent, somewhat a hardship upon him—not in reality, because I have no doubt that the trustees will not lay out more than Lord Cowley would have felt himself bound to do; but if this is an argument at all (which, in reality, it is not), it is met by the counter-argument, referred to by my Brother Martin, that if we were to allow this, it would lead to every testator's saying, "I am going to leave a large estate. I know my devisee cannot manage it himself. In order that he may get the benefit of a deduction from the duty, I will have a formal trustee to do this or that thing;" and, by the mere contrivance of words, the successor would be subject to a less succession duty than he ought to be. However, it is not necessary to go into that. My judgment is based on the authority of *In re Elwes* (2 Hurl. & N. 719; s. c. 28 Law J. Rep. (N.S.) Exch. 46), and on the consideration that the tax is to be assessed on the "annual value of the property," making allowance for necessary outgoings, which means outgoings intrinsically necessary, and not necessary because of the arrangements which the testator thought fit to make.

CHANNELL, B.—I am of the same opinion. The foundation of our judgment is the petition presented on the part of Lord Cowley, which I consider raises the question only of the *quantum* of assessment, that is, whether Lord Cowley is entitled to have, under the 22nd section of the act of parliament, an allowance in respect of the deductions which he claims. In that point of view, it seems to me very immaterial to consider, at least at any length, the question on whom the rate should properly be made. It appears to me that the rate may be made on any person who succeeds to the property, or, according to the 44th section, the trustees, or persons having the management of the property. I think that the rate is properly made in point of form; and I cannot help coming to the opinion, that whether the rate be made on the trustees or on the person who, according to the clauses in the act of parliament, may be treated as the successor, the *quantum* must be the same. Then, we have to consider the construction to be placed on the 22nd section. The preceding section directs the assessment to be made according to the value "of an annuity, equal to the annual value of such property, after making such allowances as are hereinafter directed." In section 22, we find the words again repeated, "in estimating the annual value of the lands," and then provision is made for certain deductions. Thus we have two things to ascertain; first, what is the annual value; secondly, what deductions are to be made for certain matters specially provided for in the act? It appears to me that neither the 22nd section, nor the one or two other sections which have been more slightly alluded to in the course of the argument, provide for the deductions that are now claimed. Even therefore if there was no authority on the point, I should come to this conclusion; but I conceive that though there is a difference in point of fact between the present case and the case of *In re Elwes* (2 Hurl. & N. 719; s. c. 28 Law J. Rep. (N.S.) Exch. 46), that case, in principle, is a decision in support of and warranting the judgment which the Court now pronounces. I am therefore of opinion that the Crown is entitled to our judgment.

Judgment for the Crown.

[IN THE COURT OF EXCHEQUER.]

June 12, 1866.

HODGSON v. SIDNEY.

35 L. J. Ex. 182; 4 H. & C. 492; L. R. 1 Ex. 313; 14 L. T. 624; 14 W. R. 923;
12 Jur. N.S. 694.

See *Morgan v. Steble*, [1872] E. R. A.; 41 L. J. Q.B. 260; L. R. 7 Q.B. 611;
26 L. T. 906 (Q.B.). Not considered, *Rose v. Buckett*, [1901] E. R. A.;
70 L. J. K.B. 736; [1901] 2 K.B. 449; 84 L. T. 670; 50 W. R. 8 (C. A.).

*Bankruptcy—Vesting of Cause of Action in Assignee—Special Damage
resulting from False Representation—Personal and Pecuniary Loss—Parties.*

BANKRUPTCY.—*To a declaration charging that the defendant, by a false and fraudulent representation respecting the solvency of a third person, induced the plaintiff to advance to that person the sum of 2,000l., and that "by reason of the said false and fraudulent representation the plaintiff sustained great loss, and became and was adjudicated a bankrupt, and suffered personal annoyance, and was put to great trouble and inconvenience, and was greatly injured in character and credit," the defendant pleaded, except as to the claim in respect of the plaintiff's becoming and being adjudicated a bankrupt, and the personal annoyance, trouble, inconvenience and injury to character and credit, that the loss alleged in the declaration was a pecuniary loss, and that the cause of action in respect thereof vested in his official assignee:—Held, on demurrer, that this was a good plea to the whole declaration, the exception in the plea being idle, and the only damage recoverable under the declaration being for pecuniary loss.*

Quære—*Whether in the case of injury to a bankrupt's estate, with special damage to himself, resulting from the act of a wrongdoer, the cause of action can be split between the bankrupt and his assignee, so as to enable the former to sue for the personal damage and the latter for the damage to the estate.*

Declaration—For that the plaintiff, having been requested by one J. C. Piper to advance, lay out and expend a large sum of money, to wit, 2,000l., for the purpose of producing and to be employed in the manufacture of certain wine, which said wine, as the plaintiff was informed by the said J. C. Piper, had been ordered by one William Sidney for exportation to Australia and California, under conditions of certain cash payments to be made therefore by the said William Sidney, to the extent of 2,000l., applied to the defendant to inform him, the plaintiff, whether the said William Sidney might be depended upon for cash payments to the said extent, and whether the said order had been so given as aforesaid; and that thereupon the defendant, well knowing the aforesaid premises, and intending that the plaintiff should act upon the representation made by him as hereinafter mentioned, falsely and fraudulently represented to the plaintiff that the said William Sidney was able to carry out the arrangement for purchasing the said wine, which, as the defendant represented, he, the said William Sidney, had entered into with the said J. C. Piper, to wit, the said order, whereas, in truth and in fact, the said William Sidney was not able to carry out the said arrangement or order, or to pay for the said wine, and that the defendant, by so representing as aforesaid, induced the plaintiff to make certain large advances and payments of money on account of the said manufacture, and in respect of the said arrangement or order, whereby, and by reason of the said false and fraudulent representation, the plaintiff has sustained great loss, and became and was adjudicated a bankrupt, and suffered great personal annoyance, and was put to great trouble and inconvenience, and was greatly injured in character and credit.

Second plea—except as to the claim in respect of the plaintiff becoming and being adjudicated a bankrupt, and suffering the alleged personal annoyance, and being put to the alleged trouble and inconvenience, and being injured in character and credit—that the said loss which the plaintiff sustained, as in the declaration alleged, was a pecuniary loss, to wit, the loss of the monies which he so advanced and paid, as in the declaration mentioned; and that after the accruing of the supposed cause of action, and before suit, the plaintiff, being liable to become and to be adjudicated a bankrupt as thereafter mentioned, became bankrupt; and upon a petition for adjudication in bankruptcy, duly filed against him by himself, in a Court having jurisdiction to receive the same and to adjudicate thereon, was by the said Court duly adjudicated to be a bankrupt, according to the statutes in force concerning bankrupts; and thereupon an official assignee of the estate and effects of the plaintiff as such bankrupt was, according to the said statutes, duly appointed before this suit; and all things were done and happened, and all times elapsed, according to the said statutes, to give validity to the said adjudication and appointment, and to cause the estate of the plaintiff, including the cause of action in the declaration mentioned, and therein pleaded to, to vest, and the same did vest in the said official assignee before this suit, and had not re-vested in the plaintiff.

Demurrer.

Lumley Smith (*Streeten* with him), in support of the demurrer.—The cause of action mentioned in the declaration did not vest in the assignee, but remained in the bankrupt. The action is in tort, not in contract; and it alleges special damage to the bankrupt, in respect of which the assignee, if he sued, could recover no compensation.

[BRAMWELL, B.—But the substantial part of the damage is the loss of the 2,000*l.*: the residue, such as the becoming bankrupt, being surely too remote.]

In *Howard v. Crowther* (8 Mee. & W. 601; s. c. 10 Law J. Rep. (N.S.) Exch. 355) Mr. Baron Alderson says, "Assignees can maintain no action for libel, although the injury occasioned thereby to the man's reputation may have been the sole cause of his bankruptcy." His opinion would appear to be that the bankrupt had a right to recover for such damage. The proper test to be applied is stated in *Brewer v. Dew* (11 Mee. & W. 625; s. c. 12 Law J. Rep. (N.S.) Exch. 448), which was an action of trespass for seizing goods, under an unfounded claim of debt, with special damage that the plaintiff was annoyed and injured in credit. It was contended there, as here, that on the plaintiff's subsequent bankruptcy the right of action vested in the assignee; but it was held, that as the jury had power to give vindictive damages beyond the value of the goods, the bankrupt was entitled to sue. Here, although the loss to the bankrupt's estate might be only 2,000*l.*, the jury might give him more. *Wetherell v. Julius* (10 Com. B. Rep. 267; s. c. 19 Law J. Rep. (N.S.) C.P. 367) is also an authority in the plaintiff's favour.

Field, in support of the plea.—The correct mode of ascertaining whether a cause of action remains in the bankrupt or vests in the assignee is to consider whether the cause of action affects substantially and primarily the person or the estate of the bankrupt—*Drake v. Beckham* (2 H.L. Cas. 626) and *Wetherell v. Julius* (10 Com. B. Rep. 267; s. c. 19 Law J. Rep. (N.S.) C.P. 367). Here the alleged wrong committed by the defendant affected primarily the plaintiff's estate.

MARTIN, B.—But by pleading this defence to a portion of the declaration only, the defendant admits that some cause of action did remain in the bankrupt. Can a cause of action be split so that the assignees may sue for the damages to the estate and the bankrupt for damages for personal injury?]

In the case already cited of *Brewer v. Dew* (11 Mee. & W. 625; s. c. 12 Law J. Rep. (N.S.) Exch. 448), Lord Abinger seemed to think that a plea, similar to this, limited to the value of the goods, would have been good; and in *Rogers v. Spence* (12 Cl. & F. 700), where such a plea was held bad, because it was pleaded to the whole declaration, which included some causes of action for

which the assignees could not have sued, it was apparently assumed that it would have been good if properly limited to a portion of the declaration.

Lumley Smith, in reply.—No decision has been produced that a cause of action can be split between the bankrupt and his assignees. In *Rogers v. Spence* (12 Cl. & F. 700) Lord Campbell said, "The difficulty is where there is a mixed case of injury to the person and injury to the property. There has been no case as yet which has decided what, under such circumstances, is to happen." So in *Beckham v. Drake* (2 H.L. Cas. 626), Parke, B., after putting the case of a contract to cure the bankrupt of a disease and give him a sum of money, with a breach of both parts, says, "It is exceedingly difficult to say in whom the right of action would be. Either the right of action must be divided and each sue, or the right of action altogether must remain in the bankrupt, or altogether be transferred to the assignees, or both must join, the contract being entire to sue for damages;" but he expressly refrains from stating that a cause of action can be split. Then, if the declaration contains causes of action for which the assignees could not sue, the bankrupt must be able to sue himself, otherwise there would be no remedy for the injury sustained, though, possibly, as to the 2,000*l.*, he would be a trustee of the damages for his assignee.

Cur. adv. vult.

Judgment was delivered as follows—

MARTIN, B.—This is an action for a fraudulent representation, and the plaintiff alleges that, by reason of the misrepresentation, he sustained great loss, and became and was adjudicated a bankrupt, and suffered great personal annoyance, and was put to great trouble and inconvenience, and was greatly injured in his character and credit. The plea alleges, except as to the claim in respect of the plaintiff being adjudicated a bankrupt, subjected to the alleged personal annoyance, and put to trouble and inconvenience and injured in character and credit,—that the plaintiff had become bankrupt, and the right of action had passed to his assignees. We are of opinion that the plea is a good plea, on the ground that this exception is null and idle, and that the matters excepted afford no cause of action, and that, in point of fact, the case is the same as if the plea had been pleaded to the entire declaration, and that it covers the whole cause of action. We think that the damage is a pecuniary damage, the right to sue for which goes to the assignee and does not remain in the bankrupt; therefore there will be judgment for the defendant.

BRAMWELL, B.—I am of the same opinion. It seems to me that in this case the special damage alleged is not special damage, and that the only thing recoverable upon the declaration is the direct and natural damage of a pecuniary character, resulting from the fraudulent representation, the right to sue for which would pass to the assignees. But, further, it seems to me, that, supposing there were special damage in respect of which the bankrupt could have recovered had he not become bankrupt, a cause of action cannot,—I will not say be split, but—remain partially in him, for the purpose of recovering special damage, and go partially to the assignee for the purpose of recovering the natural damage. If there were a contract with two breaches in it, or if there were a tort of two different characters, as, for example, a trespass to a man's person and to his goods, even to his clothes, or some articles which he might have about him, I do not see at all why the assignee might not recover in respect of the latter, and the bankrupt in respect of the former. But where there is only one cause of action, it seems to me, as at present advised, that if the right to sue for pecuniary damage passes to the assignee, the bankrupt cannot say that enough of the cause of action remains in him to enable him to sue in respect of the special damage. On the two grounds, therefore, that no special damage is shewn, and that the breach in respect of which it is claimed was a cause of action which passed to the assignees, the plea seems to be good.

Judgment for the defendant.

[IN THE COURT OF EXCHEQUER.]

May 26, 1866.

RYALLS v LEADER AND OTHERS.

35 L. J. Ex. 185; L. R. 1 Ex. 296; 14 L. T. 563; 14 W. R. 838; 12 Jur. N.S. 503.

Libel—Privilege—Report of Proceedings before Registrar in Bankruptcy—Bankruptcy Act, 1861, ss. 52, 58, 101, 102.

LIBEL AND SLANDER.—*The examination of a prisoner in gaol by the Registrar in Bankruptcy under the 101st section of the Bankruptcy Act, 1861, is a public judicial proceeding; and therefore a fair and correct report without comment of the examination is privileged, even though it may contain statements which injuriously affect the character of a third person.*

And semble (per Bramwell, B.), even though those statements be not relevant to the matter in hand.

Declaration on a libel published in the Sheffield and Rotherham Independent.

Plea—not guilty.

The libel complained of was contained in a report (without comment) of "Proceedings in Bankruptcy, at York Castle, on Saturday, December 16, before P. A. Welch, Esq., Registrar," wherein it was stated that Frederick George Gray, a prisoner confined in York Castle, had, when examined by the Registrar, said that he had been "in partnership with the plaintiff, who had compounded with his creditors."

The action was tried, at the West Riding Spring Assizes, 1866, before Keating J., who told the jury that a fair report of the proceedings in a public court of justice is privileged, and that this occasion was a privileged one; but that if they thought the report not fair, or that it was maliciously published, then the plaintiff would be entitled to a verdict.

The libel was proved to be false in fact.

The jury found a verdict for the defendants.

Manisty obtained a rule to set this verdict aside, on the ground of misdirection.

Overend and Cave now shewed cause.—The proceedings before the Registrar, under the 101st section, are judicial proceedings in the strictest sense. The powers given to the registrars by the act support this view. The 52nd section empowers them to make adjudications of bankruptcy, and to grant protection; the 54th imposes penalties on parties or witnesses not attending before the Registrar when summoned; the 58th empowers the Courts to direct the Registrar to hold meetings of creditors; the 101st enacts that the Commissioner shall order the Registrar to examine the prisoners in the gaol, and gives

(1) The 101st section of the Bankruptcy Act, 1861, enacts, that the Commissioner in Bankruptcy or county court Judge shall make an order that a registrar shall attend at the prison (after notice has been given to all the prisoner's creditors) and examine every prisoner included in the gaoler's return who shall have been in prison, being a trader for fourteen days, or not being a trader for two calendar months, touching his estate and effects, debts, dealings, and transactions: that the registrar shall have power to make an order of adjudication in bankruptcy against every such prisoner, and to grant him protection and to make an order for his release from prison, and shall also direct in what court such adjudication shall be prosecuted, &c. The 102nd section enacts, that if the prisoner shall refuse to appear or to be sworn, or to answer all lawful questions of such registrar or of the execution of detaining creditor, or of any other creditor who shall be present, respecting his debts, liabilities, dealings, and transactions, or to make a full discovery of his estate and effects, and of all his books of account, or to produce the same, or to sign his examination when taken, the registrar shall report the same to the Court, and the Court may, by warrant under the hand and seal of the Judge or Commissioner, commit him to the common gaol of the county, and the Court may at the same time adjudge such prisoner bankrupt.

the Registrar power to make an order of adjudication in Bankruptcy, and to grant protection; and the 102nd provides for the punishment of prisoners refusing to conform. When such extensive powers are given to the Registrar, it is for the interest of the public that the investigations should be conducted *foribus apertis*, and that it should be generally known on what grounds the debtor has been committed to prison. In *The King v. Wright* (8 Term Rep. 293, 298), Laurence, J. said, that, "though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of justice should be universally known." The notice which the creditors are entitled to under the 101st section makes the proceedings before the Registrar sufficiently "public" for the purpose of the privilege claimed. A report of the proceedings before Judges at chambers, on applications to discharge a bankrupt out of custody (under 5 & 6 Vict. c. 122. s. 42), was held in *Smith v. Scott* (2 Car. & K. 587) to be privileged, being a fair account of a "public" judicial proceeding. At any rate this report is perfectly fair, according to *Lewis v. Levy* (27 Law J. Rep. (N.S.) Q.B. 282; s. c. El. B. & El. 557) and *Andrews v. Chapman* (3 Car. & K. 286), for it is not accompanied with any comments reflecting upon the parties whose names appear in it.

Manisty and *T. Jones*, in support of the rule.—It cannot be said that this was a public judicial proceeding. The Registrar is merely sent to the prison by the Commissioners to examine a prisoner. He exercises no judicial functions. The proceeding is entirely *in invitum*, and the public have no right to go within the walls of the prison. The privilege of entry is confined to *creditors*. Again, it has not yet been actually decided that the publication of proceedings in a court of justice is privileged if the publication reflect injuriously on character. In *Lewis v. Clement* (3 B. & Ald. 702) this was left an open question; and in *The King v. Carlile* (Ibid. 167), it was held to be unlawful to publish even a correct account containing matter of a scandalous or blasphemous nature. The privilege, if it exist at all, must be absolute, and not dependent on *bona fides*. At any rate, the publication of injurious statements, *with reference to a stranger* to the inquiry, cannot be justified.

POLLOCK, C.B.—We are all of opinion that my Brother Keating was quite right in his ruling and the mode in which he presented the case to the jury. The complaint of the plaintiff is merely this: "You have published an account of certain proceedings in a court of justice containing that which is libellous upon me." The defence is, that this account was a fair, correct and *bona fide* statement of what passed in a court of justice. If this was a court of justice and a public court, and if the publication was a fair and correct account of what passed, then it is not the subject of an action. Now, the question is, was this court of justice a public court? I must say, I think it was. I think that, so far from endeavouring to limit, we ought to make as wide as possible the rights of the public to know what takes place in the course of the administration of justice. The jury found that it was a fair account of what took place; and, if that finding was according to the evidence, the verdict ought not to be disturbed.

MARTIN, B.—I also think that the direction of the learned Judge was perfectly right. The case depends upon whether or not any man had a right to report that which he heard. If he reported *bona fide* what occurred before the Registrar, I cannot entertain a doubt that his report was privileged. I collect from the 51st section of the act that the object of the legislature was, that this bankruptcy business should be discussed and performed in public, because the 51st section says that the Commissioners may "sit at chambers for the despatch of such part of the business of their Court as can without detriment to the public advantage arising from the discussion of questions in open court be heard in chambers." Then the 100th section proceeds to make a provision for what had been found to be a very great evil, viz., where prisoners went to prison and continued there voluntarily, setting their creditors at defiance,

and keeping them completely at arm's length; and then came the 101st and 102nd sections, directing the Registrar to examine the prisoner, and providing for the committal of any prisoner who shall refuse to answer. Can any one contend that if any person may in consequence of default in these matters, and in consequence of the report of the Registrar be committed to prison as a criminal for the space of a month, such matters are not to be heard in public? The Registrar may have power to exclude persons in certain cases, provided it be expedient, but he cannot exclude the creditors. It seems to me this is a proceeding proper to be had in public, and, as a consequence, any *bona fide* and honest publication of what takes place there is justifiable. It is a mistake to call it a privilege; it is no privilege at all; it is a right.

BRAMWELL, B.—I am of the same opinion. I think that this was a public court, and I think it is so according to the 101st and 102nd sections; therefore I think that what took place in it was as much the subject of publication as what takes place in any other court. I am inclined to think that, in point of law, this was not a public court, but the registrar thought fit to let it be a public one, then the same consequences would follow. It seems to me that just as those who are present may hear with their ears directly, so may those who are absent hear the same thing if any one communicates it to them. If it were not so, every witness who thought he had been subjected to unpleasant treatment in a court of justice, would be at liberty to bring an action against the publishers of reports of what occurs in courts of justice. And it also seems to me that there is no such qualification as that contended for, namely, that in order to be justified the matter published must be relevant to the matter in hand. I think those who publish the reports are justified if what they publish is an accurate account of what takes place. There may be some inconvenience on some occasions, but this is a case where individuals must suffer for the public benefit, because there is no means of communicating it in any other way; and I think it would be an impossibility to call on people to discriminate between what was relevant to the matter and what was not. When once it is established that the place is a court of justice, then what transpires in it may be published, even although some private inconvenience may ensue. Probably, the reason why this power of publication is limited to courts of justice, may be the reasonable expectation that unfair statements will not be made there. I therefore think that this rule should be discharged.

CHANNELL, B.—I am of the same opinion. The Court of Bankruptcy has for the purpose of carrying out the powers of the act, the power to exercise all the authorities of the superior Courts of law and equity, and the jurisdiction possessed by the Court for the Relief of Insolvent Debtors; and by the 52nd section of the act of 1861 large powers are conferred upon the registrar like those which formerly devolved upon the Commissioners, and he may perform those duties in court or in chambers. These large powers are further expanded by the 58th section and others, giving the power to summon witnesses and to call for papers and documents, and thus putting parties in the same position that they would be placed in if they were subpœnaed in an ordinary court of law. Now, it was not contended, and I think it could not have been contended, on the part of the plaintiff, that a proceeding before the registrar at chambers would not be a public judicial proceeding; but we are told, and fairly enough, that this examination in the gaol before the registrar is supportable, if at all, under sections 100, 101, 102; and that the larger provisions of a general character have no application to proceedings under one or other of those three sections. But that is to put a very narrow and uncalled for construction upon the act. The 100th section calls upon the gaoler to make certain returns, and the 101st then calls upon the registrar to act, and it is quite clear that in carrying out the authority that is given by the 101st section he must go at a particular time yearly to the gaol and execute it, and in that respect the proceedings at the gaol stand in a somewhat different position from a hearing before the registrar in open court or in chambers. But then I see no ground of necessity, therefore, to hold that the proceeding before the registrar at the gaol

is not a proceeding of a judicial character. The 102nd section requires the prisoner to appear and be sworn or to answer all lawful questions of such registrar or of the execution creditor, or of any other creditor who shall be present. And, therefore, one can well understand why this power is given for the protection of the public, to prevent prisoner from continually remaining in gaol and preventing the creditors having the benefit to be derived from an adjudication in bankruptcy, and it is partly in case of the man himself; and, looking at what the registrar may do when he gets there, and that the bankrupt ought to answer the questions that are put to him, I think that gives a sufficient publicity to the proceedings to make them proceedings in a public court of justice. I am disposed so to think, even though the Judge might, in certain cases, have power to exclude the public; because, if there be a court open for the parties interested to be there and to hear what passes, that is sufficiently a court of justice for the purposes of this case.

Another point has been made, namely, that assuming this to be a report of proceedings in a public court of justice, it is not, under the circumstances, such a report as the law will protect, because it contains a reflection upon the character of a third person. I think that when the reference to the conduct of a third person is not irrelevant to the inquiry before the Judge, the publication of it does not prevent the party relying on this defence. What is the matter complained of here? That there is a publication of a statement made by the alleged bankrupt on his own part comprising his partner. I cannot for a moment think that the reference to the position of his partner is so irrelevant as to shew that this is not a *bona fide* and fair report. I think that, upon both these grounds, the rule should be discharged.

Rule discharged.

[IN THE COURT OF EXCHEQUER.]

May 26, 1866.

O'BRIEN v. BRODIE.

35 L. J. Ex. 188; L. R. 1 Ex. 302; 14 L. T. 559; 14 W. R. 840; 12 Jur. N.S. 527.

Inapplicable, *Ex parte Todhunter*, [1870] E. R. A.; 39 L. J. Bk. 17; L. R. 10 Eq. 425; 25 L. T. 313; 18 W. R. 890 (C. J.). Referred to, *Ex parte Veness*, [1870] E. R. A.; 39 L. J. Bk. 23; L. R. 10 Eq. 419; 25 L. T. 311; 18 W. R. 979 (C. J.). See *In re Halling*, [1878] E. R. A.; 47 L. J. Bk. 25; 7 Ch. D. 159; 37 L. T. 809; 26 W. R. 182 (C. A.).

The Bankrupt Law Consolidation Act, 1849, and The Bankruptcy Act, 1861, were repealed by 32 & 33 Vict. c. 83. s. 20.

Debtor and Creditor—Execution—Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), ss. 133, 184.—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 73.—Sale suspended by Interpleader Order.

BANKRUPTCY.—*The sale of goods which had been seized in execution was suspended by an interpleader order for seven days; on the seventh day the execution debtor was adjudicated bankrupt on his own petition, after which the goods were sold:—Held, that notwithstanding the interpleader order, the execution creditor was still a creditor having security within the meaning of the 184th section of the Bankruptcy Law Consolidation Act, 1849, and that therefore, not having sold before the adjudication, he was only entitled to receive a rateable part of his debt.*

This action was tried, before Pollock, C.B., at the Middlesex Sittings after

Michaelmas Term, 1865, when the jury found a verdict for the plaintiff for 133*l.* 14*s.*

On the 20th of December, 1865, the sheriff entered on the defendant's premises under a *fi. fa.* The goods seized were thereupon claimed by Harriet Lloyd, the defendant's mother, under a bill of sale. An interpleader summons was then taken out by the sheriff, and on the 23rd of December Lush, J. made an order that upon payment of the sum of 200*l.* into court by the claimant within seven days, or upon her giving within the same time security for the payment of the same, and upon payment to the sheriff of the possession-money from that date, the sheriff should withdraw; and further, that, unless such payment should be made or such security given within the time aforesaid, the sheriff should proceed to sell the goods and pay the proceeds of the sale (after deducting the expenses and the possession-money) into court; and further, that the parties proceed to the trial of an issue, &c.

The claimant did not comply with the terms of this order.

On the 30th of December the defendant was adjudicated a bankrupt on his own petition; an official assignee was duly appointed, and notice was given to the sheriff that the goods were claimed by the official assignee.

On the 1st of January, 1866, the sheriff took out another interpleader summons, upon which Martin, B., made an order barring the claim of the official assignee. On the 10th of January, 1866, the sheriff sold the goods, and after deducting his fees, &c., paid the balance, 51*l.* 6*s.*, into court under the order of the 23rd of December.

On the 20th of January a creditors' assignee was chosen, and the plaintiff and the assignee having each applied at chambers to get the money paid to him, Martin, B. referred the matter to the Court.¹

Hannen now moved for a rule directing that the money should be paid to the assignee.

(1) The 133rd section of the act of 1849 enacts that "All payments really and *bona fide* made by any bankrupt, or by any person on his behalf, before the date of the fiat or the filing of a petition for adjudication of bankruptcy, and all payments really and *bona fide* made to any bankrupt before the date of the fiat or the filing of such petition, and all conveyances by any bankrupt *bona fide* made and executed before the date of the fiat or the filing of such petition, and all contracts, dealings and transactions by and with any bankrupt really and *bona fide* made and entered into before the date of the fiat or the filing of such petition, and all executions and attachments against the lands and tenements of any bankrupt *bona fide* executed by seizure, and all executions against the goods and chattels of any bankrupt *bona fide* executed and levied by seizure and sale before the date of the fiat or the filing of such petition, shall be deemed to be valid notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with, or paying to or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such payment, conveyance, &c., or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed," &c.

The 184th section is as follows: "No creditor having security for his debt, or having made any attachment in London or in any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure and sale upon, or any mortgage of or lien upon, any part of the property of such bankrupt before the date of the fiat or the filing of the petition of adjudication of bankruptcy, provided always," &c.

The 73rd section of the Bankruptcy Act, 1861, is as follows: "If any execution shall be levied by seizure and sale of any of the goods and chattels of any trader debtor upon any judgment recovered in any action personal for the recovery of any debt or money demand exceeding 50*l.*, every such debtor shall be deemed to have committed an act of bankruptcy from the date of the seizure of such goods and chattels: provided always, that unless in the mean time a petition for adjudication of bankruptcy against the debtor be presented, the sheriff or other officer making the levy shall proceed with the execution, and shall at the end of seven days after the sale pay over the proceeds or so much as ought to be paid to the execution creditor, who shall be entitled thereto notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale, in which case the money so received by the creditor shall be paid by him to the assignee under the bankruptcy, but the sheriff or other officer shall not incur any liability by reason of anything by him done as aforesaid: provided also, that in case of bankruptcy the costs and expenses of such action and execution shall be retained and paid out of the proceeds of the sale, and the balance only after such payment be paid to the assignees."

Holl shewed cause in the first instance.—The 133rd section of the Bankrupt Law Consolidation Act, 1849, does not apply, because here the act of bankruptcy was not committed prior to the seizure—*Edwards v. Scarsbrook* (32 Law J. Rep. (N.S.) Q.B. 45); nor is the case within the 73rd section of the act of 1861 (which is the only section of that act which could have any application here), because this adjudication was founded on the debtor's own petition, and not on the execution. So that the case turns entirely upon the 184th section of the act of 1849. Now that section was only intended to apply to a common law execution, and to give the assignees the benefit where there is laches on the part of the creditor; and therefore this case is not within the rule in *Hutton v. Cooper* (6 Exch. Rep. 159; s. c. 20 Law J. Rep. (N.S.) Exch. 153) and *Young v. Roebuck* (32 Law J. Rep. (N.S.) Exch. 260), for here the creditor's hands were tied by the interpleader order, which prevented the sale and took the goods entirely out of the controlling power of the sheriff, although they remained in his custody. The plaintiff was no longer a "creditor having security for his debt" within the meaning of the 184th section; his hands and the sheriff's were tied whilst the debtor was still *sui juris*, and when the Judge directed the goods to be dealt with in a particular manner, they became clogged with a trust in respect of which a Court of equity would interfere—*Murray v. Arnold* (3 Best & S. 287; s. c. 32 Law J. Rep. (N.S.) Q.B. 11), per Blackburn, J. It would have been a contempt of Court if the sheriff had sold before the claimant had the opportunity of complying with the order by paying the money or giving security, and the sale, when it did take place, was not by virtue of the writ, but was under the Judge's order.—[He also cited *Parsons v. Lloyd*,² decided by Bramwell, B. at Chambers.]

Hannen, contra.—The 133rd section has some bearing on the question, as it gives protection to the execution creditor, who has seized and sold before the adjudication and without notice; but the case is governed by the 184th section, which deprives him of the benefit of his execution when he has not sold. The words are clear that he is to have only a rateable part of his debt, and unless there be some implied reservation as to cases where a sale is prevented by operation of law, this case must be decided on the principle of *Hutton v. Cooper* (6 Exch. Rep. 159; s. c. 20 Law J. Rep. (N.S.) Exch. 153). The principle on which the Judge gave the claimant seven days, was pointed out by the legislature in the 73rd section of the act of 1861; and the Judge must be taken to have considered, in making the order, whether there was danger of bankruptcy or not. That section shews that the legislature intended to limit more and more the rights of the execution creditor. If the goods had been sold on the 23rd of December, and the money handed over

(2) *Holl* stated this case as follows :

PARSONS AND ANOTHER v. LLOYD.

Goods which were seized by the sheriff of Surrey under a *fi. fa.* were claimed by a mortgagee. The sheriff interpleaded, and Martin, B. ordered a sale and that the proceeds of such sale, after deducting the amount of the mortgagee's claim, should be paid to the execution creditor to the amount of his execution. The sheriff sold under the order; the debtor afterwards became bankrupt, and his assignees claimed the proceeds. The sheriff called on the assignees and execution creditor to interplead, and the parties agreed to abide by the opinion of Bramwell, B.

BRAMWELL, B.—Though (as there is no appeal) my reasons are unimportant, I wish the parties to see that I have duly considered the matter. The execution creditor would be entitled, notwithstanding the bankruptcy, but for some special provision in the Bankruptcy Acts, because the assignee succeeded to the rights of the bankrupt as he possessed them, which was subject to the execution. Then, is there any such special provision? I think not. I think section 184. does not apply. The goods were not subject to a common law execution, which that section deals with. The Common Law Procedure Act, 1860, gives the execution creditor a lien right in respect of which there is no special provision in the bankruptcy acts, unless it be the one in section 184. as to liens. In this case the defendant might have given a second mortgage on these goods, which would have been perfectly valid. He did not, but Martin, B., by his order, having full power, did. In short, the execution, as such, was at an end by this order, and the plaintiffs had a lien as security by other means, valid against a subsequent bankruptcy.

to him, still, having regard to the dates, the assignee could have recovered it back according to the 73rd section, as the adjudication would have been within fourteen days of the order. Notwithstanding the interpleader order, the sale was under the original execution, for the order only interfered to suspend the sale for a time; no new authority to sell was created; and the effect of the order cannot be to prevent the assignees taking advantage of the act of bankruptcy. *Parsons v. Lloyd*² was different, because there the sale was completed and the execution at an end before the bankruptcy.

POLLOCK, C.B.—I think that the legislature, had they contemplated this case, would have provided for it; as it is, they have not provided for it, and I have a great difficulty in legislating, under the name of interpreting a clause in an act of parliament. The plain result of the language used appears to me to be this: that though there be a seizure, the seizure is to convey nothing, unless it be followed up by a sale. I think that is the clear and plain result of the 184th section of the act of 1849. Here there has been no sale. Very intelligent and equitable grounds are suggested to us upon which we ought to say that the 184th section does not apply to a case like this. But I think the meaning of the 184th section is, that a seizure by a sheriff not followed by a sale is not to prevail against the title of the assignees. Now here, the sale has been prevented by a proceeding which in all probability the act of parliament did not intend should have operation. In future, probably, no Judge will postpone a sale for a single instant, but leave the sheriff to sell, in order not to deprive the execution creditor of the benefit of his judgment. But I consider the words of the act too strong to be got over by the suggestions made on behalf of the creditor, though I feel the force of them in every way. There being no sale, and nothing in lieu of a sale, I think the rule should be made absolute.

MARTIN, B.—I am of the same opinion. If I were to put a construction upon the Interpleader Act and the 184th section of the act of 1849 alone, I should hold that in consequence of the interference of a Judge, in taking the case out of the usual course and making this order, the creditor ceased to have security for his debt within the true meaning of the 184th section; and that in fact the goods became *in custodia legis*, as it were. But when I look to the 73rd section of the act of 1861, it is perfectly clear that if that had been done which it is suggested might have been done, the assignee would still be entitled to the money; for if the Judge had said, "Now you have seized, go on and sell," the assignees would be entitled to recover from the creditor. Putting the two sections together, I think there is a clear indication that the legislature intended that the general body of the creditors should take the money. We have nothing to do but to carry out the law; we have nothing to do with its policy. As I find it to be the result of these two sections that the assignee has the right to the money, it is my duty to abide by what the legislature has enacted.

BRAMWELL, B.—I am of the same opinion. I think if the creditor were to succeed here, he would recover more than a rateable part of his debt. Now, the 184th section says, that he shall not receive more than a rateable part, except in respect of an execution levied by seizure and sale before petition. And if the creditor receive this money, he will certainly receive it in respect of an execution, but in respect of an execution which had *not* been levied by seizure and sale before the date of the fiat or the filing of the petition, and therefore the 184th section is against him. I only wish to add, that I consider this opinion in no way inconsistent with what I said at chambers in *Parsons v. Lloyd*.²

CHANNELL, B.—The question is one of general importance and of considerable difficulty; it turns principally upon the 184th section of the Bankrupt Act of 1849, though some light has been thrown upon the 184th section by the 133rd section. Now, the words of the 184th section are

extremely strong, and if there had been no Interpleader Act, or no order made by a Judge upon the Interpleader Act, it could have admitted of no doubt that the plaintiff, who had levied under the execution upon the judgment, and had not proceeded to sale, would be a creditor having security for his debt, and would, therefore, by the operation of the 184th section, be deprived of his right to more than a rateable portion of his debts with the other creditors. Now, the argument suggested is, that in the events that have happened the creditor no longer has security for his debt within the meaning of the 184th section, because the Judge has interfered to prevent either the sheriff acting for the execution creditor (or the execution creditor giving directions to the sheriff) freely and voluntarily in the matter. But I think he still remained a creditor having security; and I have come to that conclusion not only upon the words of the 184th section, but from the course of legislation that has taken place, the tendency of which evidently is to give the property of the bankrupt to the creditors generally; and for these reasons I think the rule should be made absolute.

Rule absolute.

[IN THE COURT OF EXCHEQUER.]

June 4, 12, 1866.

GIDDINGS AND ANOTHER v. PENNING.

35 L. J. Ex. 191; L. R. 1 Eq. 325; 14 L. J. 667; 14 W. R. 940;
12 Jur. N.S. 634.

The Bankruptcy Act, 1861, was repealed by 32 & 33 Vict. c. 83. s. 20.

Debtor and Creditor—Bankruptcy Act, 1861—Unreasonable Provision—Penalty for not verifying Debt.

BANKRUPTCY.—*A clause in a deed of arrangement under the Bankruptcy Act, 1861, rendered it lawful for the trustees to require debts to be verified by solemn declaration, and subjected those creditors who should not comply with such requisition within two months to the loss of all benefit, dividends and advantages under the deed,—their dividends to fall into the general estate for the benefit of the creditors not making default:—Held (dubitante Martin, B.), that this clause was unreasonable and invalidated the deed.*

Declaration on the common indebitatus counts.

Plea—of a deed of arrangement under the Bankruptcy Act, 1861, expressed to be made between the defendant of the first part, two trustees on behalf of his creditors, of the second part, and the "several other persons whose names or the names of whose firms were written in the schedule thereunder written, and whose seals or the seals of individual members or of a member or agent of whose firms were affixed, being respectively creditors of the defendant, upon or against whom the said deed should become valid, effectual and binding by reason of the Bankruptcy Act, 1861," of the third part.

Replication, that the plaintiffs never executed or assented or became parties to the said deed, nor were they or their firm, or any agent of theirs, or their debt, named or mentioned in the schedule written under or forming part of the said deed.

Demurrer and joinder in demurrer.

The defendant contended that the deed shewed on the face of it that it was to operate for the benefit of all the creditors, whether scheduled or not, and that the plaintiffs were bound by it.

The plaintiffs contended that the following clause which was contained in the deed was unreasonable, and rendered the deed inoperative as against them: "It shall be lawful for the trustees, at the expense of the estate, to require the amount of any debt of any of the creditors to be verified by solemn declaration; and in the event of any such creditor, if in Great Britain or Ireland, failing so to verify such debt for two calendar months after such requisition, such creditors or creditor shall lose all benefit, dividends and advantage to be derived from these presents, and thereupon such last-mentioned dividends shall fall into the general estate for the benefit of the creditors not making similar default."

J. M. Howard (with him *F. Abbott*), for the defendant.—The case differs from *Leigh v. Pendlebury* (33 Law J. Rep. (n.s.) C.P. 172), where a similar clause was held unreasonable because it left the method and the sufficiency of the verification in the discretion of the trustee, Erle, C.J. saying that such a power would be unreasonable if carried out in its terms, and a non-assenting creditor might well refuse to be bound by a deed containing such a power. Here, however, the trustee has no such power, and there is simply the substitution of a solemn declaration for the ordinary affidavit. In *Coles v. Turner* (35 L. J. C.P. 169) a similar provision was held reasonable by the Court of Exchequer Chamber, though they refrained from expressing any opinion as to the reasonableness of the entire clause in *Leigh v. Pendlebury* (33 Law J. Rep. (n.s.) C.P. 172). The only question here is, whether the forfeiture of the debt is too severe a penalty for not verifying. There must be some provision binding the creditor to come in within a definite time; and seeing that the statutory majority of the creditors, who are the best judges of what is a reasonable penalty, have adopted this provision as a reasonable one, it is not for the Court to make it void because they think it unreasonable.

Macnamara, for the plaintiffs.—In *Leigh v. Pendlebury* (33 Law J. Rep. (n.s.) C.P. 172) the Court did not advert to the clause which attached forfeiture to non-verification, because they held it unreasonable that the trustees should have the power of rejecting a debt if the creditor should not verify in the way the trustees should think expedient. In *Coles v. Turner* (34 Law J. Rep. (n.s.) C.P. 198) the same Court held, that the provision as to verification had *per se* the same effect as the entire objectionable clause in *Leigh v. Pendlebury* (33 Law J. Rep. (n.s.) C.P. 172); and the Court of Exchequer Chamber, in reversing the judgment of the Court below in *Coles v. Turner* (34 Law J. Rep. (n.s.) C.P. 198), did so on the ground that there was no penalty of forfeiture following non-compliance with the required verifications. The clause objected to here is unreasonable in either view, because it actually contains the provision for forfeiture.

[*MARTIN, B.*—The clause was usual in the old composition deeds.]

Those deeds only bound the parties who assented to them. In *Lyne v. Wyatt* (Ibid. 179) a corresponding clause, making forfeiture the penalty for breach of a covenant not to sue, was held unreasonable.

Howard, in reply, cited *Scott v. Berry* (34 Law J. Rep. (n.s.) Exch. 193, 197), where Bramwell, B. said, that "if the debtor, not being able to covenant directly with the non-assenting creditors because they will not be parties to the instrument, enters into a covenant with third parties on their behalf, and so does his best to give them the same right, they ought not to be allowed to complain that they are not on equal terms with the other creditors."

Cur. adv. vult.

Judgment was delivered, on the 12th of June, as follows—

CHANNELL, B.—The stipulation, by reason of which the plaintiffs seek to invalidate this deed, involves two matters for consideration: first, what the stipulation requires the creditor to do; and, secondly, the consequences

attaching to non-compliance with the stipulation. After some doubts in the course of the argument, I have arrived at the conclusion, taking the stipulation in its entirety, that it is unreasonable as it is.

I do not think it unreasonable on the part of the trustees to require the amount of any debt to be verified by solemn declaration. I take it that means a declaration to be substituted for an affidavit—the form of verification ordinarily adopted; and whatever unreasonableness might attach to a condition requiring a declaration to be made *to the satisfaction of trustees*,—so that they could, if so disposed, take a captious objection to it,—does not apply, in my judgment, to the first part of this stipulation; for all it amounts to when reasonably read is, that the person claiming to be a creditor for a certain amount, shall make, not an affidavit, but a solemn declaration that he is a creditor for that amount; and if that be good in point of law, it, in my judgment, gives the trustees no right to object to its sufficiency. But it would be very different if the stipulation required the declaration to be made *to the satisfaction of the trustees*. I therefore wish it to be understood, that with the first part of the stipulation I find no fault.

But there the deed provides that if the creditor shall not verify within a certain time, if within Great Britain or Ireland, he shall lose all benefit, dividends and advantages to be derived from the deed, and the dividends are to fall into and form part of the general residue, in which he is not to participate. Now, this is very different from the case frequently arising under the Bankruptcy law, where a party proving and claiming at a late period of the proceedings is not entitled to disturb prior dividends, but is entitled to come in for a share of future dividends. Here he is to forfeit his claim altogether. Looking, then, at the second part, which, in my opinion, cannot be separated from the first, it appears that the stipulation in its entirety is unreasonable, and therefore the deed is not binding on non-assenting creditors.

BRAMWELL, B.—I am of the same opinion.

MARTIN, B.—I am somewhat inclined to be of a contrary opinion. And my reason for thinking that this provision does not defeat the deed is, that it was common to insert a similar clause and provision in the old composition deeds, as may be seen by reference to the precedents in *Forsyth on Composition with Creditors*. And on that ground, if the thing rested with me, I should not be of opinion that it had the effect of defeating the deed.

POLLOCK, C.B.—I am of opinion that the clause by which the debt is forfeited is unreasonable, and therefore that the deed is a void deed. The ground of my opinion is, that the new law introduced upon this subject is founded upon applying the principles of the common law to certain arrangements among the creditors themselves when a specified proportion in value and in number unite, and without the expense of a bankruptcy proceeding. It seems to me to be the object of the law to produce, through the medium of a majority of the creditors in number and value, what may be called a bankrupt arrangement, giving effect to the bankrupt law, without any appeal to the Judges of the Court of Bankruptcy, but only to the arrangements made by the creditors themselves; and the clause in the act of parliament by which the minority are bound by the majority is precisely in accordance with what the bankrupt law itself enacts, when it gives to a certain majority in number and value the power of giving, through the medium of a certificate, an effectual release to the bankrupt, so as to enable him to begin the world again. But there is, in no part of the bankrupt law, anything which appears to justify the introduction of a penal clause, by which, just because a man does not come within a certain time to participate in a share of the effects of the insolvent, he is therefore to lose every chance of getting any portion of his claim and forfeit it altogether. I think such a stipulation extremely unreasonable, notwithstanding that it is found in a deed of composition which binds nobody but those who are actually parties to it. It cannot be said to be unreasonable *quoad* the creditors

who all agree to it and who enter into the composition deed on the distinct understanding that if a creditor does not bring his claim forward, it shall be forfeited. But that is not the case here. This is a statutable provision, endeavouring to produce the effect of bankruptcy or insolvency through the medium of the action of the creditors themselves. And my view is supported by the decision of the Court of Exchequer Chamber in *Coles v. Turner* (35 L. J. C.P. 169), where it was held that "a clause in a deed of assignment, by which a trustee is empowered to require any creditor to verify, &c., by statutory declaration or otherwise, has not the effect of depriving the creditor who fails to produce proof, of all benefit under the deed, and such clause is, therefore, reasonable." In my judgment, the conclusion follows, from that decision, that if the deed had contained the clause which is now under discussion, namely, that the creditor should forfeit all benefit, the Court would have pronounced that it was unreasonable. Blackburn, J., in delivering judgment (see 35 Law J. Rep. (N.S.) C.P. 171), said, "It will be found that the provision in this deed did, perhaps, require no more from the creditors than would be required if the deed were silent. At all events, it requires nothing unreasonably beyond what would thus be required. It does not make a trustee arbitrator, finally to decide whether there is any debt, nor does it impose any penalty on those creditors who fail to produce what the trustee thinks sufficient proof of the debt." I must infer from all that, that if the deed had contained a forfeiture in consequence of the want of proof, the Court would have held the condition unreasonable, and therefore the deed void.

I am now called upon to decide in this case, whether an entire forfeiture of the whole right to participate under the deed is unreasonable or not, in the case of a person who is no party to it, but who is only made a party by the act of parliament, which binds those who do not consent, and who are made parties provided a certain majority in number and value consent. Now had the deed provided that the creditor who failed to give a satisfactory account of his debt, should forfeit all claim to the distribution that had already taken place, and that if he came in to prove, he should come in without disturbing any former dividend; all that would have been in accordance with the spirit of the bankrupt law. But I think the forfeiture, as provided by this deed, is useless, unjust, pernicious, quite contrary to the spirit of the bankrupt laws, and, therefore, unreasonable.

Judgment for the plaintiffs.

[IN THE COURT OF EXCHEQUER.]

June 2, 1866.

BAINES AND ANOTHER v. EWING.

35 L. J. Ex. 194; 4 H. & C. 511; L. R. 1 Ex. 320; 14 L. T. 733; 14 W. R. 782.

See, *In re Norwich Equitable Fire Assurance Society*, 1888, 58 L. T. 35.

Insurance—Principal and Agent—Secret Limitation of Authority.

MARINE INSURANCE. PRINCIPAL AND AGENT.—*The defendant authorized a broker at Liverpool to underwrite marine policies for him "not exceeding 100l. by any one vessel." The broker underwrote a marine policy for 150l. At Liverpool it is notorious that there is generally a limit fixed between the principal and the broker, though this limit is not disclosed to the public:—Held, that the agent in this case had no authority to underwrite for 150l., and that the contract being indivisible, the assured could recover nothing from the defendant in respect of the policy.*

Declaration on a marine policy of insurance subscribed by the defendant for 150*l*. Plea that the defendant did not subscribe the policy and become an insurer as alleged. Issue thereon.

The action was tried, before Lush, J. at the Liverpool Spring Assizes, 1866. It appeared in evidence that the defendant had authorized his agents at Liverpool to underwrite policies for him to the extent of 100*l*. by the following letter:

"Gentlemen,—I hereby authorize you in my name, on my behalf, to underwrite policies of insurance against marine risks, *not exceeding 100*l*. by any one vessel*; and I authorize you to hold and retain all premiums received for me as a fund to answer losses, it being understood that all accounts between us are to be settled according to the usual course of transacting business between an underwriter and a broker, as customary in Liverpool; separate deposit account to be kept at the bank, and accounts to be rendered half-yearly.

. . . .—I remain, gentlemen, your obedient servant,

"WILLIAM EWING."

It also appeared that, according to the custom of doing insurance business at Liverpool, the agent or broker underwrites for his principal, whose name he gives to the Underwriters' Association at the time. It is known that there is in nearly every case a limit fixed between the principal and the broker as to the extent to which the broker may underwrite, but it is not known to the public what that limit is.

In this case the defendant's brokers had underwritten the policy for 150*l*.

At the desire of the parties, Lush, J. directed the verdict to be entered for 150*l*., giving the defendant leave to move to enter a nonsuit or to reduce the damages to 100*l*.

Edward James having obtained a rule accordingly,

Brett and Quain shewed cause.—The defendant has allowed his agents to hold themselves out as persons authorized to underwrite for him, not perhaps as his general agents for all purposes, but as general agents for underwriting all policies brought to them. The private and confidential restrictions to which the agent is subject, are as against third persons, inoperative unless disclosed—2 *Duer*, 346, s. 50. The question then is, what are the usual incidents of an agency to underwrite in the principal's name? In this case they are the incidents of underwriting in the ordinary Liverpool way. In Liverpool the agents sign for all sorts of different amounts, and the fact of a limit being fixed between the principal and his agent cannot limit the right of the assured to assume that the broker is doing his duty. In *Story on Agency*, s. 127, p. 100, it is said, that "if a person is held out to third persons, or to the public at large, by his principal as having a general authority to act for and to bind him in a particular business or employment, it would be the height of injustice, and lead to the grossest frauds, to allow him to set up his own secret and private instructions to the agent limiting that authority." So *Smith on Mercantile Law* (7th edition), p. 128. If there had been no question of limit here, it cannot be doubted that the broker would have been a general agent—*Story on Agency*, s. 126,¹ and *Lloyd on Agency*, p. 136. And the fact of there being a limit makes no difference, because it is not disclosed, and therefore the same rule prevails as if there were no usage as to limit—just as in the case of a factor employed to sell who has not an unlimited authority, the limit privately agreed upon between him and his principal cannot bind the public. At any rate, the case is within the ordinary rule as to a general

(1) "In the case of a general agent the principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although he violates by those acts his private instructions and directions, which are given to him by the principal, limiting, qualifying, suspending, or prohibiting the exercise of such authority under particular circumstances."

and specific authority laid down by *Story on Agency*, s. 131.² At any rate, the broker acted under authority to the extent of 100l., and therefore to that extent the defendant is liable. He can sever the contract—*Co. Litt.* 258 a.³

Edward James Mellish, and *H. T. Holland*, for the defendants, were not called upon.

MARTIN, B.—As to the point that although there was no authority to enter into the contract for 150l., still the contract is valid to the extent of 100l.,—the limit to which the agent who made the contract had authority to go,—I am of opinion, upon plain, intelligible and legal principles, that the contract was one entire contract, and it is not divisible.

And with respect to the other point, it seems to me very clear. A contract was made by an agent on behalf of his principal the defendant, and it was necessary, in an action against the principal, to prove the authority. This is the authority: "I hereby authorize you, in my name and on my behalf, to underwrite policies of insurance against marine risks, *not exceeding* 100l. by any one vessel." That is the authority which is produced to prove a declaration alleging that a policy was effected by the defendant for 150l. upon a single vessel. Now, if the case stood there, the agent clearly made a contract which he was not authorized to make. But then, it is said, there is a practice in Liverpool, whereby brokers, acting on behalf of others who underwrite ships, make valid contracts in their names. But it is also accompanied with this, which is well known, that in almost all cases a limit is put on the amount to which the broker, who signs his principal's name, is to go. When the name of the underwriter is given to the Underwriters' Association, the limit is not disclosed; it remains known only to the broker and his principal. Now, that having been stated, and the parties having produced this authority by which the contract which is contained in the policy was certainly not authorized, it is said that, by reason of this custom at Liverpool, there is virtually an authority to underwrite for 150l. He states it is perfectly well known there is a limit put upon it; therefore any man who makes a contract of this kind on a policy with an agent, knows that he is dealing with an agent, who has also a limit to his authority put upon him. When a person has given a limit to the authority, and another person makes a contract with a knowledge that a limit is universally put, how can it be said that there is any authority in the broker to bind the principal to a greater extent than the limit stated? The opinion I take of the matter is consistent with common sense; and it is impossible by any refinement in *Duer's Marine Insurance* or any other book, to alter the common-sense view. When the person with whom the contract is made has had notice that there is a limit, I cannot see how, after that, he can make the underwriter liable to an unlimited extent; and this view is entirely consistent with that taken by the learned Judge at the trial.

BRAMWELL, B.—I am entirely of the same opinion. In this case the particular capacity of the agent cannot be relied on; therefore the plaintiff is obliged to rely on the defendant having held out the agent as possessing an authority which, in fact, he had not,—that is to say, he must say he has held out the broker as his agent, having authority to sign policies for more than 100l. How can he do so? The utmost that can be said is, that he has held him out to have that authority which a Liverpool broker ordinarily has. It seems to me almost a matter of logical demonstration in this case that the

(2) "It makes no difference in a case of this kind whether the factor, if known to be such, has been employed by the principal to sell, or whether it is the first and only instance of his being so employed by the principal; for, still being a known factor, he is held out by the principal as possessing in effect all the ordinary authority of a factor in relation to the particular sale."

(3) "Regularly it is true that where a man doth lesse than the commandement or authority committed unto him, there the act is void. And where a man doth that which he is authorized to doe and more, there it is good for that which is warranted, and void for the rest."

proposition put forward by the plaintiff must be answered against him. What would have been the case if there had been no such limitation upon Liverpool brokers in general, it is not necessary for me to say, because it might give rise to some questions of very considerable difficulty and nicety. A passage has been cited from *Story on Agency*, section 131, to the effect that factors possess a general authority; and if on selling they violate their principal's instructions, the principal is nevertheless bound. I see that Story refers to *Fenn v. Harrison*,⁴ which certainly does not warrant the general proposition. I can understand that, if a factor has authority to sell, although he has also given to him a particular amount at which to sell, it is presumed he has authority to sell in the ordinary way,—that is to say, in ordinary contracts there is the ordinary obligation of delivery, and other matters of that sort; but I doubt extremely whether, when he has authority to sell at a particular price only, he could, in spite of that particular express limit, have an authority to sell for any price he thought fit. I do not think any case referred to in the note by Mr. Justice Story warrants that. Again, we are asked how is this business to be carried on if this sort of argument prevails? There are two answers to that question. In the first place it is carried on, and in the next place it will be carried on, in this way: the assured trusts to the honesty of the broker, that he is not telling him an untruth when he assumes to act beyond his authority, and he trusts to the solvency of the party whose name is mentioned as principal; and I dare say that, generally speaking, he is very well content to trust to the matter without referring to the terms of the powers of the broker, because, generally speaking, though people may sometimes pledge their credit beyond what is right, and beyond their means at the time, yet, after all, they do not often assume an authority which they do not possess. People must trust to the veracity of the broker and to the solvency of the principal.

CHANNELL, B.—I am of opinion that so much of the rule which has been obtained by the defendant as seeks to set aside the verdict for the plaintiff for 150*l.* and to enter a nonsuit, should be made absolute; and, except for the purpose I am about to notice, that would render it unnecessary to discuss the other part of the defendant's rule, because if he is right in asking the Court to enter a nonsuit for him, he does not want the other part of the rule. If the defendant is right in his contest on that point, it becomes unimportant in that point of view. I am clearly of opinion that if the defendant is right in his contest, that there was no authority to underwrite for 150*l.*, the plaintiff cannot sever that sum and seek to recover his verdict for the amount of 100*l.* I do not want to add anything upon that point.

The material question is, whether the defendant is liable in respect of the policy declared upon. Now, if we are to look at the express authority given, not only does it not establish a liability upon the defendant, but it negatives the liability. Then it is stated that we are not bound to look at it; but even if we are, we cannot give effect to it, upon the ground that the authority which is given to a general agent, cannot be limited by any secret limitation given by his principal to him inconsistent with that general authority. I do not want to interfere with that as a general rule of law; it is one of which I entirely approve; nor do I think that to make a man a general agent, for the purpose of the application of that rule, he must be a general agent for all purposes. If I may use such an expression, which is not very correct, a man may be a kind of special general agent, that is, an agent to sign bills or to execute policies; and although his authority is not extended to every matter of business, it may be general to every matter of business to which the authority applies. Then it appears to me in this particular case,—looking at the custom alleged (which we must take as part of the case), that it is understood in Liverpool there is a limit to a broker's authority,—the only

(4) 3 Term Rep. 757, 762; s. c. 4 Term Rep. 177. Story also incites *Whitehead v. Tuckett*, 15 East, 400; *Pickering v. Busk*, 15 Ibid. 38, 43; *Daniel v. Adams*, Amb. 495 498.

argument that can be urged for the plaintiff is, that the precise limit is not known; but that makes no difference, as the knowledge of the custom prevents the plaintiff from contending that the broker stood in the situation of a general agent, so as to apply the argument that has been addressed to us on the part of the plaintiff. For these reasons, I think the rule the defendant has obtained to enter a nonsuit should be made absolute.

Rule absolute to enter a nonsuit.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Exchequer.)

June 18, 1866.

SMITH AND ANOTHER v. RIDGWAY.*

35 L. J. Ex. 198; L. R. 1 Ex. 331; 4 H. & C. 577; 14 L. T. 632; 12 Jur. N.S. 742; 14 W. R. 868: affirming, [1866] E. R. A.; 35 L. J. Ex. 11; L. R. 1 Ex. 46; 4 H. & C. 37; 13 L. T. 561; 14 W. R. 207 (Ex.).

Referred to, *Cuthbert v. Robinson*, [1882] E. R. A.; 51 L. J. Ch. 238; 46 L. T. 57; 30 W. R. 366 (Ch. D.); *King v. King*, 1885, 18 L. R. Ir. 531 (V.C.). See *Seal v. Taylor*, [1894] E. R. A.; 63 L. J. Ch. 275; [1894] 1 Ch. 316; 70 L. T. 329 (C. A.).

Will, Construction of—"Appurtenances"—"Manufactory."

WILL.—*A testator was possessed of two buildings used as manufactories of earthenware, one on the west and the other on the east side of a street. The buildings were capable of being used as separate manufactories, but for very many years they had been used together, and they were occupied by the same tenants, A. and B, at the time of the testator's death. At that time, however, certain repairs were necessary in order to make the buildings on the east side available as a separate manufactory. The value of the buildings on the east side was about half that of those on the west. The testator, by a codicil to his will, devised his manufactory on the west side of the street—describing it as in the occupation of A. and B, with the outbuildings and appurtenances thereto belonging—to certain devisees. The buildings on the east side were not specifically mentioned either in the will or the codicil, but there was in the will a general devise of all the real property to trustees for sale:—Held, that the buildings on the east side, although at the time forming part of the manufactory in the occupation of A. and B, did not pass under the words of the devise in the codicil, as appurtenant to the manufactory on the west side.*

This was an appeal from a decision of the Court of Exchequer discharging a rule to enter a nonsuit.

The material facts are fully stated, with the pleadings, in the report below (35 L. J. Ex. 11).

It appears that one Joseph Mayer was possessed of two manufactories of earthenware, the one on the east and the other on the west side of High Street, in Hanley, Stoke-on-Trent. They were distinct factories, and capable

* Coram Willes, J., Blackburn, J., Byles, J., Mellor, J., Shee, J. and Smith, J.

of being used separately, but for many years they had been occupied by the same tenant. At the time of Mayer's death in 1860, the smaller factory (which was on the east side of the street, and of about half the value of the other) could not be used as a factory without a new chimney being built and other repairs being executed.

By his will, Mayer devised all his real estate to the plaintiffs and one Abington, upon trust for sale.

By a codicil he devised to Abington and Abner Wedgwood absolutely, as tenants in common, his "messuages, cottages, *manufactory* and land on the west side of High Street, in Hanley aforesaid, in the occupation of Ridgway & Abington and others: his messuage on the east side of High Street, in Hanley aforesaid, in the occupation of Mrs. Ridgway; his messuage on the east side of High Street, in Hanley aforesaid, in the occupation of Mrs. Adams; and his five messuages or cottages at the corner of Broom Street, Hanley aforesaid, in the occupation of William Charters and others, all which said messuages, lands, hereditaments and premises were situate in the parish of Stoke-upon-Trent aforesaid, together with the stables, *warehouses*, *outbuildings*, yards, gardens, and all other rights, *members and appurtenances* to the said messuages or tenements, lands and hereditaments belonging or appertaining."

At the time of Mayer's death the defendant and Abington occupied both factories in partnership. The plaintiffs contended that Abington was devisee in trust jointly with them of all the hereditaments not specifically devised by the codicil, including therefore the factory on the east side, in respect of which they sought to recover a portion of the rent in this action.

The defendant contended that the testator, when he specifically devised the manufactory on the west side, describing it as "in the occupation of Ridgway and Abington," must be taken to have intended to include in the description the buildings on the east side of the street, which would then of course be taken out of the general devise in the will to the plaintiffs as trustees for sale.

The Court below held, that the factory on the east side could not be considered as appurtenant to the factory on the west side, and discharged the rule for a nonsuit, which the defendant had previously obtained.

W. H. Terrell (with whom was *Quain*) now argued, in support of an appeal from this decision, that the clause in the codicil carried both the factories.

Milward (*Baylis* with him) argued, for the plaintiffs, the respondents, that the manufactory on the east side could not pass under the word "appurtenances," or any other of the general words used.

Terrell was heard in reply.

The arguments did not differ materially from those in the Court below. In addition to the authorities cited there, the following were now cited—*Steele v. the Midland Railway Company* (14 Law Times, N.S. 8) (as to what is included in the term "house" under the 92nd section of the Lands Clauses Consolidation Act), and *Bodenham v. Pritchard* (1 B. & C. 350, and note to 2 Wms. Saund. 401).

WILLES, J.—We are of opinion that this judgment ought to be affirmed. The question for our decision is, whether the words "on the west side" in the devise ought to be rejected as a false description inserted by mistake, or whether they are true words of restriction of the general terms of the devise in which they are inserted, and of which they profess to be a limitation; in which latter case the Court must of course in construction restrain the devise to this portion by the condition which those words impose, namely, that the whole of the property passing thereunder should be "on the west side" of High Street.

It is unnecessary to enter into any consideration of the authorities, because they are all consistent from the time of Lord Bacon to the time of *Webber v. Stanley* (33 Law J. Rep. (N.S.) C.P. 217), in which case

Erle, C.J., laid down the law with a clearness and an authority which cannot be at all surpassed. And the law is that, where words can be applied so as to operate upon the subject-matter, and so as to limit the other terms employed in the devise where there is a subject-matter to which all the terms apply, we ought not to reject any of the terms as being a false description,—as was expressed in the maxim commented on by Lord Bacon, *Non accipi verba debent in demonstrationem falsam quæ competunt in limitationem veram*.

The question is, whether, looking at all the words employed by the testator, they are satisfied by—and are a competent description of—the “property upon the west side of the High Street,” or whether, in order to satisfy the language of the testator taken altogether, it is necessary to say that property on the east side passes, and that the introduction of the words “on the west side” ought to be rejected as a false demonstration.

Now that must depend, of course, on the facts; and the result of the evidence appears to be that there is (and has been for a great number of years) a manufactory on the east side; that in the state in which it was at the time of the devise in 1860, it could not have been used as a distinct manufactory, without the chimney being repaired and other work being done upon it. It also appears that, with such alterations and repairs, it was capable of being used as a manufactory distinct and separate from that on the west side. Both factories appear to have been taken under one lease about the year 1830, at which time it would seem that the factory on the east side was of importance; but that in consequence of expenditure and improvements in the factory on the west side, that factory appears to have subsequently become the more important part of the property, and the principal process of the manufacture would seem to have been carried on there. And the manufactory on the west, like that on the east side, appears also to have been capable of being used as a distinct manufactory.

In point of fact, however, it would seem that both factories were more or less used for the purpose of the same business from 1830 down to the present time. At the time of the devise, and also at the time of the testator's death, it appears there was a manufactory upon the west side, answering to the description in the devise, and there was another manufactory on the east side, which does not come within its terms, unless we are to reject the west side.”

Now, before we can reject language of the testator, which is applicable to the subject-matter existing at the time when the words were used, some reason must be presented to us; and one reason—and the main one—relied upon strongly for the defendant, is, that in this will the term “manufactory” is found used—not alone, but—in company with very general language sufficient to describe all that was necessary to make up the entirety of the manufactory, by reason of its use being essential to the convenient occupation of the manufactory as such; there are the ordinary general words which are intended to take in any small members of the property, which may be supposed to have been omitted in the specific description which precedes; and it is said that the factory on the east side of the street ought therefore to have been held to pass, as “belonging or appertaining to” the factory on the west side of the street, or, at any rate, under the general word “appurtenances.”

I apprehend the rule upon that subject is clear enough. There can be no doubt that words which *prima facie* describe a building only, may be considered to include land, which is so intimately connected with the use of the building that it would be, in the mention of it, as in the cases referred to in *Steele v. the Midland Railway Company* (14 Law Times, N.S. 3), and the cases collected in the notes to *Smith v. Martin* (2 Wms. Saund. 401). And it must be admitted that the word “manufactory,” which is a larger and vaguer term, may well include, not merely the building, such as

machinery works, but may also include small outbuildings necessary to be used in the course of manufacture, such as a drying-house, or land that is used in the course of any of the necessary processes. But in this case the difficulty is, that that which was sought to be included in the members as belonging to the manufactory, is a thing which is itself capable of being used as a manufactory; it is not a mere accessory (except in the use to which it is put by the tenants of the manufactory, to which it is said to pass as a member) but it is a distinct manufactory by itself, and capable of being described as such, and not one of those smaller matters that would pass under the word "appurtenances," or, as shewn in the notes to *Smith v. Martin* (2 Wms. Saund. 401), even without that word. Moreover, it is to be observed, that between the description of the manufactory and these general words, there is inserted, first of all, a devise in terms of a message "on the east side of the street"; secondly, another message, "on the west side of the street"; and, thirdly, "five messages or cottages at the corner of — street as aforesaid." All of which, like the manufactory in question, are described somewhat precisely by way of locality; and then follow the general words. Therefore, as the general words may well have application to some portion of the devise, it is not necessary to find them an application that shall extend to a subject-matter of precisely the same description as the manufactory on the west side.

It should seem, therefore, that the proper answer to the question is, that there is here a true restriction of the devise to the manufactory on the west side. I would observe we are not assisted here by an argument often used on these occasions, namely, that there was an appearance on the face of the testamentary instrument of an intention by the testator to dispose of the whole of his property, for the result of holding that the manufactory on the west side alone passes, is not that, as to the manufactory on the east side, he died intestate; because that factory did not pass under the codicil, but under the will, to the plaintiffs (and to another tenant, whose name is omitted, for reasons to which it is unnecessary to refer), as the testator's trustees for sale.

Upon the whole, therefore, we do not see our way to a different conclusion from that at which the Court of Exchequer have arrived, nor do we feel ourselves justified in striking the words of the description "on the west side of High Street, in Hanley aforesaid," out of the will; and, therefore, the judgment of the Court below will be affirmed.

Judgment affirmed.

[IN THE COURT OF EXCHEQUER.]

May 22, June 12, 1866.

VANDENBERGH v. SPOONER.

35 L. J. Ex. 201; 4 H. & C. 519; L. R. 1 Ex. 316; 14 L. T. 701; 14 W. R. 843.

Observed upon, *Newell v. Radford*, [1868] E. R. A.; 37 L. J. C.P. 1; L. R. 3 C.P. 52; 17 L. T. 118; 16 W. R. 79 (C.P.). Distinguished, *Jones v. Joyner*, 1900, 82 L. T. 768 (Q.B.D. Div.).

Statute of Frauds, s. 17.—*Essentials of Contract—Names of Buyer and Seller.*

SALE OF GOODS.—A contract signed by S., by which "S. agrees to buy the whole of the lots of marble purchased by V. now lying at L.," is not a sufficient memorandum in writing within the 17th section of the *Statute of Frauds* to bind S., inasmuch as the name of the seller, as seller, does not appear.

Action for goods sold and delivered, and goods bargained and sold, &c.
Plea, never indebted.

At the trial, before Bramwell, B., at the Middlesex Sittings in Hilary Term, the following memorandum was produced, signed by the defendant:

"D. Spooner agrees to buy the whole of the lots of marble purchased by J. Vandenberg, and now lying at Lyme Cobb, at one shilling per foot.

(Signed) "D. Spooner."

It was then proved that the defendant afterwards wrote out another note as follows, which the plaintiff signed, believing it to be a copy of the former:

"J. Vandenberg agrees to sell to Mr. D. Spooner his several lots of marble purchased by him, now lying at Lyme, at one shilling the cubic foot, and a bill at one month.

(Signed) "J. Vandenberg."

The jury found that the real contract was contained in the former of these two notes, the one signed by the defendant, and found a verdict for the plaintiff for 35*l*.

A rule for a nonsuit was afterwards obtained by *J. B. Karlake* on the ground that the note was not a sufficient memorandum of the contract within the Statute of Frauds to bind the defendant, as it did not contain the name of the seller *as seller*.

Huddleston and *Hannen* shewed cause.—The seller's name is to be found in the note, and all the necessary elements of an agreement are there. The note in fact states all that was to be done by the person charged, and is signed by him, and that is sufficient to satisfy the 17th section of the statute—*Sarl v. Bourdillon* (1 Com. B. Rep. N.S. 188; s. c. 26 Law J. Rep. (N.S.) C.P. 78), *Bailey v. Sweeting* (9 Com. B. Rep. N.S. 843; s. c. 30 Law J. Rep. (N.S.) C.P. 150). In *Williams v. Lake* (2 El. & El. 349; s. c. 29 Law J. Rep. (N.S.) Q.B. 1), Mr. Justice Hill says, that "it is sufficient if the particulars appear by a reasonable construction, together with the signature of the party to be charged." And in *Blackburn on the Contract of Sale*, p. 55, it is said that "it is not necessary that the name of the party with whom the contract is made should be inserted, if there be on the face of the memorandum a sufficient description to shew who he is." This document must be read as ordinary men of business would read it; and, reading it in that way, the reasonable construction and inference is that the plaintiff is the seller. But even if it does not appear from the document itself that he is the seller, still it may be shewn from the surrounding circumstances who the seller is, just as parol evidence was admitted in *Macdonald v. Longbottom* (1 El. & El. 987; s. c. 29 Law J. Rep. (N.S.) Q.B. 256), to shew the meaning of "all your wool."

Karslake and *T. K. Kingdon*, contra.—The document which the jury have found *not* to be the contract may be put aside at once. Either then there is no contract at all, because the notes do not tally, or the contract is found in that note only which is signed by the defendant; and the absence of the plaintiff's name as one of the contracting parties is fatal to the validity of that note—*Champion v. Plummer* (1 Bos. & P. N.R. 252) and *Williams v. Lake* (2 El. & El. 349; s. c. 29 Law J. Rep. (N.S.) Q.B. 1). The way in which the plaintiff's name is mentioned serves only to identify the goods; the name cannot, just because of certain extrinsic circumstances, be imported into the contract as the name of one of the parties. If that were allowed, the whole contract might as well be proved by parol at once. *Sarl v. Bourdillon* (1 Com. B. Rep. N.S. 188; s. c. 26 Law J. Rep. (N.S.) C.P. 78) does not help the plaintiff, for that case only decided that where the purchaser wrote an order in the seller's book, the seller's name, which was written on the fly-leaf of the book, might be incorporated into the contract; whereas *Boydell v. Drummond* (11 East, 142) shews, on the other hand, that parol evidence cannot be given to connect names written in different books so as to shew

that they are the names of the parties to the contract. Although for certain purposes you may look to the surrounding circumstances, yet for the essential elements of the contract you must look only to the written document itself. The plaintiff might have purchased these goods as broker, and on the face of the contract there is no sort of reasonable certainty that he is the person selling the goods to the defendant.

Cur. adv. vult.

BRAMWELL, B. (June 12) delivered the judgment of the Court (Pollock, C.B., Bramwell, B., Martin, B., and Channell, B.).—This case turns upon whether there was a sufficient memorandum in writing within the 17th section of the Statute of Frauds to bind the defendant to an alleged purchase of goods. A memorandum was produced, signed by him, but not mentioning the sellers' name as the seller, but only mentioning it in this way, that the defendant agreed to buy certain goods which had been "purchased by J. Vandenberg," the plaintiff; and the question is, whether as a matter of "construction" or of "reasonable intendment," no matter which of the two expressions is used, that document would convey that Vandenberg was the seller. We have come to the conclusion that we cannot say it conveys that meaning. We may speculate or guess, on reading the document, that Vandenberg is the seller, but we cannot say that is the reasonable construction of the document. There is therefore, in our opinion, no sufficient memorandum in writing within the Statute of Frauds to bind the defendant, inasmuch as the name of the seller, as seller, does not appear. The rule will be made absolute to enter a nonsuit.

MARTIN, B.—I do not intend to differ from the rest of the Court, but I cannot say that I am satisfied that the document is not a sufficient memorandum.

Rule absolute.

[IN THE COURT OF EXCHEQUER.]

June 12, 1866.

BICKFORD v. D'ARCY AND BEACHEY.

35 L. J. Ex. 202; 4 H. & C. 534; L. R. 1 Ex. 354; 14 L. T. 629;
14 W. R. 900; 12 Jur. N.S. 816.

Interrogatories—Action against Solicitors—Liability to Penalties.

DISCOVERY. SOLICITOR.—*In an action against D. and B., a firm practising as attornies and solicitors, for not properly investing the plaintiff's monies intrusted to them, the plaintiff was allowed to administer interrogatories to the defendant B., although they were such that the answers might render B. liable to a penalty (under the 6 & 7 Vict. c. 73. s. 2. and the 23 & 24 Vict. c. 127. s. 26) for practising as an attorney and solicitor without having the proper certificate,—the Court holding that the questions were put bona fide in aid of the action, to ascertain whether B. was really liable with D., and that B. might safely answer them, as they related to the business of the partnership as scriveners.*

Baker v. Lane (3 H. & C. 544; s. c. 34 Law J. Rep. (N.S.) Exch. 57) explained.

The declaration alleged that the plaintiff employed the defendants as her attornies and solicitors to invest monies for her on mortgage, and that the defendants promised to invest the same on mortgage in a proper manner,

and received the monies for that purpose, but did not invest the same, though a reasonable time in that behalf had elapsed before action. There were also the ordinary money counts.

Pleas, to the first count, that the defendants did not promise, and that they did not, in pursuance of the alleged retainer and employment, receive the said monies for the purpose and on the terms alleged; to the other counts, never indebted.

Pigott, B., at chambers, made an order allowing interrogatories to be administered to the defendant Beachey.

The first interrogatory, from which the characters of the others may be inferred, was as follows: "Did you, during the year 1857, and during the succeeding years down to July, 1865, or during any and which of such years, receive any and what share of the profits made in those years respectively, in the business of attorneys or solicitors, carried on by the firm of D'Arcy & Beachey, at Newton Abbott, Devonshire?"

It appeared, from the affidavit of the defendant Beachey, that he had never been admitted as an attorney and solicitor; and he was never partner with D'Arcy, and that the money was paid to D'Arcy alone.

According to the plaintiffs' affidavit, the defendants' firm formerly consisted of D'Arcy and the son of the defendant Beachey, and that the last-named defendant had entered the firm on the death of his son; and that the question was, whether the father was, under the circumstances, liable to refund the plaintiff's money which had been intrusted to the firm.

J. B. Karslake obtained a rule to shew cause why the order of Pigott, B., should not be rescinded.—The objection to the interrogatories was, that they might tend to make the defendant liable to an indictment for misdemeanor, and to penalties (under 6 & 7 Vict. c. 73. s. 2. and 23 & 24 Vict. c. 127. s. 26), for practising wrongfully as an attorney or solicitor, without the necessary certificate, &c.

J. D. Coleridge and *H. T. Cole*, for the plaintiff, now contended that the interrogatories ought to be allowed, on the authority of *Osborn v. the London Dock Company* (24 Law J. Rep. (N.S.) Exch. 40; s. c. 10 Exch. Rep. 698), which was acted upon in *Chester v. Wortley* (25 Law J. Rep. (N.S.) C.P. 47; s. c. 17 Com. B. Rep. 410). The objections, if taken at all, should be taken when the defendant comes to answer them—*Bartlett v. Lewis* (31 Law J. Rep. (N.S.) Exch. 477). At any rate, the Court had a general discretion in the matter—*Tupling v. Ward* (30 Law J. Rep. (N.S.) Exch. 222) and *Stern v. Sevastopulo* (32 Law J. Rep. (N.S.) C.P. 268, per Erle, J., 270).

[CHANNELL, B., referred to *The Queen v. Garbett* (2 Car. & K. 474).]

Karslake and *Wills*, in support of the rule, relied principally on *Baker v. Lane* (3 H. & C. 544; s. c. 34 Law J. Rep. (N.S.) Exch. 57), where it was held that interrogatories could not be allowed in an action of libel if they tended to charge the defendant with an indictable offence. The interrogatories here are framed in order to render the defendant liable as an attorney. They inquire as to the share he had in the profits of the firm as attorneys; and his answers might render him liable to penalties.

[POLLOCK, C.B.—He would not be liable to penalties for acting as a scrivener. The inquiries seem directed to that branch of the business.]

Even in cases where criminal proceedings cannot be taken, the Court will not compel a party to answer: *ex gr.*, in *Pye v. Butterfield* (34 Law J. Rep. (N.S.) Q.B. 17), interrogatories were disallowed, on the ground that the answers might expose the defendant to a forfeiture.

POLLOCK, C.B.—In the judgment in *Baker v. Lane* (3 H. & C. 544; s. c. 34 Law R. Rep. (N.S.) Exch. 57) we did not state our reasons at length; but the real ground discussed among ourselves was, that the interrogatories were not *bona fide*. Now, I believe that these interrogatories are put *bona*

fide. For myself, I should have preferred, in the first place, making a broad distinction between what may be called an examination in chief and a cross-examination. Here the interrogatories are administered under circumstances not at all similar to a cross-examination. So far as I know, this distinction has never yet been made. I fall in with the general view of the Court, that interrogatories of this character, if made *bona fide*, ought to be allowed; though I think it would be better if originally such a distinction had been made as I have pointed out; and that if the questions obviously tended to criminate, they should not be allowed.

MARTIN, B.—I am of the same opinion. In *Wigram on Discovery* it is said that, if the question involves a criminal charge, the interrogator is not entitled to an answer to such question, although the question may be put. Soon after the 17 & 18 Vict. c. 125. was passed, *Osborn v. the London Dock Company* (24 Law J. Rep. (n.s.) Exch. 40; s. c. 10 Exch. Rep. 698) was decided in this Court, Mr. Baron Alderson being at the time a member of the Court; and both he and Mr. Baron Parke seemed to adopt the view put forward in *Wigram on Discovery*; and the Court of Common Pleas seems also to have adopted it. I have acted on the same principle, but I have over and over again directed a question to be struck out when I thought it was not put *bona fide*; for in such a case I would not allow a proceeding in chambers to be made use of for putting a man in the disagreeable position of saying, "I will not answer that."

I remember the discussion in *Baker v. Lane* (3 H. & C. 544; s. c. 34 Law J. Rep. (n.s.) Exch. 57), and without saying that there was *mala fides*, there was certainly a further object in the interrogatories than that of merely getting answers for the particular suit. Now, in the present case the question is, whether or not the defendant Beachey is jointly answerable with D'Arcy for the alleged negligence in respect of certain monies. I do not see any objection to this, and I believe the questions are put *bona fide*, and that the real object is to obtain answers to questions to which the plaintiff is entitled to have answers. That is, in point of fact, whether Beachey was a partner in the transaction as a scrivener. I think he may very safely answer these questions without submitting himself to any penalty whatever. For these reasons, I am of opinion that this rule should be discharged.

CHANNELL, B.—I also think that this rule should be discharged. If I thought these interrogatories were propounded with a different object, and not to serve the purposes of the suit, I should have come to a different conclusion. I apprehend that the object the plaintiff has in view is to shew that the firm of D'Arcy & Beachey was intrusted with the duty of investing the plaintiff's money, and that in that firm the defendant Beachey was a partner so as to be responsible in his own person for the negligence of the firm. The business of a money-scrivener is a business which is not necessarily incident to the business of an attorney; but it may be incident to it, and is commonly carried on with it. And, therefore, the reference to the fact that Beachey may have been in partnership with D'Arcy as an attorney, is for the purpose of shewing that he is responsible as one of the firm intrusted with the investment of the plaintiff's money.

It appears further that, as far as the authorities go, they are in favour of the plaintiff. I think that *Osborn v. the London Dock Company* (24 Law J. Rep. (n.s.) Exch. 40; s. c. 10 Exch. Rep. 698) and *Chester v. Wortley* (25 Law J. Rep. (n.s.) C.P. 47; s. c. 17 Com. B. Rep. 410) are in favour of the plaintiff; and I do not think, looking at the particular circumstances of *Baker v. Lane* (3 H. & C. 544; s. c. 34 Law J. Rep. (n.s.) Exch. 57), that we ought to consider the decision of this Court in that case interferes with the fair inference to be drawn from *Osborn v. the London Dock Company* (24 Law J. Rep. (n.s.) Exch. 40; s. c. 10 Exch. Rep. 698) and *Chester v. Wortley* (25 Law J. Rep. (n.s.) C.P. 47; s. c. 17 Com. B. Rep. 410). I confess I wish some clear rule could be laid down on more satisfactory grounds.

I do not think that the defendant may not be relieved from the necessity of answering these questions; but I think the interrogatories may be propounded. We may have to discuss the question over again; but on the question of whether the interrogatories ought to be allowed, we ought to be governed by the decision in *Osborn v. the London Dock Company* (24 Law J. Rep. (N.S.) Exch. 40; s. c. 10 Exch. Rep. 698).

Rule discharged.

[IN THE COURT OF EXCHEQUER.]

June 12, 26, 1866.

LORD COLCHESTER AND OTHERS v. KEWNEY.

35 L. J. Ex. 204; 4 H. & C. 445; L. R. 1 Ex. 368; 14 L. T. 888; 14 W. R. 994; 12 Jur. N.S. 743: affirmed, [1867] E. R. A.; 36 L. J. Ex. 172; L. R. 2 Ex. 253; 16 L. T. 463; 15 W. R. 930 (Ex. Ch.).

Land-Tax—Exemption—Hospital—Royal Charity—38 Geo. 3. c. 5. s. 25.

HOSPITAL. LAND TAX.—*The proviso in the 38 Geo. 3. c. 5. s. 25, exempting hospitals from land-tax, does not apply to hospitals founded since the passing of that act.*

Quære—*If an asylum for the maintenance and education of orphan children of soldiers who have fallen in active service, built and endowed out of a fund produced by general subscription, is an hospital within the meaning of 38 Geo. 3. c. 5. s. 25.*

SPECIAL CASE stated by consent, and by order of Bramwell, B., without pleadings.

The plaintiffs were three of the Royal Commissioners and Trustees of the Patriotic Fund, and the defendant was the collector of land-tax for the parish of Wandsworth, acting in the division of West Brixton, in the county of Surrey, within which the asylum and buildings of the Victoria Patriotic Asylum were situate.

The plaintiffs and divers other persons were appointed Commissioners under a Royal Commission, dated the 7th of October, 1854, for the purpose of ascertaining the best mode of applying the Patriotic Fund which had been raised by public subscription for the widows and orphans of soldiers and marines who had fallen in the Crimean War. The Commissioners, after having appropriated a portion of the fund to the immediate relief of those persons for whose benefit it was intended, decided on establishing and endowing with the residue an institution for the education of three hundred daughters of soldiers, sailors and marines who had fallen in active service. They accordingly purchased a portion of Wandsworth Common from Lord Spencer, the Lord of the Manor of Battersea and Wandsworth, and built the Royal Victoria Patriotic Asylum.

The children admitted were lodged, boarded, clothed and educated at the cost of a portion of the Patriotic Fund, which had been invested in public securities under the control of the Paymaster General. The asylum was occupied exclusively by the children and the necessary officers and servants of the establishment, the latter being paid and removed by the plaintiffs and the other Commissioners.

In August 1863, the assessors of land-tax for the parish of Wandsworth assessed the asylum in respect of its site and the buildings within the walls

and limits of the asylum to the land-tax for one half-year, in the sum of 37l. 10s. on a rental of 1,500l. The plaintiffs claimed exemption under the 38 Geo. 3. c. 5. s. 25, by which, amongst other buildings, hospitals are exempted, and also on the ground that the asylum was a royal charity and Crown property. They appealed to the local Land-tax Commissioners, who decided that the asylum was not an hospital within the meaning of the statute nor a royal charity, and dismissed the appeal. The defendant thereupon distrained for the amount of the assessment; and, an action being brought by the plaintiffs, the question for the opinion of the Court was, whether or not the asylum was liable to be assessed and rated to the land-tax.

Sir R. P. Collier, Solicitor General (*Prideaux* with him), was heard (June 12) for the plaintiffs.

Mellish (*Philbrick* with him), for the defendant, contended that the asylum was a school and not an hospital within the meaning of 38 Geo. 3. c. 5. s. 25; and that even if it were an hospital, the section exempted only hospitals in existence at the time of the passing of the act.

The arguments are sufficiently noticed in the judgment of the Court.—The following statutes and authorities were referred to: *The Warden and College of All Souls v. Costar* (3 Bos. & P. 635), *Harrison v. Bulcock* (1 H. Black. 68), *The Attorney General v. Hill* (2 Mee. & W. 159; s. c. 6 Law J. Rep. (N.S.) Exch. 105), *Johnson's Dictionary*, "Hospital," "Almshouse," *Com. Dig.* tit. 'Hospital,' note, 38 Geo. 3. c. 60. and 42 Geo. 3. c. 116.

Cur. adv. vult.

On the 26th of June the judgment of the Court (Pollock, C.B., Bramwell, B., Martin, B., and Channell, B.) was delivered by—

CHANNELL, B.—The question for our decision in this special case is, whether the site of the Royal Victoria Patriotic Asylum is liable to be assessed to the land-tax. Exemption is claimed by the plaintiffs, who are the trustees of this asylum, on two grounds. First, that this asylum is an hospital, and therefore exempt by the 25th section of the 38 Geo. 3. c. 5; secondly, that it is Crown land, and therefore exempt. On the part of the defendant, these propositions are disputed, and it is further contended that even if this were an hospital within the meaning of that word in the section in question, yet it was not in existence in the 38th year of the reign of George the Third, and that the exemption only extends to institutions then existing. The facts are fully set out in the case, and it will not be requisite further to refer to them. It will, however, be necessary to examine the statutes imposing the land-tax to shew how the law now stands, and the successive changes that have been made. The tax appears to have been first imposed as an annual tax in the time of William and Mary, and by several successive acts of parliament to have been continued. Those acts imposed, not only the tax now known as the land-tax, but also a tax on personal property and salaries, somewhat analogous to the present income and property tax, and from the time of the 4 & 5 W. & M. they contained a clause exempting hospitals from its operation in somewhat similar terms to that hereafter referred to. These annual acts appear to have been passed in much the same terms, until 1798, the date of the 38 Geo. 3. c. 5, the last annual act. The 25th section of that act provides that nothing in the act shall extend to charge any college or hall in either of the two universities of Oxford and Cambridge, or certain colleges named, or the corporation of the Sons of the Clergy, or the College of Bromley, "or any hospital in England, Wales or Berwick-upon-Tweed, for or in respect of the scites of the said colleges, halls or hospitals, or any of the buildings within the walls or limits thereof." The section then proceeds to provide for the exemption of persons connected with such institutions from the tax on their salaries, and also for the exemption of land which in 1693, the date of the act 4 & 5 W. & M., had formed part of the site of any college, or

of certain specified institutions, and also that the act should not charge "any other hospitals or almshouses" in respect of lands the rents of which in 1693 had been applicable solely to the relief of the inmates.

Now, the first question that arises is, whether if this asylum had been in existence at the time of the passing of this act, the trustees could have claimed exemption. It is objected that they are not incorporated, and that there can be no hospital without incorporation, and no doubt the old authorities tend to shew that an hospital must be incorporated. But they shew something more, for Lord Coke says, in the case of *Sutton's Hospital* (10 Rep. 1), that there is no legal hospital except where the poor persons benefited are themselves incorporated; and he says that where the corporate succession is vested in trustees to effectuate the purposes of the institution, that is no legal hospital. It seems, however, tolerably clear that a legal hospital, in that sense, is not meant when the word "hospital" is used in this section, for towards the end of the section the words "other hospitals," follow the names of some particular hospitals, some of which seem not to be incorporated in such a manner as to make them legal hospitals under this definition. If, then, we understand that the word "hospital" in the section does not mean strictly a legal hospital, is there any reason for supposing that there need be any incorporation at all? It seems rather more reasonable to hold that the word is used in a popular sense only, and that any institution which, though not in a strictly legal, might in a popular sense be called an hospital, might claim exemption. But some doubts arise whether even upon this view this institution would be an hospital, by which word we understand rather an institution for the relief of the sick or aged than for the maintenance and education of children. We do not speak of an hospital for orphans. But upon the whole we are inclined to think that if this institution had been in existence at the time of the passing of the act 38 Geo. 3. c. 5, it might have claimed exemption.

This point is certainly not so clear as to make it unnecessary to consider the position of a subsequently founded hospital of that character and the course of subsequent legislation. In the same session of 38 Geo. 3. was passed another act, c. 60, which enacted that the sums charged by the previous act, c. 5, on counties, towns and places in respect of lands within the same, to be raised, levied and paid within a year, should be raised, levied and paid yearly for ever, and that the several powers, provisions, clauses, &c., of the former act, except as in the second act altered or varied, should be in full force as if repeated and re-enacted in that act, but that all this should be subject to redemption as therein provided. By subsequent statutes the provisions for redemption were from time to time altered, repealed, re-enacted, and consolidated; but the scheme remained the same, and the alterations were principally of the machinery and regulations for carrying it into effect. Now, one object of the legislature in passing the act was to support the public credit by imposing a fixed charge on land, on the strength of which money could be borrowed, and to relieve the country of a portion of the existing debt on advantageous terms. Provision was made for redemption of the tax by transferring to the Commissioners for the reduction of the national debt a sum in consols, the income of which should exceed by one-tenth the tax to be redeemed. At this time the funds were greatly depreciated, as compared with other securities, and especially with land. A permanent charge of 10*l.* a year upon land would therefore be of greater value in the market than a sum producing 11*l.* a year in the funds. It would therefore, if the then imposed tax was to be permanent, be to the interest of landowners to redeem, and upon their doing so the revenue would be benefited to the extent of one-tenth of the tax redeemed. It was therefore the policy of the legislature to encourage redemption. That this was so we see from the extensive powers given to persons having a limited interest only to raise money to redeem the tax, and other inducements held out to land-

owners to redeem, and from the fact that upon refusal of the owners, third persons might purchase the tax, retaining it as a charge payable to themselves. But no one would have redeemed the tax unless it had been made a permanent charge upon the land, not likely ever to be much less in amount and not to be got rid of except by redemption. If that were the case the redemption would necessarily increase the market value of the land, and would do so as we have shewn to a greater extent than the sum required to be expended in the redemption. If, however, the land was to be liable to the tax in the hands of one purchaser, but not of another, the value of the land to sell would not be increased in proportion to the outlay for redemption. To carry out the policy of the act, therefore, we should expect to find that no new or shifting exemptions could arise or come into effect after the tax became permanent. The effect of the acts on several points was explained in *The Queen v. the Land Tax Commissioners* (2 El. & B. 694; s. c. 22 Law J. Rep. (N.S.) Q.B. 211). Upon each district separately assessed a fixed quota was to be charged. That was not to be altered, although before levy the amount of tax redeemed within the district was to be deducted and the remainder only levied. This was to be levied on the lands not exonerated by redemption. These lands were to be assessed yearly by an equal pound-rate, sufficient to produce the required amount. We see, therefore, from this, in the first place, that the amount of tax payable in any particular portion of land would increase or decrease not according as the value of land increased or decreased absolutely, but according as it increased or decreased relatively to the other lands in the district not exonerated; and as any owner who was about to improve his land to such an extent as to have any effect on the rest of the district might be expected first to redeem the tax, no person could ever expect that the amount of tax upon his land would ever be sensibly diminished, although he would know that if he improved without taking the precaution of redeeming, the tax would be increased. We see, then, that this inducement for redemption, viz., that no loss was likely to be incurred, was actually held out by the legislature. In the next place, we see that if any portion of land chargeable with tax came into the hands of a proprietor having a valid claim of exemption, a greater burden would be thrown upon the remainder of the district, for the amount to be raised would be the same as before, and the land on which it was to be charged less. This of itself is a strong argument for supposing that all exemptions must attach at the time these quotas were thus permanently fixed, and must in all changes of ownership follow the land and not the proprietor. As long as the tax was imposed annually, although the legislature, in fact, imposed the same quota in each district as they had done before, it must be taken that this was done deliberately and after consideration of all the changes that had taken place in the ownership of property since the last act. We find in two cases arising under the temporary acts, viz., *Harrison v. Bulcock* (1 H. Black. 68) and *All Souls College v. Costa* (3 Bos. & P. 635), that it has been held, with respect to additions to hospitals and colleges which had been made since exemption was first given, but before the act imposing the tax under which the assessment complained of was made, that such additions were exempt. The distinction between those two cases and the present was noticed in one of them, the *All Souls College case* (3 Bos. & P. 635), by the Chief Justice of the Common Pleas, Lord Alvanley, who says, that with respect to colleges founded since the land-tax was made perpetual, he would say nothing. The inference we are disposed to draw from what was said in that case seems to us to be, that the important thing to see in construing the exemption is, whether or not the land was within the exemption at the time of the passing of the act imposing the tax on all land. In that case it was, in the present it was not. Considering, therefore, the hardship on other proprietors in the district, which would be caused by shifting exemptions coming into operation on a change of ownership, together with the evident policy of the act to make the charge on lands a permanent

one, with a view to encourage its redemption for the benefit of the revenue, we think we should hold that there can be no exemption in case of lands not exempt when the tax was made permanent. The same conclusion would, we think, necessarily be drawn from a strict construction of the words of the exemption; for "any hospital" must mean "any existing hospital."

Then, the further question arises, whether this asylum is exempt as Crown land; but to this we think the same reasoning will apply. There is, indeed, very great doubt whether, supposing this asylum to have been in existence in 1798, it would have been exempt on this ground, viz., as Crown land. It is true that the Commissioners were appointed by the Crown, and, to some extent, for public purposes; but it was mainly to administer funds contributed for a particular purpose by individuals, and all taxes or other imposts charged upon them would be payable from these funds, and not from the public purse. But however that may be, we think that these lands, having been chargeable with land-tax when belonging to Lord Spencer, as we presume to have been the case, although it is not distinctly stated, would be chargeable still in the hands of the Crown, if directly purchased for the Crown. The case quoted to shew that Crown lands are not chargeable with land-tax, *The Attorney General v. Hill* (2 Mee. & W. 159; s. c. 6 Law J. Rep. (N.S.) Exch. 105), seems to us to favour this view rather than the contrary; for it is distinctly found in the case (at page 163) that the assessment complained of on Deptford Dockyard was for land which had formed part of the dockyard when the land-tax was made perpetual. This shews that, in the opinion of the late Mr. Justice Wightman, who was then counsel for the Crown, it was a material point in order to make out the exemption. It may be observed that the effect of holding that the Crown must pay the land-tax chargeable on land which they may purchase, is not really to tax the Crown, but merely to make the Crown pay the market-price for land purchased. If the tax had been previously redeemed, of course the purchase-money would have been larger, and the difference between the money in the two cases would be gained by the Crown at the expense of the other proprietors of the district, not at the expense of the public revenue, whenever lands were purchased on which the tax had not been redeemed, if the exemption claimed were to be allowed. If there were any provisions for reducing the amount of the tax to be levied on the district, of course the case would be different. There may be some difficulty in enforcing payment against the Crown, and we do not say that all, or even any, of the remedies provided for ordinary cases, could be resorted to. We do not, however, think that this shews that the lands would not be still chargeable, or that an assessment, in which part of the quota to be levied on the district was assessed on Crown lands, chargeable before they became Crown lands, would not be a good one. For these reasons, we think our judgment should be for the defendant.

Judgment for the defendant.

[IN THE COURT OF EXCHEQUER.]

June 8, 1866.

WRIGHT v. CHILD.

35 L. J. Ex. 209; 4 H. & C. 529; L. R. 1 Ex. 358; 15 L. T. 141.

Sheriff—Negligence in conducting Sale—Interference of Debtor—Special Bailiff.

SHERIFF.—The sale of goods under a fi. fa. having been fixed for the 26th of July, the sheriff's officer, at the request of the debtor, delayed issuing

advertisements till the 25th. On that day a further delay of some hours was granted at the request of the debtor's attorney, who ultimately instructed the officer to go on and sell, at the same time under another writ which had been delivered to the officer during the day. The goods were thereupon sold together without being lotted, at a considerable loss:—Held, that the interference of the debtor did not make the officer his agent, and that the sheriff was not relieved from his liability in respect of the negligent conduct of his officer in conducting the sale.

This action was brought by the assignee of Joseph Outram, a bankrupt, against the sheriff of Staffordshire, for negligence in executing a *fi. fa.* against the bankrupt's goods.

The first count of the declaration alleged that a *fi. fa.* issued out of the Court of Common Pleas to the defendant (the sheriff of Staffordshire) against the goods of Joseph Outram, indorsed for 163*l.* 18*s.* 4*d.* (the sum recovered against him in an action in the said Court), and that the defendant accordingly took divers goods of the said Joseph Outram of far greater value than sufficient to satisfy the writ; yet that the defendant, although the said execution was brought for the recovery of a debt, &c., exceeding 50*l.*, unlawfully, wrongfully, injuriously and negligently sold by auction the said goods without publicly advertising the sale thereof on or during the three days next preceding the day of sale,¹ and wrongfully, &c. sold the said goods for a small, inadequate and insufficient price, and for much less than the reasonable price and value, and without taking due and reasonable care in and about the advertising and giving notice, and without giving due and sufficient notice thereof, and negligently and improperly conducted himself in and about the conduct and management of the sale, and wrongfully, &c., converted to his own use a great part of the said goods and of the proceeds of the sale; and by reason of the premises the sale of the goods realized a much less sum than it would otherwise have done, and the plaintiff, as Outram's assignee, was deprived of and lost a great part of the bankrupt's estate and effects.

The second, third and fourth counts were similar to the first, and related to other writs issued in other actions against the bankrupt. The fifth count alleged a delivery of all these writs to the sheriff, seizure by him thereunder, and negligence in the execution thereof. There were also counts in trover, and money counts.

Pleas—not guilty; leave and licence; a denial of Outram's property in the goods; and to the money counts, never indebted. Issue on all the pleas.

The action was tried before Montague Smith, J., at the Gloucester Spring Assizes, 1866, when the following facts appeared in evidence.

A *fi. fa.* was levied against Outram's goods on the 20th of July, under three of the writs mentioned in the declaration, and the sheriff's officer fixed the sale for the 26th. In consequence, however, of Outram having requested the officer not to issue any advertisements of the sale till an attempt had been made to raise money, no advertisement was published before the 25th of July. On the morning of the 26th the officer proceeded to lot the goods for sale, but again postponed the sale for some hours on the application of Outram's attorney. Later in the day the attorney told the officer that no money was forthcoming, and that he could go on with the sale. In the mean time, the other writ in the declaration had been delivered to the officer, and upon his telling the attorney that he could not sell under that writ without Outram's authority, the attorney authorized him to sell under all four writs at once. The

(1) The 74th section of the Bankruptcy Act, 1861, is as follows: "Wherever the goods and chattels of a debtor are sold under an execution upon any judgment recovered in any action or suit brought for the recovery of a debt, money demand, or damages against any debtor exceeding 50*l.*, such goods and chattels shall in all cases, unless the Court shall otherwise direct, be sold by the sheriff by public auction, and not by bill of sale or private contract, and such sale shall be publicly advertised by the sheriff on and during three days next preceding the day of sale."

goods were thereupon all sold together, and fetched 430*l.*, which was shewn to be very much less than their real value.

The sale also was proved to have been hurried, and otherwise negligently conducted.

Outram was adjudicated a bankrupt on his own petition on the 1st of August, and the plaintiff was appointed assignee.

The jury found that the advertisement of the sale had been postponed by Outram's interference, but that the defendant had not taken due care about the sale. They gave the plaintiff 150*l.* on the counts for negligence, and 15*l.* on the money counts.

J. O. Griffiths (pursuant to leave reserved) obtained a rule for a nonsuit, or to reduce the damages, on the ground that the defendant was not liable, because the bankrupt had by his own acts disentitled himself from suing the sheriff; or that if he could do so, it would only be in respect of the sheriff's overcharges for fees.

Huddleston and *H. James* shewed cause.—An execution debtor occupies a very different position with regard to the sheriff from that occupied by an execution creditor. The creditor may say, "I will have an officer of my own;" but the debtor cannot appoint a special bailiff, and has no right to interfere at all. Besides, the interference that took place in this case extended only to the delay in advertising; and, if it amounted to any contract at all to relieve the sheriff from liability, it certainly did not extend to the subsequent negligence of the officer in carrying out the sale; and it is in respect of that particular negligence that the jury have given the plaintiff 150*l.* Until the execution was satisfied, the sheriff remained liable; he could not divest himself of his official and ministerial character; even the appointment of a special bailiff would not relieve him from the subsequent liability—*Taylor v. Richardson* (8 Term Rep. 505). Even where the officer is authorized by the debtor to sell more goods than are necessary to satisfy the writ, the sheriff must be identified with his officer to the extent of the sum to be levied—*Cook v. Palmer* (6 B. & C. 739), per Bayley, J. Here the officer, after granting an indulgence to the debtor, which is by no means unusual, went on with the sale under the writ, and the sheriff is therefore responsible for the whole. Again, the assignee is not in this case estopped by the bankrupt's acts—*Bankruptcy Act, 1861, ss. 73, 74.*

Mellish and *J. O. Griffiths*, in support of the rule.—The questions are, first, could the bankrupt himself have maintained this action? and, secondly, can his assignee do so? First, then, the bankrupt here made the bailiff his own agent. When an execution creditor appoints a special bailiff who sells negligently, no doubt the sheriff is still answerable to the debtor, though not to the creditor; and so the converse may be equally true; that is, the execution debtor may have interfered so that *he* cannot sue the sheriff, though at the same time the sheriff is not thereby released *quoad* the creditors. Here the two heads of negligence are so mixed up that they must both be regarded as the consequence of the debtor's original interference; they cannot be separated merely because of the peculiar finding of the jury. Far less interference on the part of the creditor would have discharged the sheriff—*Ford v. Leche* (6 Ad. & E. 699; s. c. 6 Law J. Rep. (N.S.) K.B. 150).

[MARTIN, B.—"Leave and licence" does not extend beyond that for which it was given. The sheriff's authority to sell was still under the writ. The title of the buyer was under the writ.]

So it would be in the case of a special bailiff. The execution debtor can put himself in the same position in several respects as the execution creditor; for instance, they can both rule the sheriff to return the writ; and as the direction of the creditor's attorney would have been sufficient to constitute the officer the agent of the creditor, and would have disentitled the creditor from ruling the sheriff—*Porter v. Viner* (1 Chit. Rep. 613. See also 1 Chitty's Archbold, (10th edit.) pp. 16, 587, and cases there cited), so by analogy the

same reason is equally applicable to the debtor's interference here, and ought therefore to disentitle him from suing the sheriff. And secondly, the bankrupt himself being disentitled, the 73rd and 74th sections of the Bankruptcy Act cannot have the effect of placing his assignee in a better position than himself in respect of suing the sheriff.

MARTIN, B.—I am of opinion that this rule should be discharged. There was no contract, nor anything like a contract, that the sheriff's officer should be Outram's agent. Outram's interference may have relieved the sheriff from any liability in respect of postponing the advertisement; but with regard to the not taking due care about the sale, there is no evidence to shew that the sheriff was relieved from performing his ordinary duty of making the most he could of the goods.

BRAMWELL, B.—I think, on examining the case, that the defendant fails upon the facts. I think that we cannot come to the conclusion that there was an agreement between Outram and the sheriff's officer superseding the authority of the writ. I think there was merely a sort of modification of the authority, such as a man may, and very frequently does, give, that is to say, Outram may have said, "I will not charge you with the consequences, if you postpone the sale for me." But the sale was after all under the writ, and with the same powers which the sheriff's officer had before the interference of the debtor.

CHANNELL, B.—I am also of opinion that this rule must be discharged. I agree that there is no evidence of a contract to discharge the sheriff. There may have been a modification of the officer's authority, which would relieve the sheriff as to acts or omissions under certain circumstances to which this modification clearly applied, but no further, and the sheriff is still liable for his negligence in conducting the sale.

Rule discharged.

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Exchequer.)

May 14; June 18, 1866.

REDPATH v. WIGG AND O'BEIRNE.

35 L. J. Ex. 211; 4 H. & C. 432; L. R. 1 Ex. 335; 14 L. T. 764; 14 W. R. 866;
12 Jur. N.S. 903.

Followed, *Easterbrook v. Barker*, [1871] E. R. A.; 40 L. J. C.P. 17; L. R. 6 C.P. 1; 23 L. T. 535; 19 W.R. 208 (C.P.).

Debtor and Creditor—Deed of Inspectorship—Liability of Inspectors—Bankruptcy Act, 1861 (23 & 24 Vict. c. 134.) s. 192.

BANKRUPTCY.—*M*, trading as *C. J. M. & Co.*, ordered goods of the plaintiff, and before their delivery executed a deed of inspectorship. The inspectors under the deed afterwards requested the plaintiff by letter to send in the goods, signing their names "for *C. J. M. & Co.*" Under the deed *M*. had power to carry on the business for six months, under the control of the defendants, who were to receive moneys, pay current expenses, including salaries, &c., but were not to share in the profits, and had no power to take the management of the business out of *M*'s hands:—Held, that the deed did not make the inspectors *M*'s principals in the business, or liable as such for the debts incurred by *M. & Co.*, and that there was no evidence of their liability to go to the jury.

Error upon a bill of exceptions to the ruling of Martin, B.

The action was brought for goods sold and delivered, by the plaintiff (who carried on business as an iron-founder, under the firm of Redpath & Leigh) against the inspectors of the estate of Charles James Mare, who carried on the business of a ship-builder, under the firm of C. J. Mare & Co.

At the trial, in London, at the Sittings after Hilary Term, 1866, it appeared that Mare executed a deed of inspectorship dated the 3rd of January, 1865, which was intended to operate under the Bankruptcy Act, 1861.

The goods in question were ordered on the 9th of December, 1864, by an order signed by a clerk "for C. J. Mare & Co.," which order was accepted by the plaintiff before the execution of the deed of inspectorship. The stoppage of payment took place before the goods were ready for delivery.

On the 1st of February, 1865, the plaintiff wrote to C. J. Mare & Co., stating that the goods were ready, and awaiting further instructions as to delivery. On the 3rd of February, 1865, an order for delivery, as follows, was sent to the plaintiff, signed by the defendants :

" Messrs. Redpath & Leigh,

" Please send three of Redpath's patent iron pumps, &c. (describing the goods previously ordered).

(Signed) " George Wigg,
" James L. O'Beirne.
" for C. J. Mare & Co."

Upon this order being given, the goods were on the 13th of February sent in to Mare's place of business, together with an invoice made out in the name of his inspectors. Whether this invoice came to their knowledge did not appear, but it was soon afterwards returned with a request, signed by a clerk "for C. J. Mare & Co.," that the firm should be made the debtors instead of the inspectors. The required alteration was accordingly made by one of the plaintiff's clerks, and the invoice returned,—but, as the plaintiff stated, without his knowledge.

The deed was made between Mare of the one part, Wigg and Green (for the latter of whom the defendant O'Beirne was afterwards substituted under a power), as inspectors, of the second part, and Mare's creditors of the third part. It provided for Mare being allowed to carry on his business under the inspection and subject to the direction and control of the inspectors for six months from the 1st of January, 1865, or for such longer period as they should think proper.

Mare covenanted to state an account for the assistance of the inspectors, to act under their direction, control and advice, not to dispose of the property without their consent, or to give any preference to any of his creditors; to keep proper books, and allow the inspectors to inspect them; not to enter into any new trade, or doubtful or uncertain contracts, or to become surety for any one, or do anything to obstruct the inspection or liquidation contemplated by the deed.

Then followed authority to the inspectors to sue for and get in any claims in Mare's name; and it was further provided that the inspectors might employ, or authorize him to employ, all necessary clerks, servants and workmen to assist in carrying on the business, and to pay to them, or to Mare himself, such reasonable salaries, wages or remuneration as they should think fit. Then followed a provision for the application of the moneys coming under the inspector's control: first, to the payment of the expenses of the inspection deed; secondly, to the expenses of carrying out the powers and provisions of the deed; and thirdly, and not until after those expenses (which would include such debts as the plaintiff's) were discharged, the payment rateably of all debts due from Mare to the creditors. Then followed an express provision that the expenses in respect of the business should, in the first instance, be paid out of moneys produced by carrying on the business, and subject thereto, out of any other moneys coming under the

control of the inspectors from time to time; with a provision that, as often as they had in their hands money amounting to 50*l.* under the inspection, it should be paid into the bank to the credit of the inspectors, and should be distributed as they should direct; and that they should pay dividends whenever they possessed a competent sum, after allowing for current expenses. There was the usual power retained in respect of creditors who should not have signed, or the amounts of whose debts had not been previously ascertained, and a power to sue, and to litigate and arrange any claim by or against the inspectors. There was also a power to pay out of moneys in hand the expenses of carrying out any contract already entered into by the debtor in the way of his business, or which he might, with the sanction of the inspectors, enter into during the inspectorship, and to determine such contract if they should think it not for the benefit of the estate. In case of a violation of these terms by the debtor, the inspectors were to be at liberty to declare the deed to be void. If at the end of the six months the creditors were not paid there was a power to determine whether the debtor should be called on to submit to a winding-up, and to execute an assignment, or whether he should be allowed further time by letter of licence. The statutory majority were to be consulted in the case of any such extension of the time, and the statutory majority had also power to discharge him by agreeing to accept any composition which they might think proper to accept upon their debts. There was power to appoint a new inspector in case of inability or refusal to act (under which power O'Beirne was appointed inspector instead of Green). Then followed the usual provision with regard to the receipt of the inspectors being a discharge. They were not to be answerable for each other's default or for loss to the estate, and they were to be reimbursed all costs and expenses actually incurred in the course of the inspectorship; and there was a declaration that the deed was intended to operate as a deed of inspectorship under the Bankruptcy Act, 1861.

It was contended for the defendants at the trial, that there was no evidence of their liability to go to the jury; but Martin, B. ruled that there was; and a verdict having been found for the plaintiff, a bill of exceptions was tendered.

J. C. Mathew, for the defendant O'Beirne, now argued that, if the defendants were liable, they could only be liable as the real principals in the transaction, Mare being their agent; and that the circumstances under which the order was given shewed no such state of things.

[WILLES, J. referred to *Hart v. Alexander* (2 Mee. & W. 484; s. c. 6 Law J. Rep. (N.S.) Exch. 129) and cases where a new partner has entered a firm after a contract has been made.]

The question in every such case is, for whom the business is carried on; and on the facts here, there can be no doubt that the liability is that of Mare & Co., and not of the defendants.—He cited *Cox v. Hickman* (8 H.L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 125) and *Bullen v. Sharp* (35 L. J. C.P. 105).

Garth, for the defendant Wigg, was not heard.

Joseph Brown (*Barnard* with him), for the plaintiff, contended that the letter of the 3rd of February was really a fresh order, in giving which the defendants acted as principals; they became responsible by signing it as they did. Why should they have so signed it, or have given a fresh order at all, except to quiet the plaintiff's apprehensions as to payment? They thus induced the plaintiff to supply the goods, for the invoice shews that he gave *them* credit. If there were any doubt arising from their using this form of order, it should operate against them in favour of the persons who were thereby induced to deal with them.

Mathew, in reply.—The only evidence against the defendants is the order, and in that they say clearly that they are not principals, but that they are acting for *C. J. Mare & Co.*

Cur. adv. vult.

The judgment of the Court¹ was delivered on the 18th of June by—

WILLES, J.—After stating the facts as given above, his Lordship said: The invoice, having been altered without the plaintiff's knowledge, may be considered out of the case, and the question for our decision is, whether the order of the 3rd of February, and the supply of the goods thereunder, furnish any evidence of liability on the part of the defendants.

Upon this it is first to be observed that there was no suggestion of fraud. The deed when put in appeared to be an ordinary transaction, the *bona fides* of which was not impeached; nor was the action founded upon any misrepresentation as to the authority from Mare to give the order in the name of "C. J. Mare & Co." The order upon the face of it purported to be given by the defendants for a named principal, on whose behalf (and not for themselves) they professed to act. Had the order been signed, like the original one, by a clerk of C. J. Mare & Co., no liability could have been imposed upon such clerk, except by shewing want of authority from the alleged principal. And the burthen of proving want of authority would have rested with the plaintiff. No such evidence was offered or suggested to exist in this case. The plaintiff therefore cannot rely upon any ostensible liability of the defendants, but must shew that the capacity which they actually filled was that of Mare's real principals, so as to be in substance themselves C. J. Mare & Co. for the time.

This question whether the inspectors are to be considered as principal traders, and the debtor as only a servant or agent of theirs, is one of great and general importance (and so far as we are aware quite novel), the decision of which in the affirmative would seriously interfere with arrangements under inspectorship, inasmuch as it must needs deter responsible persons from undertaking the office of inspector. It would of course be possible to suppose a case in which the debtor becomes by arrangement a mere servant, acting only for the benefit of others, or in which the business is intended to be carried on at the expense of new creditors, who might be deceived into giving credit to the debtor, but really for the advantage of the old ones. Such a case, should it arise, would admit of an easy solution as one of fraud.

On the other hand, there may be a good business, with a temporary embarrassment, where the intention is to keep together the debtor's business in his name (which may be an important element of its success), and for his permanent benefit as well as for the temporary benefit of his creditors; and where with that view a letter of licence is granted, enabling him to carry on the business, and to retain it for himself after he has paid his creditors, who stipulate however that, until the debts are discharged, the business shall be carried on under the inspection and control of persons appointed by them, who shall receive the proceeds, pay the current expenses of the business, and distribute the surplus. In such a case, the object seems to be to maintain the debtor in the position he previously occupied, as the person principally interested in the business; and it seems no more reasonable to hold the inspectors liable, as being his masters, than it would be to say that a confidential clerk, to whose opinion his employer absolutely defers, or to whom he intrusts the entire control of the business, is as to third persons the principal.

The difference between such a case and the present is, that there the principal might resume the control at any time, whereas in the case before us Mare could only do so upon payment of the debts, or a composition agreed to by the majority of creditors, or by breaking his contract to submit to inspection; which he might do if he thought proper, at the risk of damages and loss of the benefit of his deed. But the cases put by way of illustration clearly shew that the mere fact of inspecting and controlling another person's business

(1) Willes, J., Byles, J., Blackburn, J., Keating, J., Montague Smith, J. and Lush, J.

does not involve responsibility for debts contracted therein by him or in his name; and as for the contract, it cannot, in favour of third parties, create such responsibility, unless it makes the inspectors the real principals.

In order to ascertain the precise position which the defendants occupied, it will be necessary to refer to the terms of the deed.—[His Lordship then stated the effect of the deed, as given above.]—This being the scope of the deed, it appears that the intention of the parties was, instead of pressing Mare for immediate payment or liquidation, to allow him to continue the business in such a manner if possible that, after paying his creditors, he should have the option of continuing the business for himself; that the business was to remain his, subject to his clearing off his debts; that the inspectors were to inspect, direct and control him, to receive the proceeds of the business, and, after paying current expenses (including such debts as the plaintiff's), and not before, to divide the surplus amongst his other creditors. They were not to have any share of the profits, and were only to receive their actual costs and expenses. The deed contains no power to the inspectors to take the management of the business to the exclusion of Mare, so that they could not dismiss him, as a master or principal might dismiss his servant or agent.

Under these circumstances, we think it cannot be maintained that the inspectors became Mare's masters or principals in the business, or liable as such for debts incurred by Mare & Co. Nor can the plaintiff justly complain of this result. The form of the order gave him notice that Mare & Co. were his customers, and to that firm and to the trust for payment of current expenses, he must be content to look.

The direction of the learned Judge that, under the above circumstances, there was evidence of liability on the part of the defendants was therefore erroneous, and a trial *de novo* must be awarded.

Venire de novo.

[IN THE COURT OF EXCHEQUER.]

June 5, 26, 1866.

THE ATTORNEY GENERAL FOR THE PRINCE OF WALES *v.*
CROSSMAN.

35 L. J. Ex. 215; L. R. 1 Ex. 381; 4 H. & C. 568; 14 L. T. 856; 14 W. R. 996;
12 Jur. N.S. 712.

Practice—Venue—Privilege of the Attorney General for the Duchy of Cornwall.

CROWN. PRACTICE.—An information being laid in Middlesex, by the Attorney General for the Duchy of Cornwall, for the recovery of dues claimed in respect of goods imported into a port alleged to be parcel of the Duchy, the defendant applied to the Court to change the venue to Devonshire, upon the ordinary affidavit that the cause of action arose and the witnesses resided there:—Held, first, that although the Attorney General for the Crown may not have a right in all cases to lay and retain the venue where he pleases, he has such right in the case of such an information, it being a suit in the nature of a transitory action; secondly, that in the case of such an information relating to matters affecting the Duchy of Cornwall, the Attorney General for the Prince of Wales would have the same right as the Attorney General for the Crown; but, thirdly, that as documents relating to the Duchy of Cornwall would have to be produced from their place of deposit in Middlesex, there was no such preponderance upon the balance of convenience in favour of a trial in Devonshire as to call on the Court to interfere, or to render it necessary to decide the question of prerogative.

Information, laid in Middlesex, by the Attorney General for H.R.H. Albert Edward, Prince of Wales and Duke of Cornwall, against Thomas Crossman, for certain customs and dues in respect of goods imported into the port of Torquay, within the water of Dartmouth, parcel of the ancient possessions of the Duchy of Cornwall, in the county of Devon, and for breaking bulk from ships coming from foreign parts at Torquay.

Application was made to Channell, B., at chambers, for an order to change the venue to Devonshire, upon the ordinary affidavit that the cause of action arose in Devon, and that the defendant and all the witnesses as to facts resided at Torquay. The question to be tried was, whether or not the Prince of Wales was entitled to recover these dues in respect of Torquay being within the charter by which the Duchy of Cornwall was granted. The matter having been referred to the Court,

F. M. White obtained a rule *nisi*, against which

Karslake and *Garth* shewed cause in the first instance.—This is not an action; and it is a question whether the practice for the Court respecting a change of venue in ordinary actions applies to the case of an information filed by the Attorney General for the Prince of Wales. The Attorney General for the Prince of Wales stands for some purposes in the same position as the Attorney General for the Crown—*The Attorney General for the Prince of Wales v. St. Aubyn* (Wightwick, 167). The Attorney General for the Crown may lay and retain the venue anywhere—*The Attorney General v. Smith* (2 Price, 113).

[BRAMWELL, B.—But is there any authority for saying that the Court will not change the venue if they think it convenient?]

Inquiries have been made at the Crown Office, and no precedent has been found of the venue being changed.

[POLLOCK, C.B.—Does the Duchy of Cornwall go to the Prince's eldest son?]

No.

[POLLOCK, C.B.—Then the Crown is interested as immediate successor.]

That is so. If there is no Prince of Wales a suit may be revived by the Crown—*The Attorney General v. the Mayor and Corporation of Plymouth* (Wightwick, 134). As a mere matter of convenience the venue should remain unchanged. The Crown might claim a trial at bar in this Court. It would be most inconvenient if the Attorney General for the Prince of Wales had to consult the Attorney General for the Crown before proceeding with the suit, or before opposing an application to change the venue. The practice of changing the venue is based upon the equity of the statute of 6 Rich. 2. c. 2.—*The Attorney General v. Churchill* (8 Mee. & W. 171, 193; s. c. 10 Law J. Rep. (n.s.) Exch. 314), 1 *Tidd's Practice*, 9th edit. 601; but the Crown is not named in it, and is not bound by that statute which moreover applies to actions only, and not to informations. Besides, as documents must be produced from the Duchy Office in London, there is good reason why the venue should be retained in Middlesex.—They also referred to *Rowe v. Brenton* (Concanen; s. c. 3 Man. & Ry. 133), and *The Crown Suits Act*, 1865, 28 & 29 Vict. c. 104.

F. M. White, in support of the rule, commented on the authorities cited, and referred in addition to *Bisse v. Harcourt* (Carth. 126), *Pye v. Leigh* (2 W. Black. 1065), *The Earl of Shaftesbury v. Craddock* (Ventr. 363), and *Count de Standford v. Nedham* (1 Lev. 56).

BRAMWELL, B.—I wish to say one word as to my own opinion. It seems to me that the counsel for the Attorney General for the Prince of Wales have made out that his rights are to be treated on the same footing as those of the Attorney General for the Crown; but I doubt very much, when we come to see what the nature of the application is and the answer to it, whether any question of prerogative arises. The application seems to be made and resisted on the ground of convenience. The defendant says that it would be more

convenient to try at Exeter; and the Crown, although they assert their right irrespective of convenience, also say that it would be more convenient to try in London. As far as I can judge, the balance of convenience is not such as that, if this were a case between subject and subject, we should interfere with the right of the plaintiff to lay his venue where he likes; and I do not think we ought to do so here. But, for my own part, I should be very sorry to lay down, without much consideration, that in any case, at the pleasure of those who advise the Crown, they may lay and retain the venue in an inconvenient county. I am not at all prepared to assent to any such proposition. I do not at all dissent from anything that may be said by my Brother Channell.

CHANNELL, B.—The Court is very anxious to deliver judgment in this case at these Sittings, in order that the party who wishes to go to trial may have an opportunity of doing so either in Devonshire or in Middlesex; and a judgment has been prepared, which I am to read as the judgment of my Lord Chief Baron, my Brother Martin and myself. There has not been time to submit it to my Brother Bramwell to enable him to give all the considerations and reasons he would wish to give; but he has stated that he does not differ from us in the result; and from what he has said to-day it would seem that there is not any difference between the reasons on which he relies and those which will be found in our judgment.

This was an information, filed by the Attorney General for his Royal Highness the Prince of Wales, Duke of Cornwall, to recover certain port-dues, alleged to be due from the defendant to the Duchy, claimed by the Duchy in respect of goods brought into and loaded at Torquay, which is alleged by the Attorney General for the Prince to a member of the port of Dartmouth, referred to in Hale's *De Portibus Maris*, p. 48. The venue in this information is laid in Middlesex. Application was made by the defendant to a Judge at chambers to change the venue to the county of Devon. This application was supported by an affidavit, which, if made in an ordinary action between subject and subject, and not answered, would have been sufficient to entitle the defendant to have the venue changed, on the ground that the cause of action arose within the county of Devon. It would still, however, have been open to the Judge in such an action to have retained the venue in or restored it to Middlesex, notwithstanding the cause of action arose in the county of Devon, upon being satisfied upon affidavit that, on the score of saving expenses, or some manifest convenience, it was proper that the trial should take place in Middlesex.

In the present case, the Judge at chambers, on certain objections being made on behalf of the Attorney General for the Prince of Wales, referred the application to the Court. Accordingly, in last term, Mr. Meadows White, on the part of the defendant, obtained a rule to change the venue to Devon, against which cause was shewn, in the first instance, by Mr. Karslake and Mr. Garth, on behalf of the Attorney General for the Prince of Wales. It was contended, on the part of the Attorney General, that the Court had no power to change the venue in this case; that the Attorney General for the Prince of Wales, Duke of Cornwall, is, in cases affecting the rights of the Duchy, in the same position as the Attorney General for the Crown, and that they both have the right, not only to lay the venue where they please, but to keep it there. It was further contended, that the application of a defendant by motion to change the venue arose upon the equity of the statutes of Richard the Second and Henry the Fifth, and that these statutes did not bind the Crown, the Crown not being named therein—see the judgment of the Court delivered by Mr. Baron Parke in the case of *The Attorney General v. Lord Churchill* (Concanen; s. c. 3 Man. & Ry. 133), where the origin of changing the venue in actions is explained; see also *Tidd's Practice*, 9th edit. vol. 1, p. 601 and following pages. It was further contended that the statutes applied to actions only, and not to informations.

We are agreed that it is for the officers of the Crown to make out clearly the prerogative in any case where they claim to be on a different footing from the subject as regards procedure in any litigation. This was in effect laid down in the case before referred to, namely, *The Attorney General v. Lord Churchill* (Concanen; s. c. 3 Man. & Ry. 133).

We think, although the Attorney General for the Crown may not have a right in all cases not only to lay, but also to retain the venue where he pleases, that in an information such as the present, which is a suit in the nature of a transitory action, he would have the right. It would not necessarily follow that the Attorney General for the Prince of Wales would have the same right. The authorities cited to us to shew that he would were *The Attorney General v. the Mayor and Corporation of Plymouth* (Wightwick, 134), *The Attorney General for the Prince of Wales v. St. Aubyn* (Wightwick, 167), *Rules on the Revenue Side of the Exchequer*, June, 1860, Rule 190, November, 1861, and November, 1863, *The Crown Suits Act*, 1865, 28 & 29 Vict. c. 104; and *Roure v. Brenton* (8 Concanen; 3 Man. & Ry. 133) was also referred to. We think, in this case, that the Attorney General for the Prince of Wales must be taken to be in the same situation as the Attorney General for the Crown. But it does not appear to us absolutely necessary to decide whether in the case of an information such as the present, if filed by the Crown, the Crown would have a right to lay and keep the venue where it pleased; nor whether, if as against the Crown, the venue could not be changed on motion, the Crown not being bound by the statutes and practice referred to, the same rule would apply to the Attorney General for the Prince. For the case was argued before us on the ground of convenience as well as on the points we have noticed. The facts on which the argument as to convenience or inconvenience proceeded were not stated on affidavit; at least no affidavit has been filed, but were referred to by counsel on each side with the sanction of the other. For the defendant were urged upon us the inconvenience and expense of bringing up witnesses from Torquay to London to attend the trial. On the other hand, it is clear, from the facts stated to us by the counsel for the Attorney General for the Prince of Wales, and not disputed by the defendant's counsel, that the question to be tried must depend to a considerable degree upon the documents and records which would be produced by the officers of the Duchy, no doubt more conveniently in Middlesex; nor was it disputed by the defendant's counsel that the Attorney General for the Prince of Wales might allege such an interest in the Crown as to entitle him to appear and claim a trial at bar. The inconvenience of bringing a Devonshire jury to Middlesex for a trial at bar at Westminster would be great, and would go a long way to counterbalance the inconvenience of many of the witnesses residing at Torquay. We think, then, that the Court ought not to interfere to change the venue, and that the rule should be discharged, and discharged without costs.

Rule discharged.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Exchequer.)

June 19, 1866.

REUSS AND ANOTHER v. PICKSLEY AND ANOTHER.

35 L. J. Ex. 218; L. R. 1 Ex. 342; 4 H. & C. 588; 15 L. T. 25; 14 W. R. 924;
12 Jur. N.S. 628.

See, *Buxton v. Rust*, [1872] E. R. A.; 41 L. J. Ex. 173; L. R. 7 Ex. 279; 27 L. T. 210; 20 W. R. 1014 (Ex. Ch.). Applied, *Dartford Guardians v. Trickett*, 1889, 59 L. T. 754 (Q.B. D.). Not applied, *New Eberhardt Co.*, [1890] E. R. A.; 59 L. J. Ch. 73; 62 L. T. 301; 38 W. R. 97 (C. A.). Referred to, *Filby v. Hounsell*, [1896] E. R. A.; 65 L. J. Ch. 852; [1896] 2 Ch. 737; 75 L. T. 270; 45 W. R. 232 (Ch. D.).

Statute of Frauds (29 Car. 2. c. 3), s. 4.—*Agreement not to be performed within a Year—Written Proposal signed by Party to be charged, and Parol Assent by the other Party.*

CONTRACT.—*The 4th section of the Statute of Frauds,—which enacts that no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing signed by the party to be charged therewith or his agent,—is satisfied by a written proposal containing the terms of the agreement, signed by the party to be charged, proof being given of a subsequent assent to these terms by the other party without writing.*

[*Smith v. Neale* (2 Com. B. Rep. N.S. 67; s. c. 26 Law J. Rep. (N.S.) C.P. 143) and *Warner v. Willington* (3 Drew. 523; s. c. 25 Law J. Rep. (N.S.) (Chanc. 662) affirmed.)]

This was an appeal, by the defendants, against a judgment of the Court of Exchequer discharging a rule obtained by the defendants to set aside the verdict entered for the plaintiffs at the trial and enter a nonsuit, or for a new trial.

The first count of the declaration stated that, on the 8th of September, 1864, it was agreed between the plaintiffs and the defendants, that the defendants should retain and employ the plaintiffs as the agents of the defendants, in Russia, for ten years from that date, in and about the sale for the defendants, in Russia, of machinery manufactured by the defendants in their trade or business of engineers and machine dealers at Leigh, near Manchester; that the defendants should allow to the plaintiffs full discounts for cash on all orders received by the plaintiffs direct, and should hand over to the plaintiffs, to be dealt with in the same way, all orders the defendants should receive from Russia, except those from Odessa; and that on all orders executed by the defendants from Russia, except Odessa, that might come through any other agents in Great Britain, the defendants should allow the plaintiffs a commission of 5l. per cent; and that the plaintiffs should confine themselves to the defendants for the sale of every description of machinery which the defendants manufactured, and the plaintiffs should sell in Russia; and further that the plaintiffs should take charge of certain machines of the defendants in Hull, intended for the Moscow Exhibition, and to be exhibited there by the defendants, and that the plaintiffs should pay for their account all freight, charges and assurance, in respect of the same, until as many of such machines as possible were delivered in Moscow, and that after the close of the exhibition in Moscow, the unsold remainder should be at the risk and

expense of the defendants, either to keep in Moscow, or return home, as the defendants might think fit, at the defendants' expense; and that the plaintiffs should pay the defendants in Manchester cash for all machines sold during the exhibition; the price to be calculated at &c. And all conditions were performed &c. Yet the defendants did not nor would allow to the plaintiffs full discounts for cash on the several orders received by the plaintiffs direct, nor hand over to the plaintiffs, to be dealt with in the same way, the several orders which the defendants received from Russia, except those from Odessa, nor on the several orders executed by the defendants from Russia, except Odessa, and which came through other agents in Great Britain allow the plaintiffs the commission of 5*l.* per cent. as agreed; and although the plaintiffs were ready and willing to continue such agency as aforesaid, upon the terms aforesaid, yet the defendants, during the continuance of the said agency, and whilst the said agency was still subsisting and undetermined, and before the expiration of the said term of ten years, contrary to the said agreement, wrongfully discharged and dismissed the plaintiffs from the said agency and employment, whereby the plaintiffs were deprived of gains and profits which they would have acquired by reason of the said agency, and lost the benefit of the outlay and expense which they were necessarily put to and incurred upon the faith of the continuance of the said agency, and were otherwise damnified.

The second count stated that it was agreed between the plaintiffs and the defendants, as in the first count mentioned, and the plaintiffs thereupon became the agents of the defendants, and served them in that capacity until the 9th of March, A.D. 1865; and although all things were done to entitle the plaintiffs to maintain the action, and although the plaintiffs were, and always had been ready and willing to continue the agency, yet the defendants, by their own voluntary act, on the said day, put an end to their business, by transferring it to a joint-stock company, and precluded themselves from carrying on the said business, and thereby put an end to the said agency, whereby, &c.

The defendants, by their pleas, denied the alleged agreement, and traversed the material allegations in the declaration.

Issue was joined on all the pleas.

At the trial, before Pigott, B., at Manchester, it was proved that, in the year 1864, the plaintiff Ernst Gustavus Reuss carried on business in Manchester in partnership with his father, who was the other plaintiff on the record, and who had died since the commencement of the action.

The defendants carried on business at Leigh, near Manchester, as agricultural instrument makers. In 1864 the defendants were desirous of sending some machines to the Industrial Exhibition at Moscow, and wished the plaintiffs to take charge of them. After some negotiation it was verbally agreed that the plaintiffs should have an agency for ten years for the sale of the defendants' machines in Russia, and a commission on all sales, and that the plaintiffs should bear part of the expenses of the exhibition. The plaintiff E. G. Reuss went to Moscow in July for the purpose, amongst other things, of making arrangements for the reception of the defendants' goods; and during the month that he remained there a quantity of goods were sent by the defendants to the plaintiffs for transmission to the exhibition. On his return he had an interview with Mr. Sims, one of the defendants, and afterwards wrote him the following letter:

“ Manchester, 8th September, 1864.

“ Messrs. Picksley, Sims & Co., Leigh.

“ Referring to our conversation with Mr. Sims respecting the machinery for the Moscow Exhibition, it was arranged that we take charge of all the machines, &c., in Hull, and pay for our account all freight, charges, insurances, &c., till delivered in Moscow. That we sell in Moscow as many of the machines as possible, and that after the close of the exhibition the unsold remainder be at your risk and expense, either to keep in Moscow or to return home, as you think fit, at your expense; that we pay you here cash for all machines sold

during the exhibition, the price to be calculated at list price, less the full trade discounts for cash; that you pay the travelling expenses there and back of Mr. Smith, but that we pay his additional salary whilst in Moscow of 10s. per day, and his hotel bill. That the agency for Russia be for ten years from date, on following conditions: You to allow us full discounts for cash on all orders received by us direct, and that you hand over to us, to be dealt with in the same way, all orders you receive from Russia (excepting those from Odessa). On all orders executed by you from Russia (excepting Odessa) that may come through any other agent in Great Britain, you allow us a commission of 5l. per cent.; that we act as and are hereby appointed your sole agents for the kingdom of Italy on the same conditions as for Russia. Awaiting your reply, we are, &c.,

“ Ernst Reuss & Co.”

This was replied to as follows:

“ Bedford Foundry, Leigh, Lancashire.

“ September 9, 1864.

“ Gentlemen,—Our Mr. Sims desires me to acknowledge the receipt of your favour, dated the 8th inst., and to say, as far as the agency for Russia goes, he considers it satisfactory, except that you must confine yourselves to us for every description of machinery we manufacture and which you sell in Russia. With respect to Italy Mr. Sims cannot at present say anything about it, in consequence of the change which is likely to take place in our firm shortly. I am, &c.,

“ p. p. Picksley, Sims & Co.

“ Josh. Smith.

“ Messrs. Ernst Reuss & Co.”

No reply was sent to this by the plaintiffs; but goods were afterwards sent by the defendants to the plaintiffs, and forwarded by them to Moscow, and exhibited there in September, 1864, and some were sold. Considerable expenses were incurred by the plaintiffs, exceeding the amount of their commission on the sales.

After the close of the exhibition the plaintiffs received from the defendants a printed circular, dated the 8th of December, 1864, stating that their works and warehouses would, on the 2nd of January, 1865, be transferred to a joint-stock company, which would carry on the business under the style of Picksley, Sims & Co. (Limited), and that the accounts of the late firm would be made up. The plaintiffs' agent at Moscow died at the commencement of the year 1865. An attempt was made by the plaintiffs and the defendants to come to a settlement, but without success, the defendants wishing the plaintiffs to buy the machines at Moscow—the plaintiffs demanding to be refunded the amount of their outlay, and making a claim for damages for breach of contract. No orders for machinery were received by either the plaintiffs or the defendants for Russia (except Odessa) up to the time of the alleged breach.

At the trial, Pigott, B., directed the jury that the letters of the 8th and 9th of September contained one entire contract as to the Moscow and Russia agencies, and not two separate contracts relating the one to the Moscow the other to the Russia agency. The jury found that the plaintiffs assented to the terms of the agreement contained in the letters, and a verdict was entered for the plaintiffs for 850l.; the defendants having leave to move to set aside the verdict and enter a nonsuit, on the ground that there was no sufficient memorandum in writing signed by the defendants to satisfy the 4th section of the Statute of Frauds, the agreement being one which was not to be performed within one year from the time when it was made.

The defendants moved accordingly, and obtained a rule *nisi*, to enter a nonsuit or for a new trial on the ground that the learned Judge misdirected the jury in ruling that the Moscow and Russia stipulations were one contract,

and also on the ground that the damages were excessive. The Court of Exchequer, after argument, discharged the rule, the plaintiffs consenting to reduce the damages to 650*l.*, and the defendants having leave to appeal.

Brett (*Hayman* with him), for the defendants, in support of the appeal.—There were here, in fact, two contracts. As to the contract for the Russian agency, there was no assent by word or deed. There was a proposal and a counter-proposal in writing, but nothing more. Even if there was a parol assent, that is insufficient to satisfy section 4. of the Statute of Frauds.

[*WILLES, J.*, referred to *Smith v. Neale* (2 Com. B. Rep. N.S. 67; s. c. 26 Law J. Rep. (N.S.) C.P. 143).]

As to the Moscow contract, the only assent shewn was by the defendants acting on it and sending goods to Hull for shipment to Moscow. This is insufficient to satisfy the statute, for an acceptance must be unambiguous—*Warner v. Willington* (3 Drew. 523; s. c. 25 Law J. Rep. (N.S.) Chanc. 662). The statute requires that there should be an agreement, or memorandum of agreement, in writing, signed by the party to be charged. A signed proposal is neither one nor the other.

[*BYLES, J.*—It could not be stamped as an agreement.]

There is no express decision in point, but the principles to be applied are to be obtained from the cases cited, and *Laythorpe v. Bryant* (2 Bing. N.C. 735; s. c. 5 Law J. Rep. (N.S.) C.P. 217), *Coleman v. Upcot* (5 Vin. Abr. 527), *The Liverpool Borough Bank v. Eccles* (4 Hurl. & N. 139; s. c. 28 Law J. Rep. (N.S.) Exch. 122), *Mozley v. Tinkler* (1 Cr. M. & R. 692; s. c. *nom.* *Morley v. Tinkler*, 4 Law J. Rep. (N.S.) Exch. 84), *Martin v. Mitchell* (2 Jac. & W. 426) and *Williams v. Lake* (29 Law J. Rep. (N.S.) Q.B. 1).

Manisty (*Holker* and *Baylis* with him), for the plaintiffs, supported the judgment of the Court below.—The letters constitute one contract only. The authorities are uniform that a written proposal may be assented to by parol, so as to render the proposal a memorandum in writing sufficient to satisfy the statute.

Brett replied.

WILLES, J. delivered the judgment of the Court.¹—We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed. The action is brought upon a contract, and it is alleged that the defendants employed the plaintiffs as agents in Russia for the sale of their agricultural machinery, the services to be rendered by the plaintiffs as the defendants' agents to be paid for by a commission, orders from Odessa alone being excepted from the agency. The first count, upon which the judgment, no doubt, proceeded, further states that the plaintiffs, as incidental to the agency in Russia, had agreed to render certain services to the defendants in the exhibition of their machines at a show to be held at Moscow. It appears that the plaintiffs, through one of their firm, had negotiations with the defendants, through one of their firm, with reference to so much of the agency in Russia as related to the show at Moscow and to the exhibition of the defendants' machines there; and in the course of those negotiations the plaintiffs refused to undergo the expense which they would have to incur with reference to the show at Moscow unless they were repaid in some manner. There was a communication between the plaintiffs and the defendants as to the manner in which that remuneration should take place, and it was suggested that it should be by the plaintiffs being employed not only as the defendants' agents with reference to the show at Moscow, but also for ten years as agents for the sale of their machines in Russia. That negotiation when first entered into did not come to a head. One of the plaintiffs, *Ernst Reuss*, through whom the business was transacted, appears to have gone abroad for some time, and upon his return to this country he sent word that he desired to see one of the defendants, *Mr. Sims*, on business of importance, being that respecting which the negotiation had previously taken place. Accordingly an interview

(1) *Willes, J., Byles, J., Blackburn, J., Mellor, J., Shee, J. and Montague Smith, J.*

was had between them, at which the terms of the agency were discussed, and the letters which afterwards passed between the parties leave no doubt that the discussion related to the show at Moscow, to an agency for the sale of the defendants' machines in Russia, except Odessa, and to an agency which the plaintiffs desired to have for the defendants in Italy. Immediately after that discussion the letter of the 8th of September was written by the plaintiffs to the defendants, and on the following day an answer was sent by the defendants to the plaintiffs. Now, the letter of the plaintiffs was to this effect: "We propose to state what passed between our Mr. Reuss and your Mr. Sims respecting the agency. As to the Moscow Exhibition, it was arranged so and so,"—and then were stated the terms upon which the goods were to be sent to the Moscow Exhibition, and at whose expense they were to be, and what was to be done with them, and with reference to the expenses of Mr. Smith, who was to accompany or look after them. The letter then proceeds to speak of the agency for Russia, in terms which do not appear to be applicable to the subject of a distinct and separate contract. Having dealt with the show which was to be at Moscow, and the exhibition there of articles of the sort to which the subsequent agency was to refer, (which exhibition would operate as an accessory to that agency, by way of advertisement,) it goes on in terms which seem to shew that the writer was speaking of a matter cognate to, and not at all distinct from, that which had been discussed, to say "that the agency for Russia be for ten years from date, on following conditions." Then it states that commission is to be paid upon transactions which come direct through the plaintiffs, and also upon transactions which come through other agents, upon which the plaintiffs, having the exclusive contract of agency, were still to have an allowance by way of commission. With respect to this part of the dealings, the plaintiffs do not state that they were to abstain during the period of the agency from taking orders from other manufacturers, and that appears to be the only part of their proposal with respect to Russia to which the defendants objected in the letter of the 9th. The plaintiffs' letter then goes on to state that the plaintiffs, being agents for Russia, were to be sole agents for Italy. That is the scope of the letter of the 8th. The answer comes upon the 9th: "Our Mr. Sims desires me to acknowledge the receipt of your favour, dated the 8th inst., and to say, as far as the agency for Russia goes, he considers it satisfactory." The letter of the 8th had dealt with the exhibition at Moscow, and also with the valuable agency in respect of the loss of which damages were given, namely, the agency for Russia, except Odessa, during a period of ten years. No reference is made to the exhibition at Moscow, as distinct from the agency for Russia. The proper conclusion is, that as to what was said about Moscow, the writer of the letter of the 9th of September considered it to require no observation; and as to the rest of the agency for Russia, that it was satisfactory, except that the plaintiffs must confine themselves to the defendants for every description of machinery made by them. This was the only objection made as to the agency for Russia.

With respect to Italy, the defendants say that arrangements have been made which put it out of the question. Therefore, the meaning of the letter of the 9th of September is this: "It is true that we came to an arrangement yesterday; but that arrangement with respect to Russia, excluding Odessa and including Moscow, is subject to a limitation which you have forgotten to express, namely, that you are not to trade with others for any description of machinery which we make; and as to Italy, other arrangements have been made."

Now, either that is a memorandum, signed by the defendants, of the arrangement that had taken place, or at the least it is a proposal that, to the extent mentioned in the letter of the 9th, the terms stated in the letter of the 8th should be the basis of subsequent dealings between the parties, that is, a proposal that the plaintiffs should, as alleged in their declaration, act as agents at the show at Moscow and for Russia for ten years, upon the terms agreed to, with the addition that during that time they should take no agency for any other firm than the defendants', an exception being made as to Odessa. These letters being, therefore, either an agreement in writing, or at least a proposal—assume

them, in favour of the appellants, to be the latter—what followed was this. The show at Moscow took place; the goods intended to be exhibited there were forwarded to the plaintiffs, and dealt with by them as they had undertaken to deal with them. Large expenses were incurred by them in respect of those goods, as to which they had given the defendants previous notice that they would not incur them unless they were reimbursed by some means; the means suggested being their employment as agents for Russia for ten years. These expenses were incurred by them as the defendants' agents for the exhibition at Moscow. Was this evidence upon which the jury could properly find an assent by the plaintiffs to the terms of the letter of the 9th? The defendants insist that it was not; but their argument consists of a dissection of the terms of the letter of the 8th of September. We see no reason to dis sever those terms. On the contrary, taking the two letters together, and finding that the letter of the 9th, which professes to deal with the entire letter of the 8th, leaves out altogether any mention of Moscow, there is reason for supposing that the agency for Russia was considered by the defendants, who wrote the letter, to dispose of the whole matter, so far as Russia was concerned, and therefore to include all that was to be done at Moscow. Looking, moreover, at the nature of the transaction, and seeing that the exhibition of the goods at Moscow was connected by way of advertisement with what was to be done afterwards by the plaintiffs as agents in Russia, there appear to be, both by the correspondence and the nature of the transaction, sufficient reasons for treating the whole as one transaction. Therefore, what was done by the plaintiffs was a performance of their part, made known to the defendants, which was evidence of an assent by the plaintiffs to the terms contained in the letter of the 9th of September, considered with reference to the terms of the letter of the 8th. Treating the letter of the 9th as a proposal by the defendants, there was evidence of an assent to it by the plaintiffs, and the jury have found that they did assent.

That being so in point of fact, how ought it to be dealt with in point of law? In point of law, if the Statute of Frauds were out of the question, no inquiry would be made as to the precise time at which the different parts of the transaction arose. The question would be whether it was one transaction, and whether it contained an assent expressed so as to be understood by the parties to be bound. I have said already that it is sufficiently shewn that there was such an assent, and that the terms of the agreement were those insisted upon by the plaintiffs in the declaration. But the Statute of Frauds introduces a new element into this discussion, because it makes it necessary, by the 4th section, that an agreement like this, which is not to be performed by either party within a year, should be in writing and signed by the party to be charged, and what was signed here was not a formal agreement between the parties, such as a conveyancer or an attorney would draw, but simply a proposal on the one side assented to on the other side. All difficulty with respect to the terms of the proposal is out of the case. It was contained in a letter directed to the plaintiffs and signed by the defendants, so as to give therefore the names of the contracting parties, and contained the terms of the contract with respect to business, locality and time by reference to the letter of the 8th, which reference, it is unnecessary to say, was equivalent to a recital of the letter of the 8th in the letter of the 9th.

The only question therefore is, whether it is sufficient to satisfy the 4th section of the Statute of Frauds, that the party charged should sign that which he proposes as an agreement, and that the other party should afterwards assent without writing to the proposal. I apprehend that, both upon reasoning and authority, a proposal so signed and assented to does become a memorandum or note of an agreement within the 4th section of the statute.

A variety of cases may be put, not depending upon the Statute of Frauds, for the purpose of illustration. Two will be sufficient. One of them was a case which arose under the Joint-Stock Companies' Act, 19 & 20 Vict. c. 47, which provided that no person should be deemed to have accepted any share in a company unless he had testified his acceptance by writing under his hand—(Schedule, Table B). It was thought, at first, necessary that there should be

something done in writing by a member after the allotment of shares to him by the company, and that it was not sufficient that the shares were allotted to him in consequence of his proposal to take them, although that proposal was in writing and signed by him. But when the matter came to be considered in the Court of Common Pleas, that Court said that it was a mistake to suppose that there was no acceptance in writing; and that the true mode of regarding transactions of that description was to consider whether, no matter how many distinct moments of time there might be in each transaction, all did not go to make one complete transaction; and they decided that the acceptance was complete, and the statute satisfied by the proposal in writing, followed by an allotment assented to by the allottee. Probably that will be a sufficient illustration. The Court considered and acted upon, with entire consent, a judgment delivered by my Brother Blackburn, in the Court of Queen's Bench, in a case in which it was held that an acceptance of goods to satisfy the 17th section of the Statute of Frauds might be prior to the delivery of them.² It is quite a fallacy to suppose that because acts that happened at various periods of time, whether at intervals of days, or weeks, or months, they cannot be collected in law so as to constitute as much one transaction as if the parties had been in a room together, and the whole transaction had passed between them face to face at the time. That was the ground upon which the Lord Keeper, in the case of *Coleman v. Upcott* (5 Vin. Abr. 527), founded his decision that an offer in writing to sell an interest in land, accepted by parol, became binding as a contract upon the person who made the offer. I cannot say that that case was followed by Vice Chancellor Kindersley, in the case of *Warner v. Willington* (3 Drew. 523; s. c. 25 Law J. Rep. (N.S.) Chanc. 662), but the principle of it was assented to. The Vice Chancellor, observing, I suppose, the note in *Viner*, from which it appeared that Coleman had signed the offer some two or three days after he had accepted it by parol, treated the case as not precisely shewing that a parol acceptance would have been sufficient, although the Lord Keeper's judgment was certainly based upon that foundation, and although in Lord St. Leonards' book³ the case is treated as an authority to that effect. The case of *Warner v. Willington* (3 Drew. 523; s. c. 25 Law J. Rep. (N.S.) Chanc. 662) was followed by the case which has been cited from the Court of Common Pleas, of *Smith v. Neale* (2 Com. B. Rep. N.S. 67; s. c. 26 Law J. Rep. (N.S.) C.P. 143), and it was also cited and acted upon by the Court of Exchequer in the case of *The Liverpool Borough Bank v. Eccles* (4 Hurl. & N. 139; s. c. 28 Law J. Rep. (N.S.) Exch. 122).

So far with reference to agreements which must be mutual, but in which the statute requires only the hand of the party to be charged. But there are two classes of agreements to which reference may be made, and the law relating to which may be usefully considered in determining the present case. One is the class of cases in which a proposal is made, which may or may not be acted upon, the stipulating party having a choice whether he will or not act upon the contract of the person to be charged. Such is the ordinary case of a guarantee, which is a case all the more notable because it is within the very terms of the 4th section of the Statute of Frauds. The creditor may supply the goods or not, as he thinks proper; but if he does supply them the surety is unquestionably bound, except in such cases as that of *Mozley v. Tinkler* (1 Cr. M. & R. 692; s. c. *nom. Morley v. Tinkler*, 4 Law J. Rep. (N.S.) Exch. 84), where, upon the true construction of the guarantie, it required an answer from the creditor by way of assent before he was warranted in acting upon it. But in that case it was never doubted that if the creditor's assent had been made known to the surety, and the goods supplied, the guarantie would have been binding. And it does not appear to have occurred to any of the Court that the creditor must assent in writing.

(2) The cases referred to are respectively *The Bog Lead Mining Company v. Montague*, 10 Com. B. Rep. N.S. 481; s. c. 30 Law J. Rep. (N.S.) C.P. 380: and *Cusack v. Robinson*, 1 Best & S. 299; s. c. 30 Law J. Rep. (N.S.) Q.B. 261.

(3) 1 Vendor and Purchaser, 164, 10th edit.; 106, 13th edit.

Lord Wensleydale expressly said that it was a case in which it was only necessary to have the signature of the person to be charged. It never was suggested, throughout the judgment, that the creditor must assent in writing. Here, therefore, there is a singular confirmation, as it appears to me, that the whole of the contract, in the sense of the whole of that which shews that both parties are bound, need not be in writing. If you have all the terms of the contract in writing, and the signature of the party to be charged, you have enough.

It may be said that this will lead to a prodigious deal of fraud and perjury, which the statute intended to obviate. In the first place, I cannot agree to that, because a person, in order to enforce an agreement, must not only produce evidence that the agreement was entered into, but also that he did, or was ready to do his part, to entitle him to performance by the other contracting party. But if that argument were good for anything, it would be good to shew that a regular agreement, signed by one party only, ought not to bind him. That was considered in the case of *Laythorpe v. Bryant* (2 Bing. N.C. 735; s. c. 5 Law J. Rep. (N.S.) C.P. 217), where, notwithstanding the doubt which had been expressed by Sir William Grant in the case of *Martin v. Mitchell* (2 Jac. & W. 426), the Court of Common Pleas decided that it was sufficient that the party to be charged under the agreement should have signed; and it was pointed out in the course of the argument, that the person who seeks to enforce the agreement has not the other altogether at his mercy, but must fulfil his own part of the agreement before he can seek performance on the part of the person who has signed.

The only other case to which I shall refer, is that of a contract where both parties must sign, otherwise the contract is ineffectual; that is the case of an ordinary lease for years, not under seal, which, by the conjoint operation of sections 1. and 4. of the statute must be in writing, signed by the parties making the same. I am speaking of leases within the Statute of Frauds, and before the modern act of the 7 & 8 Vict. c. 76, and the repealing act, 8 & 9 Vict. c. 106, from which it appears that the legislature thought that it would be beneficial and useful to mankind that certain leases should be under seal if they were to operate as leases at all. I speak of a lease of a chattel interest, as affected by the Statute of Frauds only. Where it was signed by the lessee, and not signed by the lessor, the lessee took no interest, and was not bound, according to the principles laid down in *Soprani v. Skarro* (Yelverton, 18). Now, suppose that the lessee in such a case had signed before the lessor, every argument that could be advanced for the purpose of shewing that no agreement was signed, and that a subsequent act cannot turn what is not an agreement into an agreement, would apply to that case. But could any person suggest that it made any difference with reference to the validity of the lease as to the Statute of Frauds, whether the lessee or the lessor signed his name first?

Many more cases might be put, but these are enough to shew that the law is clear. You must look not to the precise moments at which the assent of the one party and the assent of the other were given, but you must look at the entire transaction, and if the assent was given so as to constitute a contract between the parties, the proposal, though prior in time, is, in fact, a memorandum or note of the terms of that contract, signed by the party to be charged.

We are all of opinion that the doctrine laid down by Vice Chancellor Kindersley, which was in reality only a re-discovery of that which appears to have been the contemporaneous exposition of the Statute of Frauds, is the true interpretation of that statute. We think that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

[IN THE HOUSE OF LORDS.]

July 4, 5, 6, 1864; June 29, 30, 1865; Feb. 22, June 5, 1866.

THE MERSEY DOCKS AND HARBOUR BOARD, *appellants*, v. GIBBS
AND OTHERS, *respondents*.

THE MERSEY DOCKS AND HARBOUR BOARD, *appellants*, v.
PENHALLOW AND OTHERS, *respondents*.

35 L. J. Ex. 225; 11 H.L. Cas. 686; L. R. 1 H.L. 93; 14 L. T. 677;
14 W. R. 872; 12 Jur. N.S. 571.

Followed, *Worrall v. Lloyd*, 1866, L. R. 1 C.P. 719 (C.P.). See *Coe v. Wise*, 1866, L. R. 1 Q.B. 711; 14 L. T. 891; 14 W. R. 865 (Ex. Ch.). Applied, *Att.-Gen. v. Colney Hatch*, [1868] E. R. A.; 38 L. J. Ch. 265; L. R. 4 Ch. 146; 19 L. T. 708; 17 W. R. 240 (L.C. & L. J.). Referred to, *Foreman v. Mayor of Canterbury*, [1871] E. R. A.; 40 L. J. Q.B. 188; L. R. 6 Q.B. 214; 24 L. T. 385; 19 W. R. 719 (Q.B.). Principle applied, *Campbell v. Hornsby*, 1873, Ir. R. 7 C. L. 540 (Ex. Ch.). See *Clowes v. Staffs Potteries*, [1873] E. R. A.; 42 L. J. Ch. 107; L. R. 8 Ch. 125 n; 27 L. T. 521; 21 W. R. 82 (L. JJ.). Applied, *Winch v. Thames Commissioners*, [1874] E. R. A.; 43 L. J. C.P. 167; L. R. 9 C.P. 378; 31 L. T. 128; 22 W. R. 879 (Ex. Ch.). Principle applied, *Goslin v. Agricultural Hall*, [1876] E. R. A.; 45 L. J. C.P. 348; L. R. 1 C.P. D. 482; 35 L. T. 92 (C. A.). Referred to, *Harris v. Great Western Railway*, [1876] E. R. A.; 45 L. J. Q.B. 729; L. R. 1 Q.B. D. 515; 34 L. T. 647 (Q.B. D.); *Weir v. Barnett*, 1878, L. R. 3 Ex. D. 32; 38 L. T. 929; 26 W. R. 147 (Ex. D.): affirmed sub nom. *Weir v. Bell*, 1878, L. R. 3 Ex. D. 238; 38 L. T. 935; 26 W. R. 746 (C. A.). Explained, *Forbes v. Lee Conservancy*, [1879] E. R. A.; 48 L. J. Ex. 402; L. R. 4 Ex. D. 116 (Ex.). See, *Hill v. Metropolitan Asylums Board*, [1879] E. R. A.; 48 L. J. Q.B. 562; L. R. 4 Q.B. D. 433; 40 L. T. 491 (Q.B.): affirmed, [1880] E. R. A.; 49 L. J. Q.B. 228; 42 L. T. 212 (C. A.): latter decision affirmed, [1881] 50 L. J. Q.B. 353; L. R. 6 App. Cas. 193; 44 L. T. 653; 29 W. R. 617 (H.L.). Discussed, *Fleming v. Manchester Corporation*, 1881, 44 L. T. 517 (Q.B. D.). Followed, *Dormont v. Furness Railway*, [1883] E. R. A.; 52 L. J. Q.B. 331; L. R. 11 Q.B. D. 496; 49 L. T. 184 (Q.B. D.). Approved and applied, *Reg. v. Williams*, [1884] E. R. A.; 53 L. J. P.C. 64; L. R. 9 App. Cas. 418; 51 L. T. 546 (P.C.). Referred to, *Lowther v. Curwen*, 1888, 58 L. T. 168 (Ch. D.). Distinguished, *The Moorcock*, [1889] E. R. A.; 58 L. J. Adm. 73; L. R. 14 P.D. 64; 60 L. T. 654; 37 W. R. 439 (C. A.). See *Gibraltar Commissioners v. Orfila*, [1890] E. R. A.; 59 L. J. P.C. 95; L. R. 15 App. Cas. 400; 63 L. T. 58 (P.C.). Referred to, *Jersey v. Uzbridge Rural Sanitary Authority*, [1891] E. R. A.; 60 L. J. Ch. 833; [1891] 3 Ch. 183; 64 L. T. 858 (Ch. D.). See *Reg. v. Selby Commissioners*, [1892] 61 L. J. Q.B. 372; [1892] 1 Q.B. 348; 66 L. T. 17 (C. A.). Considered and distinguished, *Dunbar v. Ardee Guardians*, [1897] 2 I.R. 76 (C. A.). See *Taff Vale Railway v. Amalgamated Society*, [1901] E. R. A.; 70 L. J. K.B. 219; 83 L. T. 474; 49 W. R. 101 (C. A.): reversed, [1901] E. R. A.; 70 L. J. K.B. 905; [1901] A.C. 426; 85 L. T. 147; 50 W. R. 44 (H.L.). Applied, *Wheeler v. Public Works Commissioners*, [1903] 2 I.R. 202 (C. A.). Referred to, *Hackney Corporation v. Lee Conservancy*, [1904] E. R. A.; 73 L. J. K.B. 766; [1904] 2 K.B. 541; 91 L. T. 13 (C. A.). See the *Bearn*, [1906] P. 48; 94 L. T. 265 (P.D.): affirmed, [1906] E. R. A.; 75 L. J. P. 9; [1906] P. 69; 94 L. T. 265 (C. A.); *Bede S.S. Co. v. Wear Commissioners*, [1907] E. R. A.; 76 L. J. K.B. 434; [1907] 1 K.B. 310; 96 L. T. 370 (C. A.). See *Tozeland v. West Ham Union*, [1907] E. R. A.; 76 L. J. K.B. 514; [1907] 1 K.B. 926; 96 L. T. 519 (C. A.). Referred to *Hillyer v. St. Bartholomew's Hospital*, [1909] E. R. A.; 78

L. J. K.B. 958; [1909] 2 K.B. 820; 101 L. T. 368 (C. A.); *McClelland v. Manchester Corporation*, [1912] E. R. A.; 81 L. J. K.B. 98; [1912] 1 K.B. 118; 105 L. T. 707 (K.B. D.).

Negligence—Statutory Trustees of Docks—Liability of Corporate Body—Nonfeasance—Neglect of Servants.

CORPORATION. NEGLIGENCE. SHIPPING. STATUTE.—*Trustees appointed by statute for public purposes, with power to levy tolls, but not deriving any personal benefit, are liable in their corporate capacity for damage sustained by reason of the default of their servants or agents to the same extent as absolute owners levying tolls for their own profit, although there is no improper conduct on the part of such trustees.*

Dictum of Lord Cottenham in Duncan v. Findlater (6 Cl. & F. 894) overruled.

The above cases were proceedings in error from the judgment of the Court of Exchequer Chamber, sitting in Error from the Court of Exchequer.

The action in the first case was brought against (in the first instance) the trustees of the Liverpool Docks, and was continued by suggestion against their successors, the plaintiffs in error. The declaration contained two counts.

The first count alleged that the plaintiffs (below) were the owners of a cargo of guano on board the ship called the *Sierra Nevada*, and that the said ship, in endeavouring to enter a certain dock of the defendants (below), called the Wellington Half-Tide Dock, struck against a bank of mud remaining, by the negligence of the defendants (below), in the entrance of the dock. The second count alleged that the defendants (below), knowing that the said dock was, by reason of an accumulation of mud therein, in an unfit state to be navigated, did not take reasonable care to put the same into a fit state for that purpose, whereupon the *Sierra Nevada* in endeavouring to enter into the dock struck against the mud, and the cargo thereby became damaged.

The defendants below demurred to the declaration, and pleaded several pleas, including a plea of not guilty.

The demurrer was argued before the Court of Exchequer in 1856 (26 Law J. Rep. (N.S.) Exch. 109), when judgment was given in favour of the defendants below. The plaintiffs below brought error upon the judgment of the Court of Exchequer, and the Court of Exchequer Chamber reversed it, and gave judgment in favour of the plaintiffs below (27 Law J. Rep. (N.S.) Exch. 321).

The action in the second case was brought by the owners of the vessel, the *Sierra Nevada*, against the plaintiffs in error, in respect of the damage sustained by the vessel.

The declaration in that action, in respect of the vessel, was in the same form as the declaration in the action in respect of the cargo. The defendants below pleaded two pleas, the material plea being not guilty. The plaintiffs below joined issue on the pleas, and the cause came on for trial before the Lord Chief Baron and a special jury in 1859, when the learned Lord Chief Baron directed the jury that if, in their opinion, the cause of the misfortune was a bank of mud in the dock, and the defendants, by their servants, had the means of knowing the state of the dock, and were negligently ignorant of it, then, in his opinion, the defendants below were liable. A bill of exceptions was tendered to this ruling, which was duly sealed by the Lord Chief Baron, and the jury returned their verdict in favour of the plaintiffs below.

The defendants below brought error on the judgment given by the Court of Exchequer upon the verdict, and the Court of Exchequer Chamber overruled the bill of exceptions, and confirmed the judgment given by the Court of Exchequer (30 Law J. Rep. (N.S.) Exch. 329).

Both the above cases depended upon one and the same point of law, namely, whether a public board, the members of which receive no emolument

whatever, direct or indirect, appointed under the provisions of an act of parliament to carry out certain duties imposed upon them by the legislature, for the general benefit of the community, are liable for damage sustained by reason of the default of one of their officers, where no improper conduct on the part of the board is the cause of the injury.

The Court of Exchequer Chamber decided the question in the affirmative, and the judgment of the House of Lords was now sought as to the propriety of that decision.

The facts of the cases are further mentioned in the opinion of the learned Judges delivered by Mr. Justice Blackburn; and the arguments of counsel and the cases cited are also therein sufficiently referred to.

Sir Fitzroy Kelly, Mellish and Quain, were for the appellants, and

The Solicitor General (Sir R. P. Collier), Sir H. Cairns, Cleasby, Honyman and V. Lushington, for the respondents.

The LORD CHANCELLOR (Lord Cranworth) put the following questions to the Judges :

In *The Mersey Docks and Harbour Board v. Gibbs*—

Does the declaration in this case state a good cause of action?

In *The Mersey Docks and Harbour Board v. Penhallow*—

Is the judgment of the Court of Exchequer Chamber right?

The following opinion was delivered by—

BLACKBURN, J.—I have the honour, in answer to your Lordships' questions in these cases, to deliver the joint opinion of all the Judges who heard the argument.¹ The two actions before your Lordships, though arising out of the same transactions, do not come before your Lordships' House in precisely the same manner.

In *Gibbs v. the Mersey Board*, the action by the owner of the cargo, the question is raised by a demurrer to the declaration, on which all the material averments must be considered as admitted to be true. The damages are assessed on the second count, and it is to the averments on that count that your Lordships' attention should be directed. On this record it is admitted by the demurrer that the defendants (the dock corporation, at that time called by the style of the Trustees of the Liverpool Docks), knowing that the dock and its entrance was, by reason of accumulations of mud, unfit to be used by ships, did not take due and reasonable or any care to put it in a fit state, but negligently suffered the dock to remain in such unfit state, whilst, as they well knew, it was used by vessels, and that the damage arose in consequence.

In the action of *Penhallow v. the Mersey Board*, the action by the shipowner, the averments in the second count are similar to those in the first action; but they are not admitted by a demurrer. The question was raised at *Nisi Prius*, on the plea of not guilty, which the jury have found for the plaintiffs; but the charge of the Lord Chief Baron is brought before your Lordships by a bill of exceptions, by which it appears that he told the jury that if in their opinion the cause of the misfortune was a bank of mud, "and the defendants by their servants had the means of knowing the state of the dock, and were negligently ignorant of it, then, in his opinion, the defendants were liable"; obviously meaning that if the jury so thought, they ought to find the issue for the plaintiffs.

The exception taken to this summing up was, that even if the jury thought the cause of the misfortune was a bank of mud, the defendants were not liable unless they knew that the dock and entrance were, by reason of the said mud bank or otherwise, unfit for navigation. That is the only exception. Mr. Mellish, in the course of his very able reply at your Lordships' bar, contended

(1) Channell, B., Blackburn, J., Keating, J., Shee, J. and Pigott, B.

that the statement in the bill of exceptions disclosed no evidence to go to the jury of negligence on the part of the defendants or their servants. But that is not the exception on the record; and we need hardly remind your Lordships that the party tendering a bill of exceptions is confined to the exceptions he makes at the trial. This is not a merely technical answer; had the exception been that there was no evidence of negligent ignorance fit to be left to the jury, the whole of the evidence bearing on that point would have been set out on the record, and then the Court of Error could have formed a judgment whether it was sufficient or not; as it is, the record contains no more of the evidence than is necessary to explain the exception really made at the trial, viz., that the Chief Baron told the jury, in effect, that it was not necessary to prove knowledge on the part of the defendants or their servants of the unfit state of the docks, and that proof that the defendants by their servants had the means of knowledge and were negligently ignorant of it, would entitle the plaintiffs to the verdict.

The Court of Exchequer Chamber, in each of the cases, based their judgment on that of the Court of Exchequer Chamber in *The Lancaster Canal Company v. Parnaby* (11 Ad. & E. 230; s. c. 9 Law J. Rep. (N.S.) Exch. 338). In that case the defendants were a company incorporated by act of parliament for the purpose of making and maintaining a canal, which was to be open for the use of the public on the payment of rates, which the canal company were empowered to receive for their own proper use and behoof, i. e., to be divided among the shareholders. And the Court of Exchequer Chamber in that case state the law thus (11 Ad. & E. 242):—

“The facts stated in the inducement shew that the company made the canal for their profit, and opened it to the public upon payment of tolls to the company; and the common law in such a case imposes a duty upon the proprietors, not, perhaps, to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property.”

In the present case, the dock board do not receive the dock rates for their own use and behoof, i. e., to be divided amongst themselves or their shareholders; but they are bound by the statutes under which they are incorporated to apply them to the purposes of the acts, which may in substance be stated to be to maintain the docks and pay the very large debt contracted in making them. The Court of Exchequer Chamber in both cases decided that this difference did not affect the question; that so long as the dock was kept open for the public, the duty to take reasonable care that the dock and its entrance were in such a state that those who navigate it may do so without danger, was equally cast on the proprietors having the receipt of the tolls and the possession and management of the dock, whether the tolls are received for a beneficial or a fiduciary purpose. If this proposition is correct, the direction of the Lord Chief Baron excepted to was right, for a body corporate never can either take care or neglect to take care, except through their servants; and, assuming that it was the duty of the corporation to take reasonable care that the dock was in a fit state, it seems clear that if the corporation, by their servants, had the means of knowing that the dock was in an unfit state, and were negligently ignorant of its state, they did neglect this duty, and did not take reasonable care that it was fit. And after hearing the very able arguments at your Lordships' bar, we are of opinion that the judgment of the Court of Exchequer Chamber was correct. It is pointed out by Lord Campbell, in *The Southampton and Itchin Bridge Company v. the Southampton Local Board of Health* (28 Law J. Rep. (N.S.) Q.B. 41), that in every case the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created. It is desirable, therefore, in the first place, to state what was the effect of the legislation, so far as it applied to these docks, at the time of the accident on the 12th of April, 1865.

The docks in Liverpool have been made at different times, under a great many different acts of parliament, the earliest being the 8 Anne, c. 12. At the time when the accident happened which gave rise to these actions, the latest of the acts was the 14 & 15 Vict. c. 64. All these numerous statutes are public acts, of which the Courts must take judicial notice; and as many of the statutes were at that time still in force, though their provisions had been in many respects varied by those subsequently passed, it is extremely difficult to ascertain with precision what was, at the time of the accident, the exact state of the legislation peculiar to those docks. But, having had the assistance afforded by the able and industrious counsel who argued at your Lordships' bar, we think we may venture to say that the effect of the material parts of the statutes is the following:—

The members of the Town Council of Liverpool and their successors were formed into a corporation by the style of the "Trustees of the Liverpool Docks." By statutes 51 Geo. 3. c. 143. s. 2; 6 Geo. 4. c. 87. s. 3. and 14 & 15 Vict. c. 64. ss. 2, 3. and 4, the powers of this corporation were to be exercised by committee. On this Mr. Mellish founded an argument which we shall notice afterwards. Subject to these provisions we may say that the effect of the legislation was, that the dock corporation were empowered to make and maintain docks and warehouses, which were to be open to the use of the public, paying dock-rates for the use of the docks and warehouse-rates for the use of the warehouses. The same accommodation and the same services were to be supplied to those using the docks and the warehouses respectively that would have been supplied by any ordinary dock and warehouse company to their customers. Powers are given to the trustees of the Liverpool Docks from time to time to close the docks for the purpose of cleansing and repair. General powers are given to them to appoint officers and servants; but the duties of those officers and servants are not in any place defined in the statutes, except by statute 51 Geo. 3. c. 143. ss. 80, 81, 82, 84, 85. and 86. By those sections, the water-bailiff or harbour-master, or any of the dock-masters, have power to remove wrecks and obstructions, and to regulate the time and manner in which vessels shall enter and leave the docks; and penalties are imposed on those who disobey the orders of those officers. On these latter sections, and on the decision of the Court of Exchequer in *Metcalfe v. Hethrington* (11 Exch. Rep. 257; s. c. 24 Law J. Rep. (N.S.) Exch. 314), an argument was raised for the defendants, which we will notice afterwards. At present we will only observe that such powers are almost essential for the due use of any dock; and that, accordingly, it has been for many years the practice to insert similar clauses in all harbour and dock acts, whether for private companies or public bodies. And in the Harbour, Docks, and Piers Clauses Act, 1847 (10 Vict. c. 27), the clauses commonly in use are collected under the head "And with respect to the appointment of harbour-masters and pier-masters and their duties." It will be found on examining them that section 56. in the general act is equivalent to section 80. in the 51 Geo. 3. c. 143; and that the other powers given to the officers of the Liverpool Dock Corporation are also given to the officers of all dock companies, whether for public or for private purposes, incorporated by any statute which incorporated the Harbours, Docks, and Piers Clauses Act, 1847.

By a general appropriation clause, 51 Geo. 3. c. 146. s. 29, all the revenues of the trustees of the Liverpool Docks are to be applied in the first instance to making and maintaining the docks, paying the interest on the large debt secured on the dock-rates, and to paying "all the charges and expenses already incurred, or hereafter to be incurred, in the carrying into execution or under or in consequence of any of the former acts or this present act; and the residue in paying off the principal moneys of the debt." And when it is all paid off, the trustees are required to lower and reduce the rates, "as far as can be done, leaving sufficient for defraying all charges of management and other concerns of the docks, &c., and improving, repairing, and maintaining the same, and for the carrying into execution the provisions of this act and the

former acts." By subsequent enactments, the trustees of the Liverpool Docks are enabled to raise much more money on bonds, and to make much more extensive works; but in substance this clause still, at the time of the accident, remained the clause governing the appropriation of all moneys received by the trustees of the Liverpool Docks, including the moneys paid for the use of the docks and warehouses. There are some peculiar enactments in one of the statutes (6 Geo. 4. c. 187. ss. 180. to 186.) which were relied upon as shewing the intention of the legislature, on which we shall remark afterwards; but, with this exception, there is nothing in the statutes either extending or limiting the liability of the dock trustees to those paying for the use of the docks, so as to make it different from that which the general law would cast upon them under such circumstances. And, consequently, in our opinion, the great question in both these actions is, what is the duty which the general law does cast upon a corporation, being the proprietors of docks maintained under such enactments?

Now, it is obvious that a shipowner who pays dock-rates for the use of the dock, or the owner of goods who pays warehouse-rates for the use of a warehouse and the services of the warehousemen, is, as far as he is concerned, exactly in the same position, however the rates may be appropriated. He pays the rates for the dock accommodation, or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid. It is well observed by Mr. Justice Mellor in *Coe v. Wise* (33 Law J. Rep. (N.S.) Q.B. 281), of corporations, like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise. And we think that, in the absence of anything in the statutes (which create such corporations) shewing a contrary intention in the legislature, the true rule of construction is, that the legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works. If, indeed, the legislature has, by express enactment or necessary intendment, enacted that they should not be subject to such a liability, there is an end of the question; and if the legislature had in the acts now under consideration enacted that none of the revenue of the trustees of the Liverpool Docks should be applied to the purpose of discharging liabilities incurred in consequence of the trustees acting as proprietors of docks and warehouses, it would go far to shew that the legislature intended that they should not be so liable. But the appropriation clause in the acts now under consideration has no such effect. It was, indeed, supposed by the Court of King's Bench, in *The King v. Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 789), that its effect was to prohibit the payment of poor-rates; but your Lordships' House has decided, in the recent case of *Jones v. the Mersey Docks and Harbour Board*, and *The Mersey Docks and Harbour Board v. Cameron* (35 Law J. Rep. (N.S.) M.C. 1), that this was a mistake, and that the trustees of the Liverpool Docks were, out of that fund, to defray all expenses incident by law to the maintenance of the docks, and, as such, poor-rates. We think, on the same principle, they are at liberty to apply the fund to the discharge of the liabilities which, in execution of the act, by keeping open the docks and warehouses, they must from time to time incur to their customers. It was pointed out in the course of Mr. Mellish's argument, that the effect of applying the revenue of the trustees of the Liverpool Docks to the payment of such a liability as the present, would be to postpone the time at which the rates would be reduced, and that, consequently, the ultimate loss would fall on those who were the payers of the rates at the time when the rates, but for this liability, would have been reduced; and so that, in the possible, but not very probable, event of the plaintiffs being then persons using the docks, the loss would partly fall upon the plaintiffs themselves. But we are unable to

see how that affects the question whether the action would lie or not. A shareholder in an incorporated company, such as a railway company or an ordinary dock company, who has a cause of action against the corporation, does in effect, by obtaining redress, diminish the future dividends of the shareholders, including his own. In this respect his position is analogous to that of the ratepayer; yet it never can be contended that a shareholder in an incorporated dock company could not maintain an action for an injury to his ship from the neglect of the company. It was pointed out by Sir Hugh Cairns, in the course of his argument at your Lordships' bar, that the legislature, in the 6 Geo. 4. c. 187. ss. 130. to 136, shewed a clear intention that the funds of the dock trust might, in some cases at least, be applied by the committee to indemnifying parties who had suffered by the negligence of the servants of the trustees of the Liverpool Docks; and also that damages recovered against the trustees of the Liverpool Docks might be levied out of the rates, by the circuitous and somewhat clumsy process of distraining on the goods of the treasurer, who was to recoup himself out of the rates. And these enactments, so far as they go, seem to us to shew that the legislature at least did not intend to take away any liability of the trustees, which would otherwise have been cast on them by the general law, though we should not willingly infer from them that it was intended to impose any liability beyond that which would be imposed by the general law.

Mr. Mellish also founded an argument on the wording of these sections, taken in conjunction with the enactments in the second clause of the 51 Geo. 3. c. 143, and the second, third and fourth clauses of the 14 & 15 Vict. c. 64, which it is proper we should now notice. The trustees of the Liverpool Docks were required by the 2nd section of 51 Geo. 3. c. 143. to appoint a committee of their body, and all their powers were to be exercised by that committee, except in so far as the trustees of the docks might reserve any question for their own determination. By the subsequent enactments, this committee was to consist partly of the members of the trustees of the Liverpool Docks and partly of members elected by the persons who had paid dock-rates, and the whole of the powers of the trustees of the Liverpool Docks were to be exercised exclusively by this committee so constituted. When the demurrer in the case of *Gibbs v. the Trustees of the Liverpool Docks* was argued in the Court of Exchequer, that Court gave judgment upon the ground that the action, if it lay at all, lay against the committee, and not against the trustees of the Liverpool Docks. But in the Court of Error, the defendants, by their counsel, very handsomely agreed that the plaintiff should not be put to the expense and trouble of issuing another writ against the committee; but that, if the action would lie against either body, judgment might be given against the defendants on the record. Subsequent legislation has done away with the committee, and the question, whether the writ ought in such a case to have been directed against the one body or the other, can never in future arise. Your Lordships will probably agree with the Court of Exchequer Chamber that this arrangement was one which ought not to be disturbed by the Court, and there has been no attempt on the part of the counsel for the Mersey Board (who now represent both the original defendants and the committee) to depart from the agreement. But Mr. Mellish argued that the whole scheme of the legislature shewed that the intention of the legislature was to give to the committee an uncontrolled discretionary power to compensate such persons as in their opinion ought to be compensated, and no others. He did not say that they were to exercise this power capriciously, but *quasi* judicially, though without appeal; and he argued that the change of the constitution of the committee, by which one-half were to be elected by the ratepayers (though only introduced by the later acts) rendered this less unlikely. But we do not think that such is the fair construction to be put on the enactments. It is contrary to the general rule of law, not only in this country but in every other, to make a person judge in his own cause; and, though the legislature can, and no doubt in a proper case

would, depart from that general rule, an intention to do so is not to be inferred except from much clearer enactments than any to be found in these statutes. We have gone through these enactments, and we think your Lordships will hardly be inclined to dispose of this important case on any of the special provisions peculiar to these acts.

As we have already intimated, in our opinion the proper rule of construction of such statutes is, that, in the absence of something to shew a contrary intention, the legislature intend that the body, the creature of the statute, shall have the same duties, and render its funds subject to the same liabilities as the general law would impose on a private person doing the same things. This rule of construction was not admitted by the defendants. They did not rest their case exclusively, or even mainly, on any special provisions peculiar to their own private legislation, but upon broader grounds, which, if we do not mistake them, were in effect two:—

They said that by the general law of this country, bodies, such as the present, are trustees for public purposes, and that being such, they are not in their corporate capacity liable to make compensation for damages sustained by individuals from the neglect of their servants and agents to perform the duties imposed on the corporation, or, at all events, that the duty of such a corporation was limited to that of exercising due care in the choice of their officers, and that if they had properly selected their officers, any evil which ensued must be the fault of the officer, and that redress for it must be sought against him alone.

A great many cases were cited at your Lordships' bar as supporting this position, many of which are really not applicable to such a case as the present. *Lane v. Cotton* (2 Ld. Raym. 646), *Whitfield v. Le Despencer*, the case of the Postmaster-General (Cowp. 754), and *Nicholson v. Mounsey*, the case of the captain of the man-of-war (15 East, 384), are authorities that where a person is a public officer in the sense that he is a servant of the Government, and, as such, has the management of some branch of the Government business, he is not responsible for any negligence or default of those in the same employment as himself. But these cases were decided upon the ground that the Government was the principal, and the defendant merely the servant. If an action were brought against the manager of the goods traffic of a railway company for some injury sustained by the owner of goods on their line, it would fail unless it could be shewn that the particular acts which occasioned the damage were done by his orders or directions; for the action must be brought either against the principal or against the immediate actors in the wrong—see *Story on Agency*, s. 313. And all that is decided by this class of cases is, that the liability of a servant of the public is no greater than that of the servant of any other principal, though the recourse against the principal, the public, cannot be by an action. The principle is the same as that on which the surveyor of the highways is not responsible to a person sustaining injury from the parish ways being out of repair, though no action can be brought against his principals, the inhabitants of the parish. But the defendants in the present action are not servants of the public in that sense. For this we need do no more than refer to the recent decision of your Lordships' House in *Jones v. the Mersey Board* (35 Law J. Rep. (N.S.) M.C. 1), where they were held to be rateable as occupiers of the docks on the very ground that they did not occupy as servants of the public or Government.

Another class of cases also cited depends upon the following principle. If the legislature direct or authorize the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing, it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorizing the doing of such things. But no action lies for what is *damnum sine injuria*; the remedy is to apply for compensation under the provision of the statutes legalizing what would otherwise be a wrong. This, however, is the case, whether the thing is authorized for a

public purpose or for private profit. No action will lie against a railway company for erecting a line of railway authorized by their acts, so long as they pursue the authority given them, any more than it would lie against the trustees of a turnpike-road for making their road under their acts; though the one road is made for the profit of the shareholders in the company and the other is not. The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the legislature—see *The King v. Pearse* (4 B. & Ad. 30). This, we think, is the point decided in *The Governors of the British Cast Plate Manufacturers v. Meredith* (4 Term Rep. 794), *Sutton v. Clarke* (6 Taunt. 29) and several other cases, as is well explained by Mr. Justice Williams in *Whitehouse v. Fellows* (10 Com. B. Rep. 779; s. c. 30 Law J. Rep. (N.S.) C.P. 305). But though the legislature have authorized the execution of the works, they do not thereby exempt those who are authorized to make them from the obligation to use reasonable care that in making them no unnecessary damage be done. In *Brine v. the Great Western Railway Company* (2 Best & S. 402; s. c. 31 Law J. Rep. (N.S.) Q.B. 101) Mr. Justice Crompton says: “The distinction is now clearly established between damage from works authorized by statutes, where the party generally is to have compensation and the authority is a bar to an action, and damage by reason of the works having been negligently done, as to which the owner’s remedy by way of action remains.” This distinction is as applicable to works executed for one purpose as for another. This principle seems to have been acted upon in *Leader v. Moxon* (2 H. Black. 924), and it is to some extent recognized in *Sutton v. Clarke* (6 Taunt. 29) by Gibbs, C.J., who puts the judgment on the ground that the defendant, in the execution of a duty imposed on him by the legislature, had exercised his best skill, diligence and caution in the execution of it. “We are of opinion,” says Gibbs, C.J., “that he is not liable for an injury which he did not only not foresee, but could not foresee. He has done all that is incumbent on him, having used his best skill and diligence.” This certainly implies that in the opinion of those who concurred in that judgment the defendant would have been liable if he had neglected to use his best skill and diligence. In the subsequent case of *Jones v. Bird* (5 B. & Ald. 837) Bayley, J. laid down a stricter rule. He said that the defendants, who in that case were the persons actually executing a sewer, authorized by statute, were not protected merely because acting *bona fide* and to the best of their skill and judgment. “That,” he says, “is not enough; they are bound to conduct themselves in a skilful manner; and the question was most properly left to the jury to say whether the defendants had done all that any skilful person could reasonably be required to do in such a case.” And there is a considerable number of cases to which we shall afterwards refer, in which, on this principle, actions have been held to lie against bodies executing works under the authority of statutes for the improper mode in which their powers have been executed, though the defendants did not derive any profit from the execution of the works.

There are, however, authorities that bear the other way upon this part of the case; and it is necessary to examine these authorities in order to contrast them with the others. It will be for your Lordships then to decide on which side the preponderance of authority lies. Those in favour of the defendants are *Hall v. Smith* (2 Bing. 156; s. c. 2 Law J. Rep. C.P. 113), *Duncan v. Findlater* (6 Cl. & F. 894), *Halliday v. St. Leonard’s, Shoreditch* (11 Com. B. Rep. N.S. 192), and *Metcalfe v. Hethrington* (11 Exch. Rep. 257; s. c. 24 Law J. Rep. (N.S.) Exch. 314). It is necessary, in considering these authorities, to bear in mind the distinction between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation on him to perform, and the liability for the negligence of those who are employed in the work. This distinction is well stated in *Pickard v. Smith* (10 Com. B. Rep. 480), by Williams, J., who says, “Unquestionably no one can be made liable for any act or breach of duty unless it be traceable to himself or his servant or servants in the course of his or their employment;

consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. That rule, however, is inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." "If the performance of the duty be omitted, the fact of his having intrusted it to a person who also neglected it furnishes no excuse either in good sense or law." Liability for the collateral negligence depends entirely upon the existence of the relation of master and servant, between the employer and the person actually in default, according to the well-known exposition of the law in *Quarman v. Burnett* (6 Mee. & W. 509; s. c. 9 Law J. Rep. (N.S.) Exch. 308), where Parke, B. says, "Upon the principle of *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrong-doer, he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. But the liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist." In such a case as the present, the liability does not depend on that relation. Liability for doing an improper act depends upon the order given to do that thing; and the liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done; and in the last two cases it is quite immaterial whether the actual actors are servants or not. Now, in *Hall v. Smith* (2 Bing. 156; s. c. 2 Law J. Rep. C.P. 113), the action was brought against the Commissioners for paving Birmingham (sued by their clerk), Norton, a surveyor, and Kimberley, a contractor, employed by them to make a sewer, for leaving a quantity of rubbish unguarded and unlighted, whereby the plaintiff was thrown down and injured. The commissioners were authorized by an act of parliament to order the making of the sewer. "No negligence," says Chief Justice Best, "was imputed to the commissioners themselves; they had ordered the tunnel to be made, and left the making of it to the defendants Norton and Kimberley, the former of whom was the surveyor, and the latter the undertaker of the work. The accident happened to the plaintiff from these persons not putting up rails, and not having lights during the night." The close of his judgment is, that "no action can be maintained against a man acting gratuitously for the public for the consequence of any act which he is authorized to do, and which, so far as he is concerned, is done with due care and attention; and that such a person is not answerable for the negligent execution of an order properly given." This, no doubt, is true; but it would be equally true if the defendants, instead of being a body acting gratuitously for the public, had been a body, like a railway company, authorized to make the tunnel for their own profit. No action could have lain against them unless they stood in the relation of master to the parties actually guilty of negligence. This was not noticed by Chief Justice Best, as is pointed out in *Scott v. the Mayor of Manchester* (1 Hurl. & N. 59). There, Mr. Baron Alderson says, "*Hall v. Smith* (2 Bing. 156; s. c. 2 Law J. Rep. C.P. 113) goes too far—the person who selects the workmen is the party liable. Commissioners may get rid of liability by making contracts, but if they employ their own servants to do the work, they will be liable for the acts of such servants." But, he adds, "*Hall v. Smith* (2 Bing. 156; s. c. 2 Law J. Rep. C.P. 113) was rightly decided upon the facts." But though what Chief Justice Best said in *Hall v. Smith* (2 Bing. 156; s. c. 2 Law J. Rep. C. P. 113) was irrelevant, and therefore of less weight, still, his opinion is an authority in favour of the defendants. It is, however, based upon a ground quite inapplicable to the present or indeed to any modern case. He points out clearly and forcibly

that it is harsh and impolitic to cast on individuals, gratuitously, a public duty, and make them responsible out of their private means for the non-fulfilment of it. But for many years it has been the practice of the legislature to exempt the private means of commissioners from liability, either, as in the present series of acts, by incorporating them, or by enabling them to sue and be sued in the name of a clerk, and restricting the execution to the property which they hold as commissioners. The basis of Chief Justice Best's reasoning fails, and *debile fundamentum fallit opus*. *Duncan v. Findlater* (6 Cl. & F. 894) was a Scotch appeal brought before the House of Lords on a bill of exceptions. The action was against the trustees of a turnpike road, to recover damages for an injury sustained by the plaintiff from falling over a heap of stones negligently left on the road. It was stated on the bill of exceptions that the trustees had given directions, through their surveyor, that a drain should be filled up, and that the workmen engaged in filling up the drain left negligently the stones in the road. Assuming that the law of Scotland and of England are the same, it is clear that no one could be answerable for this sort of negligence unless he stood to those who actually were guilty of the negligence in the relation of master and servant. The judge who presided at the trial took a different view of the law of Scotland, and directed the jury "that road trustees on a public road are liable for any injury which may happen to passengers, in consequence of the negligence or improper conduct of labourers or surveyors, or other persons employed by the trustees, or by the officers of the trustees, when engaged in any operation performed upon the authority of the trustees." And to this direction there was an exception. If the body authorizing the operation had been a railway company or a private individual, instead of being trustees of a turnpike-road, this direction would, according to English law, have been wrong; and this is pointed out by Lord Brougham, who says: "The rule of liability and its reason I take to be this—I am liable for what is done by me and under my orders by the man I employ, for I may turn him off from that employ when I please. And the reason I am liable is this, that by employing him I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it." Language which is very similar to that already cited from *Quarman v. Burnett* (6 Mee. & W. 509; s. c. 9 Law J. Rep. (N.S.) Exch. 308). But though all that really was decided in that case was that the trustees were not liable for the negligence of persons in their employment who were not shewn to be their servants, it is not to be disputed that Lord Cottenham's language goes a great deal further, and shews that, in his opinion, persons incorporated for the purpose of executing works could never in their official or corporate capacity be liable to damages at all, the remedy for any wrong or neglect being only against the individual corporators for their individual wrong or neglect. His reasoning on this point is: "If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it. And this is clear on the legal presumption that the act creating the damage, being within the statute, must be a lawful act. On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers conferred on him by statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct?" Lord Cottenham is there speaking of a body of trustees acting under the Scotch Turnpike Act, but his reasoning is general; and the dilemma, if a good one, is applicable to all cases. This is, no doubt, a very high authority, being said by the Lord Chancellor in the House of Lords, though in a Scotch case; but not being the point decided by the House, it is not conclusively binding, and we think that, with great deference to his high authority, we must dissent from the position there laid down, both on principle and on the preponderance of authority.

It is pointed out by Lord Campbell in *The Southampton and Itchin Bridge Company v. the Southampton Local Board of Health* (28 Law J. Rep. (N.S.)

Q.B. 41) that in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created. And if the true interpretation of the statute is, that a duty is cast upon the incorporated body, not only to make the works authorized, but also to take proper care, and use reasonable skill, that the works are such as the statute authorizes, or, as in the present case, to take reasonable care that they are in a fit state for the use of the public who use them, there is, with great deference to Lord Cottenham, nothing illogical or inconsistent in holding that those injured by the neglect of the statutable body to fulfil the duty thus cast by the statute upon it, may maintain an action against that body, and be indemnified out of the funds vested in it by the statute. Accordingly, the Court of Queen's Bench, in *Ward v. Lee* (7 El. & B. 426; s. c. 26 Law J. Rep. (N.S.) Q.B. 142), and the Court of Common Pleas, in *Clothier v. Webster* (12 Com. B. Rep. N.S. 798; s. c. 31 Law J. Rep. (N.S.) C.P. 316), have expressed an opinion that an action lay against a local board of health in its corporate capacity, for an injury sustained from making improper works. And in *The Southampton and Itchin Bridge Company v. the Southampton Local Board of Health* (28 Law J. Rep. (N.S.) Q. B. 41), the point was expressly decided. And this decision was followed and approved of by the Court of Exchequer, in *Ruck v. Williams* (3 Hurl. & N. 308; s. c. 27 Law J. Rep. (N.S.) Exch. 357), where it was held that no action would lie against the Improvement Commissioners of Cheltenham (sued by their clerk) for the improper mode in which they caused a sewer to be made. And Bramwell, B. forcibly observed: "I can well understand if a person undertakes the office or duty of a commissioner, and there are no means of indemnifying him against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that if one of several commissioners does something not within the scope of his authority, the commissioners as a body are not liable; but where commissioners, who are a *quasi* corporate body, are not affected (*i. e.* personally) by the result of an action, inasmuch as they are authorized by act of parliament to raise a fund for payment of the damages, on what principle is it that if an individual member of the public suffers from an act *bona fide* but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law." In *Whitehouse v. Fellows* (10 Com. B. Rep. 779; s. c. 30 Law J. Rep. (N.S.) C.P. 305), the Court of Common Pleas decided that an action lay against the trustees of a turnpike-road sued in their *quasi* corporate capacity by their clerk, for negligence in the manner in which they had caused drains to be made. This decision, it is hardly necessary to point out, though quite consistent with all that was decided by the House of Lords in *Duncan v. Findlater* (6 Cl. & F. 894), is directly opposed to the opinion of Lord Cottenham. And, lastly, in *Brownlow v. the Metropolitan Board* (13 Com. B. Rep. N.S. 768; s. c. 31 Law J. Rep. (N.S.) C.P. 140), it was decided that an action lay against the Metropolitan Board for the injury sustained by a shipowner for the improper construction of a sewer in the bed of the Thames. And this decision was affirmed by the Court of Exchequer Chamber (16 Ibid. 546; s. c. 33 Law J. Rep. (N.S.) C.P. 233). It must rest with your Lordships to say whether those decisions to which we have referred are to be overruled. We think they are not consistent with Lord Cottenham's opinion.

Before leaving this part of the subject we ought to call your Lordships' attention more particularly to the case of *Halliday v. St. Leonard's, Shoreditch* (11 Com. B. Rep. N.S. 192). The point actually decided there was, that there is an exception from the general law making a master liable for the negligence of his servant, where the servant is employed by a public body. The Court of Common Pleas did not intend to decide anything inconsistent with the decisions of the Court of Exchequer Chamber now at your Lordships' bar, or with their own decision in *Whitehouse v. Fellows* (10 Com. B. Rep. 779; s. c. 30 Law J. Rep. (N.S.) C.P. 305). And the point which they did decide does not arise in the present case, so that it is unnecessary directly to decide anything upon it. But we think we ought to call your Lordships' attention to the case, as much

of what was said in the course of the judgment by Chief Justice Erle, is based upon the opinion of Lord Cottenham in *Duncan v. Findlater* (6 Cl. & F. 894), and is therefore an authority making against the view we have submitted to your Lordships.

There remains only one further point to consider. The acts under which the Liverpool Docks have been made contain, as has been already mentioned, clauses enabling the trustees of the docks to appoint water-bailiffs and harbour-masters, and confers on those officers powers of regulating the manner in which vessels shall enter the docks, &c. It was argued that the effect of these clauses was to confine the duty of the trustees to that of selecting proper officers, and they could not be responsible further. The case of *Metcalfe v. Hethrington* (11 Exch. Rep. 257; s. c. 24 Law J. Rep. (N.S.) Exch. 314) was cited as an authority for this position, and we think it is a decision much in point. The Court of Exchequer there, in construing the Maryport Harbour Act, attributed this effect to enactments not very dissimilar to those now in question, and we agree, if this was so, the consequence would follow that the plaintiff's remedy would be, not against those who appointed the officer, but only against the officer himself. But we cannot agree in so construing the present acts.

As has been already pointed out, clauses almost identical with those now in question are inserted in every Harbour and Dock Act, whether the docks be, as in the present case, the property of public commissioners or of a trading company. And we cannot think that it was the intention of the legislature to deprive a shipowner who pays dues to a wealthy trading company, such as the St. Catherine's Dock Company for instance, of all recourse against them, and to substitute the personal liability of a harbour-master, no doubt a respectable person in his way, but whose whole means, generally speaking, would not be equal to more than a very small per-centage of the damages, when there are any. If these enactments are in the present case so construed as to relieve the Mersey Board from liability, the corresponding enactments in the Harbours, Piers and Docks Clauses Act, 1847, must also be so construed as to relieve all trading dock companies from liability, and that we think a *reductio ad absurdum*. This was not brought to the notice of the Court of Exchequer when deciding *Metcalfe v. Hethrington* (11 Exch. Rep. 257; s. c. 24 Law J. Rep. (N.S.) Exch. 314). With the greatest respect for those who joined in that decision, we think it was erroneous.

For these reasons, we answer both your Lordships' questions in each of these cases in the affirmative, that is, in favour of the plaintiffs below, the defendants in error.

The LORD CHANCELLOR.—These are two appeals, depending very much upon the same principles as those which led to the decision of your Lordships' house last year, in the case of *The Mersey Docks and Harbour Board v. Cameron* (35 Law J. Rep. (N.S.) M.C. 1).

The question there was, whether the trustees of the docks and harbour, who are a body having no beneficial interest in the tolls and other produce of the docks, were rateable to the relief of the poor. The argument was, that, as a public body, not receiving tolls for their own benefit, they were not liable; but your Lordships, after a long argument, decided that they were.

The question in the present two cases is different. Both cases arise out of one transaction. A ship called the *Sierra Nevada* in entering, or endeavouring to enter, one of the docks sustained injury, by reason of a bank of mud left negligently at its entrance. The ship and the cargo were damaged. Two actions were brought against the appellants; one by Gibbs, as owner of the cargo, the other by Penhallow, as owner of the ship. I do not think it necessary to go through the pleadings. In both cases the Exchequer Chamber held that the appellants were liable. In both cases they have appealed; and the ground of appeal is, that they are not a public

company deriving benefit, like a railway company, from the traffic, but a public body of trustees, constituted by the legislature, for the purpose of maintaining the docks, and for that purpose having authority to collect tolls, to be applied in the maintenance and repair of the docks, then in paying off a large debt, and ultimately in reducing the tolls for the benefit of the public.

In the case of Gibbs, it must be taken, as admitted by the appellants, that knowing that the dock was, by reason of an accumulation of mud thereon, in an unfit state to be navigated, they did not take reasonable care to put the same "into a fit state for that purpose"; whereupon the *Sierra Nevada*, in endeavouring to enter into the dock, struck against the mud, and the cargo thereby became damaged. In the other case (which did not arise upon a demurrer) it must be taken as an established fact that the appellants had, by their servants, the means of knowing the dangerous state of the dock, but were negligently ignorant of it. It is plain that if the appellants are liable in the former case, they must be liable also in the latter. If the knowledge of the existence of the mudbank made them responsible for the consequences of not causing it to be removed, they must be equally responsible if it was only through their culpable negligence that its existence was not known to them. The principles, therefore, which are to regulate the judgment of the House in the one case must also decide it in the other; and the question, therefore, is what are the principles which regulate the liabilities of such a body as that of the Mersey Docks and Harbour Board.

Where such a body is constituted by statute, having the right to levy tolls for their own profit, in consideration of their making and maintaining a dock or a canal, there is no doubt of their liability to make good to the persons using it any damage occasioned by their neglect in not keeping the works in proper repair. This was decided by the Court of Queen's Bench, and their decision was affirmed in the Court of Error in the case of *The Lancaster Canal Company v. Parnaby* (11 Ad. & E. 230; s. c. 9 Law J. Rep. (N.S.) Exch. 338). The ground on which the Court of Error rested their decision in that case is stated by Chief Justice Tindal to have been that the company made the canal for their profit, and opened it to the public upon the payment of tolls; and the common law in such a case imposes a duty upon the proprietors to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may do so without danger to their lives or property.

The only difference between that case and those now standing for decision by your Lordships is, that here the appellants, in whom the docks are vested, do not collect tolls for their own profit, but merely as trustees for the benefit of the public. I do not, however, think that this makes any difference in principle in respect to their liability. It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not, such a distinction arising not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed.

It is impossible to argue, after the decision of this House in the case of *The Mersey Docks and Harbour Board v. Cameron* (35 Law J. Rep. (N.S.) M.C. 1), that the appellants are not in the occupation of the docks; they are as much the occupiers of them as if they received the tolls and dues for their own use and benefit. The principle of that decision, coupled with that of *The Lancaster Canal Company v. Parnaby* (11 Ad. & E. 230; s. c. 9 Law J. Rep. (N.S.) Exch. 338), must govern this case. The appellants are the occupiers of the docks, entitled to levy tolls from those who use them, and so are liable to the same responsibilities as would attach on them if they were the absolute owners, occupying and using them for their own profit.

It cannot be denied that there have been *dicta*, and perhaps decisions,

not capable of being reconciled with the result at which I have arrived; but the whole series of authorities has been so fully brought under review, in the very able and elaborate opinion of the learned Judges delivered by Mr. Justice Blackburn, in answer to the questions put to them by your Lordships, that I do not feel myself called on to do more than to express my concurrence in that opinion.

I content myself, therefore, with moving your Lordships to give judgment, in both cases, for the defendants in error.

LORD WENSLEYDALE.—The Court of Exchequer Chamber, in both these cases, founded their judgment on that of the Exchequer Chamber in the case of *The Lancaster Canal Company v. Parnaby* (11 Ad. & E. 230; s. c. 9 Law J. Rep (N.S.) Exch. 338), in which case there a company incorporated by act of parliament, for the purpose of maintaining a canal, to be open for the use of the public on payment of rates, which the canal company might receive for their own benefit (that is, the profits to be divided amongst the shareholders); and the Court held that the common law imposed a duty on the proprietors, not, perhaps, to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they kept it open for use of all that might navigate it, that they might navigate it without damage to their lives or property.

Of the propriety of this decision there could be no doubt, where the profits were received for the benefit of the company. In the present case, the dock board do not receive the rates for their own use, but to be applied to great public purposes for the benefit of all the subjects of the realm; that is, to maintain the docks for any who choose to frequent them, and to pay the debt incurred in their construction; and the Court decided that there was no difference between that case and the present.

If this question were *res integra*, not settled by the authority of decisions, I am strongly inclined to think that this decision of the Courts could not be supported. It would appear to me that this case falls within the principle of those cases which have decided that when a person is acting as a public officer on behalf of Government, and has the management of some branch of government business he is responsible for the neglect or misconduct of servants, though appointed by himself, in the same business. This was the principle of the decision in *Lane v. Cotton* (2 Ld. Raym. 646) and *Whitfield v. Le Despencer* (Cowp. 745), and other cases. The subordinates are the servants of the public, not of the person or persons who have the superintendence of that department, even if appointed by them.

Thus, the Postmaster-General, who has the management of one department of the public service—the duly receiving and conveying and delivering letters from and to different places, which is eminently beneficial to the whole community, and causes profit to the Government—is not responsible for any of the servants of the Post-office department, though he might appoint or dismiss them; and whether the Postmaster-General be an individual, as he is now, or two, as in the case of *Whitfield v. Le Despencer* (Cowp. 754), or if more, however numerous, or the Crown were to make a corporate body for the regulation and government of the Post-office, neither individuals nor a corporate body would be responsible for the neglect of their servants. In this case, if there had been a Postmaster-General for all the ports of England, to take care that the receipt and discharge of goods and the repairs of ships should be easy and convenient, and the receipt of Customs duties convenient; or suppose his duties to be limited to a certain number of ports, or suppose a corporation were appointed instead of an individual, would it cause that corporation to be responsible for the defects of its officers, by whom alone they act in the management of the docks, and in the due discharge of its duties towards the public, on whose behalf it was acting?

If we had now only to review a great number of cases connected with this subject decided in different Courts, many contradictory and very many

unsatisfactory, I should be disposed to abide by the decision of the case of *Metcalfe v. Hethrington* (11 Exch. Rep. 257; s. c. 24 Law J. Rep. (N.S.) Exch. 314), where the trustees and managers of the harbour were held not to be responsible for the default of the persons actually employed in conducting the business of the harbour.

If this case depended only on the decision of the Courts below, I should feel great difficulty indeed in supporting the decision of the Court of Exchequer Chamber; but I cannot help thinking that the decisions of your Lordships' House, which are, no doubt, binding upon your Lordships and all inferior tribunals, have gone so far that they have concluded the question, and ought to be considered as deciding that the appellants are responsible. In the case of *The Mersey Docks and Harbour Board Trustees v. Cameron* (35 Law J. Rep. (N.S.) M.C. 1), and *Jones v. the Mersey Docks and Harbour Board Trustees* (35 Law J. Rep. (N.S.) M.C. 1), in July, 1864, your Lordships, upon a full review and consideration, after a difference of opinion between the consulted Judges, decided that the appellants, the Mersey Dock and Harbour Board, were liable to be rated as occupiers, though they occupied those docks for the purposes of those who frequented the port, and derived no benefit from the occupation; and that they did not occupy for public purposes in such a sense as to exempt them from liability to poor rates.

It seems to follow, therefore, that they were not considered as being on the same footing as occupiers of public buildings for Post-office or other Government purposes, but were liable as mere private individuals; and if so, it is difficult to say that they were acting on behalf of the public for the public benefit, and, therefore, were irresponsible for the neglect and default of their servants, by whom alone they could act. Whether they were acting for the benefit of the public or not, seems to be decided by that case.

As we are bound by your Lordships' decision, the opinion of the learned Judges, delivered by Mr. Justice Blackburn, must be considered as correct, and therefore ought to be affirmed.

LORD WESTBURY.—I entirely concur in the conclusion derived from the authorities and from the principles of law laid down in the very able opinion delivered to your Lordships by Mr. Justice Blackburn. I concur also in the observations of my noble and learned friend on the woolsack, and that judgment ought to be given for the defendants in error.

But I think it desirable to say a few words with reference to the difficulty felt by the learned Judges in consequence of certain observations that fell from Lord Chancellor Cottenham, and which are reported in the case of *Duncan v. Findlater* (6 Cl. & F. 894). I can well divine what was, at that time, passing in the mind of my Lord Cottenham. My Lord Cottenham seems to have thought, that if a corporation be trustees of property for the direct benefit of certain individuals, and there is no other corporate property, and if in their capacity as trustees an act is done by order of the corporation, which amounts to a tort or trespass, and gives a right of action, and a right to damages to any private individual, a Court of equity would not permit an execution to issue on any judgment that might be recovered against the property of the corporation, seeing that it is property held upon trust for certain beneficiaries, and that the corporation, as trustees, have no interest therein. But I apprehend that that was a misapprehension on the part of the noble and learned Lord, and that it would lead to very mischievous consequences. It is by no means true that a Court of equity is able to protect the property of beneficiaries against the act of trustees. If trustees alienate property for a valuable consideration, to a person who pays that consideration without notice of the trust, the interest of the beneficiaries suffers from that act; and it would be a very unreasonable and a very mischievous thing if, in the case of a corporation dealing with the public or with individuals, such corporation should, by any conduct of theirs in respect to property committed to their care, give a right of action to individuals, that such individuals should

be deprived of the ordinary right of resorting to a remedy against the body doing or authorizing those acts, and should be driven to seek a remedy against the individual corporators, whose decision or order, in the name of the corporation, may have led to the mischief complained of. It is much more reasonable in such a case, that the trust or corporate property should be amenable to the individual injured, because there is then no failure of justice, seeing that the beneficiary will always have his right of complaint, and his title to relief against the individual corporators, who have wrongfully used the name of the corporation.

The learned Judges observed, and with very great correctness, that it is not everything that falls from a noble and learned Lord in advising the House which is to be considered as the opinion of the House. Those observations of Lord Cottenham, which directly tend to this conclusion, that the corporation in the case supposed would not be amenable, nor would the corporate property be liable, but that the party injured would be obliged to have resort to the individual members who directed the act to be done, would, if they were recognized as the law, undoubtedly lead to very great evil and injury.

I confine my observations to the case of a remedy sought for a wrongful act; because your Lordships are very well aware that the rule has been well established, that if, in the case of a contract entered into with a corporation created by an act of parliament, the contract is made by the corporation *ultra vires* of the corporation, the party may not be entitled to recover under that contract. That may be a very convenient rule, and it is not at all affected by the considerations we are now dealing with; but with regard to the observations attributed to the noble and learned Chancellor (Lord Cottenham), I conceive that they ought not to be taken or regarded as establishing any rule that at all interferes with the decision at which your Lordships have arrived in the case now before you.

With regard to what has been suggested by my noble and learned friend (Lord Wensleydale) that it would be a more correct principle to hold officers of public departments not to be answerable for inferior servants, that may be quite correct where an officer fulfilling a public duty is directly appointed by the Crown, and is acting as the servant of the Crown; but it has no application to the case of trustees incorporated for the purpose of public works, and standing in relation to the public in the way these trustees do in the present case. I concur, therefore, in the motion of my noble and learned friend.

Judgment affirmed, with costs, in both appeals.

[IN THE HOUSE OF LORDS.]

Feb. 18, 19, 22, 23, July 7, 1864. June 22, 1865.

JONES AND OTHERS v. THE MERSEY DOCKS AND HARBOUR BOARD.

THE MERSEY DOCKS AND HARBOUR BOARD v. CAMERON AND OTHERS.

35 L. J. M.C. 1; 11 H. & C. 443; 11 E. R.; 20 C.B. N.S. 356; 12 L. T. 643; 13 W. R. 1069; 11 Jur. N.S. 746.

Followed, *Leith Harbour Commissioners v. Inspector of Poor*, 1866, L. R. 1 H. L. (Sc.) 17 H.L. (Sc.). See, *Mersey Docks and Harbour Board v. Gibbs*, [1866] E. R. A.; 35 L. J. Ex. 225; L. R. 1 H.L. 93; 14 L. T. 677; 14 W. R. 865 (H.L.). Distinguished, *Mayor of Lincoln v. Overseers of*

Holmes Common, [1867] E. R. A.; 36 L. J. M.C. 73; L. R. 2 Q.B. 482; 16 L. T. 739 (Q.B.). Commented on, *R. v. St. Martin's, Leicester*, [1867] E. R. A.; 36 L. J. M.C. 99; L. R. 2 Q.B. 493; 16 L. T. 625; 15 W. R. 1036 (Q.B.). See, *R. v. Sherford*, [1867] E. R. A.; 36 L. J. M.C. 113; L. R. 2 Q.B. 503; 16 L. T. 663; 15 W. R. 1035 (Q.B.). Principle applied, *Lancashire JJ. v. Cheetham Overseers*, [1868] E. R. A.; 37 L. J. M.C. 12; L. R. 3 Q.B. 14; 16 W. R. 124 (Q.B.). Principle adopted, *Greig v. Edinburgh University*, 1868, L. R. 1 H.L. (Sc.) 348 (H.L. (Sc.)). Applied, *R. v. M'Cann*, [1868] E. R. A.; 37 L. J. M.C. 123; L. R. 3 Q.B. 677; 19 L. T. 115; 16 W. R. 985 (Ex. Ch.). See, *R. v. Mayor of Oldham*, [1868] E. R. A.; 37 L. J. M.C. 169; L. R. 3 Q.B. 474; 18 L. T. 240; 16 W. R. 789 (Q.B.). Applied, *R. v. Rhymney Railway*, [1869] E. R. A.; 38 L. J. M.C. 75; L. R. 4 Q.B. 276; 17 W. R. 530 (Q.B.). Referred to, *Att. Gen. v. Dakin*, [1870] E. R. A.; 39 L. J. Ex. 113; L. R. 4 H.L. 338; 23 L. T. 1; 18 W. R. 1111 (H.L.); *Metropolitan Board of Works v. West Ham Overseers*, [1871] E. R. A.; 40 L. J. M.C. 30; L. R. 6 Q.B. 193; 23 L. T. 490; 19 W. R. 246 (Q.B.); *Morgan v. Crawshaw*, [1871] E. R. A.; 40 L. J. M.C. 202; L. R. 5 H.L. 304; 24 L. T. 889; 20 W. R. 554 (H.L.). Principle applied, *Att.-Gen. v. Black*, [1871] E. R. A.; 40 L. J. Ex. 194; L. R. 6 Ex. 78; 25 L. T. 207; 19 W. R. 1114 (Ex. Ch.); *St. Thomas' Hospital v. Stratton*, [1876] E. R. A.; 45 L. J. M.C. 23; L. R. 7 H.L. 477; 30 L. T. 37; 23 W. R. 882 (H.L.). Adopted, *R. v. West Derby Overseers*, [1875] E. R. A.; 44 L. J. M.C. 98; L. R. 10 Q.B. 283; 32 L. T. 400 (Q.B.). See, *Mayor of Essendon v. Blackwood*, [1877] E. R. A.; 46 L. J. P.C. 98; 2 App. Cas. 574; 36 L. T. 625; 25 W. R. 834 (P.C.). Distinguished, *Hare v. Putney Overseers*, [1881] E. R. A.; 50 L. J. M.C. 81; 7 Q.B. D. 223; 45 L. T. 337; 29 W. R. 721 (C. A.); *R. v. Curzon*, 1882, 46 L. T. 159; 30 W. R. 521 (Q.B.D. Div.). Referred to, *Martin v. West Derby Assessment Committee*, [1883] E. R. A.; 52 L. J. M.C. 66; 11 Q.B. D. 145; 31 W. R. 489 (C. A.). See, *Mersey Docks and Harbour Board v. Lucas*, [1884] E. R. A.; 53 L. J. Q.B. 4; 8 App. Cas. 891; 49 L. T. 781; 32 W. R. 34 (H.L.). Discussed, *Coomber v. Berkshire JJ.*, [1884] E. R. A.; 53 L. J. Q.B. 239; 9 App. Cas. 61; 50 L. T. 405; 30 W. R. 779 (H.L.). See, *R. v. West Bromwich School Board*, [1884] E. R. A.; 53 L. J. M.C. 67, 153; 13 Q.B. D. 929; 52 L. T. 164; 32 W. R. 866 (Q.B.D. Div. & C. A.); *Mersey Docks and Harbour Board v. Llanelian*, [1885] E. R. A.; 54 L. J. Q.B. 349; 14 Q.B. D. 770; 52 L. T. 118; 33 W. R. 97 (C. A.). See, *Dewsbury and Heckmondwike Waterworks Co. v. Penistone Union*, [1886] E. R. A.; 55 L. J. M.C. 28; 16 Q.B. D. 585; 54 L. T. 592 (Q.B. D.); affirmed, [1866] E. R. A.; 55 L. J. M.C. 121; 17 Q.B. D. 384; 54 L. T. 592; 34 W. R. 622 (C. A.); *Dublin Corporation v. M'Adam*, 1887, 20 L. R. Ir. 497 (Ex. D.). Discussed, *Tunnicliffe v. Birkdale Overseers*, 1888, 20 Q.B. D. 450; 59 L. T. 190; 36 W. R. 360 (C. A.). See, *Bray v. Lancashire JJ.*, [1888] E. R. A.; 57 L. J. M.C. 57; 59 L. T. 438 (Q.B.D. Div.); affirmed, [1889] E. R. A.; 58 L. J. M.C. 54; 22 Q.B. D. 484; 37 W. R. 392 (C. A.). See, *Dillon v. Haverfordwest Corporation*, [1891] E. R. A.; 60 L. J. Q.B. 477; [1891] 1 Q.B. 575; 64 L. T. 202; 39 W. R. 478 (Q.B. D.). Referred to, *Perry v. Eames*, [1891] E. R. A.; 60 L. J. Ch. 345; [1891] 1 Ch. 658; 64 L. T. 438; 39 W. R. 602 (Ch. D.); *Commissioners of Income Tax v. Pemsel*, [1892] E. R. A.; 61 L. J. Q.B. 265; [1891] A.C. 531; 65 L. T. 621 (H.L.). See, *London County Council v. Erith Churchwardens*, [1893] E. R. A.; 63 L. J. M.C. 9; [1893] A.C. 562; 69 L. T. 725; 42 W. R. 330 (H.L.); *London County Council v. Lambeth Overseers*, [1896] E. R. A.; 65 L. J. M.C. 148; [1896] 2 Q.B. 25; 74 L. T. 605; 44 W. R. 621 (C. A.); affirmed, [1897] E. R. A.; 66 L. J. 806; [1897] A.C. 625; 76 L. T. 795 (H.L.); *Waterford Union v. Barton*, [1896] 2 I. R. 538 (Ex. D.). Adopted, *Middlesex County Council v. St. George's Union Assessment Committee*, [1897] E. R. A.; 66 L. J. Q.B. 101; [1897] 1 Q.B. 64;

75 L. T. 464; 45 W. R. 215 (C. A.). Referred to, *Harte v. Holmes*, [1898] 2 J. R. 656 (Q.B. D.). Applied, *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee*, [1901] E. R. A.; 70 L. J. K.B. 584; [1901] A.C. 175; 84 L. T. 542; 49 W. R. 610 (H.L.). See, *Hackney, Corporation v. Lee Conservancy Board*, [1904] E. R. A.; 73 L. J. K.B. 766 [1904] 2 K.B. 541; 91 L. T. 13 (C. A.); *Davies v. Seisdon Union*, [1907] E. R. A.; 76 L. J. K.B. 472; [1907] 1 K.B. 680; 96 L. T. 315 (C. A.): affirmed, [1908] E. R. A.; 77 L. J. K.B. 742; [1908] A.C. 315; 99 L. T. 30 (H.L.). Referred to, *Winstanley v. North Manchester Overseers*, [1910] E. R. A.; 79 L. J. Q.B. 95; [1910] A. C. 7; 101 L. T. 616 (H.L.).

*Poor-Rate—Rateable Occupation—Beneficial Occupation—Exemption on Ground of Public Purposes—Trustees of Public Works, &c., Crown Property—*43 Eliz. c. 2.—8 & 7 Will. 4. c. 96.

CROWN. RATES AND RATING.—*The occupation of property which is liable to be rated under the 1st section of the 43 Eliz. c. 2. is an occupation yielding or capable of yielding a net annual value, that is to say, a clear rent over and above the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain the property in a state to command such rent, and it is not necessary that the occupation should be beneficial to the occupier; so that trustees, who are in law, the tenants and occupiers of valuable property upon trust for charitable purposes, such as hospitals or lunatic asylums, are rateable, notwithstanding that the buildings are actually occupied by paupers who are sick or insane.*

The only occupiers exempt from the operation of the act are the Sovereign, because he is not named in the statute, and the direct and immediate servants of the Crown, whose occupation is the occupation of the Crown itself; and the only ground of exemption from the statute is that which is furnished by the above rule. And, consequently, when properly yielding a rent above what is required for its maintenance is sought to be exempted on the ground that it is occupied by bare trustees of public purposes, the public purposes must be such as are required and created by the Government of the country, and are therefore to be deemed part of the use and service of the country.

The first above-mentioned case was a proceeding in error from the judgment of the Court of Exchequer Chamber, sitting in error from the Court of Common Pleas, confirming the judgment given in the Court below in favour of the plaintiffs below (who were the defendants in error) upon a special case.

The question raised in the case was whether the docks at Liverpool were liable to be rated to the relief of the poor.

The action, in form an action of replevin, was brought by the plaintiffs below in their present corporate name of The Mersey Docks and Harbour Board (hereinafter called the Dock Corporation), against the churchwardens and overseers of the poor of the parish of Liverpool, the plaintiffs in error, who were the defendants below, for the taking and detaining of certain goods and chattels of the Dock Corporation. The distress complained of was levied by reason of the non-payment of a poor-rate, made on the 2nd of June, 1858, whereby the Dock Corporation were assessed in the sum of 20,580*l.* 18*s.* 8*d.*, as the amount payable by them in respect of the dock estates within the parish of Liverpool.

Upon the distress being levied the Dock Corporation entered into the usual replevin bond and brought their action, and thereupon a special case containing the facts was stated between the parties, and which, so far as is material, was as follows:

SPECIAL CASE.

The dock estates within the parish of Liverpool became vested originally in the mayor, aldermen, and common council of the borough of Liverpool,

as trustees of the docks and harbour of Liverpool, by virtue of several acts of parliament. Part of those estates was granted voluntarily by that corporation, part was sold by that body to the trustees for a pecuniary consideration, and other parts were purchased by the trustees from private individuals according to the powers given to them by the said before-mentioned and other acts, being altogether twenty-two in number, and forming a series extending from the eighth year of Queen Anne to the twenty-first year of her present Majesty, both inclusive. Before the construction of many of the present works, part of the land was shore both above and below high-water mark, but the greater part consisted of lands and buildings in the occupation of individuals rated to the relief of the poor of the said parish. The dock estates at present consist of docks, basins, piers, jetties, graving docks, gridirons, wharfs, quays, sheds, offices, buildings, landings, landing-stages, slips, stairs, river walls, dams, embankments, locks, gates, bridges, weirs, sluices, tunnels, cuts, channels, roads, railways, tramroads, cranes, engines, machinery, and other matters and conveniences requisite to form complete docks; and the trustees are authorized to receive large sums of money under the name of dock rates and duties, for the accommodation of vessels in the said docks, by virtue of the said acts of parliament.

Under the 6 Geo. 4. c. 187. and the 14 & 15 Vict. c. 64. a committee was appointed in the manner directed by the acts, called 'The committee for the affairs of the estate of the trustees of the Liverpool Docks,' and all the powers and authorities of the said trustees of the Liverpool Docks were vested in such committee. By the statute 20 & 21 Vict. c. 162, local and personal, entitled 'An Act for consolidating the docks at Liverpool and Birkenhead into one estate, and for vesting the control and management of them in one public trust, and for other purposes,' s. 26, all the docks, lands, buildings, and other property, real and personal, situate at Liverpool, that were held by or in trust for the trustees of the Liverpool Docks, became vested in the plaintiffs under the style of 'The Mersey Dock and Harbour Board,' but subject to all charges and liabilities affecting the same. By section 49. of the last-mentioned act, it is enacted that, "subject to the provisions of this act, the board shall stand possessed of all the property, powers, rights, and privileges hereby transferred to them upon the trusts, and for the purposes upon and for which such property, powers, rights and privileges were holden previously to the commencement of this act." The 56th section of the same act enacts as follows: "The following rules shall be observed by the board with respect to the monies received by them under this act (that is to say):—(1.) The conservancy expenditure shall be defrayed out of the conservancy receipts. (2.) The pilotage expenditure shall be defrayed out of the pilotage receipts. (3.) No portion of the conservancy receipts or pilotage receipts shall be applied in aid of the general expenditure. (4.) No sums shall be payable in respect of any docks by any vessel that does not use the same. (5.) Save as by this act is provided, no monies receivable by the board shall be applied to any purpose unless the same conduces to the safety or convenience of ships frequenting the port of Liverpool, for facilitating the shipping or unshipping of goods, or is concerned in discharging a debt contracted for the above purposes." The 59th section of the same act is as follows: "The board shall render to parliament, as soon as may be after the 24th day of June in every year, an account of its receipts during the preceding year ending the 24th day of June, and the manner in which the same has been applied."

The board manages the dock estates by its servants and agents, who receive and account for to the board the dues and other monies arising from the management of the said estates, and no part of the estates and premises comprised in the above assessment or schedule is let off to other persons, nor are any rents paid to the board for any part thereof. With regard to the application of the monies received as dock duties, the statute 8 Ann. c. 12. s. 9, under which the first dock was built, enacts "That all and every such

sum and sums of money that shall be raised and received by the duties aforesaid, and recovered for any of the forfeitures in this act appointed, other than so much thereof as shall be laid out and allowed to the collector or other necessary officer for the collecting and managing the said duty for charges of recovering the same, shall, by the said mayor, aldermen, bailiffs, and common council for the time, be applied and disposed of to the building and repairing the said new dock or basin and other works, and for the securing, preserving, amending, and maintaining the said dock or basin and harbour of Liverpool, and to no other use and purpose whatsoever." By sections in the subsequent acts, all the acts in the series, including this of 8 Anne, are directed to be read and construed as one act.

All the dock rates payable by the former acts of parliament were repealed by the 51 Geo. 3. c. 143, by which new rates were substituted. The 27th section of that statute is as follows: "And be it further enacted, that all the monies which shall be collected, received, levied, borrowed and raised by and under this act shall be applied in paying and defraying the charges and expenses attending the obtaining and passing this present act, and to the paying the expenses and charges attending the levying and collecting the said rates and duties, and after the paying and appropriating one-third part of the said monies to and for the purpose of making and completing the southernmost portion of the said North Docks, as hereinafter is mentioned, then to the paying off and discharging the present bond debt of 114,705*l.* 1*s.* 4*d.*, and the debt of 67,406*l.* 18*s.* 7*d.* owing by the said trustees to the Corporation of Liverpool for the purchase of land and strand intended for the site of the southernmost of the said Northern Docks, and any future bond debt, and the interest on the same, and to the paying and discharging the interest and all other monies which may be hereafter borrowed and taken up at interest under the provisions of this act upon the credit of the said dock rates and duties as aforesaid, and to the carrying into execution the purposes of this act and the said recited acts, in the making, erecting, building, finishing, and maintaining such docks, basins, piers, and other works and buildings in the port of Liverpool, under the said acts and this act, and to the paying, defraying, and satisfying all other charges and expenses already incurred or hereafter to be incurred in the carrying into execution, or under or in consequence of any of the said former acts or this present act; and the residue or surplus of all monies arising from such rates or duties which shall remain after such application thereof as aforesaid shall from time to time be applied in or towards the repayment of the principal monies which shall have been borrowed under this act, until all such principal monies shall be repaid, and all assignments of or mortgages upon such rates and duties are paid off, satisfied, discharged, and redeemed; and when by the means last mentioned all the principal monies which shall have been borrowed shall be repaid, and all assignments and mortgages upon the said rates are satisfied and redeemed, then and in such case it shall be lawful for the said trustees, and they are hereby required, to lower and reduce the rates and duties hereby granted and made payable, as far as the same can be done in the then state of the docks, basins, buildings, and other works and buildings of the said port, and leaving sufficient for all charges of management and collection of rates and other concerns of the said docks, basins, piers, works, and other buildings, and improving, repairing, and maintaining the same, and for the carrying into execution the provisions of the said former acts and this act."

By the act 6 Geo. 4. c. 187. power is given, by the 105th section, to the said trustees to levy certain fresh rates; and by the 106th section to lower all rates, and to raise the same again; and by the 130th section it is enacted, "That all the monies which shall be collected, levied, borrowed and raised under this act, or the said recited act, shall be applied in any order, with respect to priority of such application, as to the said trustees shall seem expedient and proper, except as by this act provided as to the time of payment of assignments of the said rates and duties granted by virtue of

the said recited act, in payment of and in defraying the costs, charges, and expenses of obtaining this act, and in paying the expenses and charges of collecting the rates and duties and all interest due and to grow due from time to time on monies borrowed or taken up at interest by the said trustees, and any principal monies that may be called in from time to time, and in the general management and conducting of the said trust estate, in the construction of the works by this and the said former acts authorized to be erected, established and maintained, in supporting, maintaining, and repairing the same, and every part thereof, and in carrying into execution all the provisions of the said several acts and this act, and in paying off and discharging the whole or any part of any present bond or other debt, and any future bond or other debt, and all interest due and to grow due thereon, and also in the paying and satisfying all the charges and expenses already incurred, or hereafter to be incurred in carrying into execution the usual purposes of or under or in consequence of any of the clauses, provisions, powers, or authorities contained in the said former acts or this act."

By the act 4 Vict. c. 30. power is given to the trustees to erect transit-sheds, to make a wet-dock, to construct other works, and to raise a further sum of money, and to levy certain additional rates; and by the 124th section it is enacted, "That all the monies which shall be collected, levied, borrowed, or raised, under and by virtue of the said recited acts and this act, shall be applied in any order, with respect to priority of such application, as to the said trustees shall seem expedient, in and towards completion of the several docks, transit-sheds, warehouses, and other works, by the said recited acts and this act authorized to be made, formed, erected and built, and for and towards the several objects and purposes in the said recited acts and this act mentioned, in the general management and conducting of the said trust estate, and carrying into execution all the provisions of the said recited acts and this act, and for the general improvement and reparation of the docks, basins, and works, of the said trustees."

By the act 7 & 8 Vict. c. 80. power is given to the said trustees to construct additional docks and raise further sums of money; and by the 127th section it is enacted, "That all the monies which shall be collected, levied, borrowed, or raised, under and by virtue of the said recited acts and this act, shall be applied, first, in and towards the payment of all expenses of and attending the passing of this act, and then in and towards the completion of the several docks and other works by the said recited acts and this act authorized to be made and constructed, and for and towards the several objects and purposes in the said recited acts and this act mentioned, and in the general management and conducting of the said trust estate, and carrying into execution the provisions of the said recited acts and this act, and for the general improvement and reparation of the several docks and other works of the said trustees."

By the 9 & 10 Vict. c. 109. power is given to the said trustees to construct additional wet-docks and other works, and to raise a further sum of money; and by the 47th section it is enacted, "That all the monies which shall be collected, levied, borrowed, or raised, under and by virtue of the said recited acts and this act, shall be applied, first, in and towards the payment of all expenses of and attending the passing of this act, and then, in and towards the completion of the several docks and other works by the said recited acts and this act authorized to be made and constructed, and for and towards the several objects and purposes in the said recited acts and this act mentioned, and in the general management and conducting of the said trust estate, and carrying into execution the provisions of the said recited acts and this act, and for the general improvement and reparation of the several docks and other works of the trustees."

By the act 11 Vict. c. 10. power is given to the said trustees to construct additional docks and other works; and by the 40th section it is enacted, "That all money which shall be collected, levied, borrowed, or raised, under

and by virtue of this and the said recited acts, shall be applied in and towards the payment of all expenses of and attending the passing of this act, and in and towards the construction and completion of the several docks, warehouses, and other works by the said recited acts and this act authorized to be made and constructed, and for and towards the several objects and purposes in the said recited acts and this act mentioned, and in the general management and conducting of the said trust estate, and carrying into execution the provisions of the said recited acts and this act, and for the general improvement and reparation of the several docks and other works of the trustees."

The board are bound to apply the present dock rates and dues, and all other monies received by them out of the dock estate, according to the directions of the several acts of parliament, and no member of the board derives any private advantage or emolument whatsoever from the execution of the trusts of the dock estate.

All the docks, sheds, tramways, railroads, offices, and other things mentioned in the assessment, were erected and provided under and in pursuance of the said several acts of parliament or some of them, solely for the purposes of the dock business, and are not used for any other purpose whatsoever, and all revenue of every kind derived by the board from any part of the property is carried to the general dock estate.

By the 4 Vict. c. 30. s. 52. the trustees were empowered to build warehouses on the quays of one of the docks, and by the 11 Vict. c. 30. s. 3. such power to build warehouses was extended to all the dock-quays, and by section 71. of the first-mentioned, and by section 4. of the second-mentioned act, such warehouses were expressly made subject to all parochial and other rates. None of the warehouses built in pursuance of the said acts are included in the assessment.

The question for the opinion of the Court was, whether the Mersey Docks and Harbour Board was rateable to the relief of the poor in respect of their property. If the Court should be of opinion in the affirmative, then judgment was to be entered for the defendants for such sum as the Court should think they were entitled to distrain for, and costs; if the Court should be of a contrary opinion, then judgment was to be entered for the plaintiffs for their costs of suit.

This special case was argued, before the Court of Common Pleas, on the 5th of June, 1860 (8 Com. B. Rep. N.S. 114; s.c. 30 Law J. Rep. (N.S.) M.C. 185), when judgment was given in favour of the Dock Corporation. Against this judgment there was an appeal to the Exchequer Chamber (30 Law J. Rep. (N.S.) M.C. 239), and that Court confirmed the judgment of the Court of Common Pleas.

[Prior to the date of the rate now in question two attempts had been made, one in 1806 and the other in 1825, to rate the Dock Corporation in respect of the Liverpool Docks. By a rate made on the 23rd of September, 1806, the Dock Corporation, by their then style of "The Trustees of the Liverpool Docks," were assessed in respect of the dock dues in the sum of 1,650*l.* The Court of Quarter Sessions, upon appeal, amended the rate by striking out the assessment upon the trustees, subject to the opinion of the Court of King's Bench on a special case. That case was argued before the Court of King's Bench in Hilary Term, 1808, when the order of the Court of Quarter Sessions was confirmed. The point raised and determined in favour of the Dock Corporation was, as appears by the last sentence of the special case, whether the Dock Corporation were liable to any rate whatever for the relief of the poor in the parish of Liverpool. There is no report of this case.

In 1825 the Dock Corporation, by their then style of "The Trustees of the Liverpool Docks," were, by a rate made for the relief of the poor of the parish of Liverpool, again assessed in respect of the dock estate. The Court of Quarter Sessions, upon appeal, amended the rate by striking out the assess-

ment upon the trustees, subject to a case for the opinion of the Court of King's Bench. The case was argued before that Court in 1827, when the order of the Court of Quarter Sessions was confirmed—*The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780).

The Dock Corporation, by five of their Dock Acts, viz., 4 Vict. c. 30. s. 71; 9 & 10 Vict. c. 119. s. 34; 11 Vict. c. 10. s. 4; 18 & 19 Vict. c. 174. s. 31, and the 21 & 22 Vict. c. 92. s. 175, passed respectively in the years 1841, 1846, 1848, 1855, and 1858, were empowered to erect and complete warehouses upon the dock estate. The legislature, on each of these occasions, enacted, that the occupancy by the Dock Corporation of the warehouses so to be erected and completed should be subject to the payment of all parochial and other local rates, in like manner as the same would be payable in respect of warehouses the occupancy of which is beneficial.]

The secondly above-mentioned case (*The Mersey Docks and Harbour Board v. Cameron and others*) was a proceeding in error from the judgment of the Court of Exchequer Chamber, sitting in error from the Court of Common Pleas, confirming the judgment given in that Court (9 Com. B. Rep. 812; s. c. 30 Law J. Rep. (N.S.) M.C. 194) in favour of the defendants upon a special case. The judgment of the Court of Common Pleas was affirmed by the Court of Exchequer Chamber without argument.

The action, in form an action of replevin, was brought by the plaintiffs, the Mersey Docks and Harbour Board, against the defendants, the overseers of the poor of the township of Birkenhead, for the taking and detaining of certain goods and chattels of the plaintiffs. The distress complained of was levied by reason of the non-payment of two poor-rates, made one in May, 1858, and the other in November, 1858, whereby the plaintiffs were assessed in the respective sums of 167*l.* 10*s.* and 235*l.* 2*s.*, as the amounts payable by them in respect of that portion of the Mersey Dock estate which is situate within the township of Birkenhead.

Upon the distress being levied the plaintiffs entered into the usual replevin bond and brought their action, and thereupon a special case, which is not necessary to be here set out, was stated between the parties, and was argued before the Court of Common Pleas in January, 1861, when the Court took time to consider, and on the 25th of February following gave judgment in favour of the defendants, on the ground that the plaintiffs ought to have appealed to the Sessions against the rates, and that an action of replevin would not lie (9 Com. B. Rep. 812; s. c. 30 Law J. Rep. (N.S.) M.C. 194).

Three questions of law arose in that case. First, whether the interest the plaintiffs had in the dock estate was such as to render them liable to be rated to the relief of the poor, under the taxing power conferred by the 43 Eliz. c. 2. Secondly, whether it was competent for the plaintiffs to raise the first question by an action of replevin. Thirdly (if the two previous questions should be answered in the plaintiffs' favour), whether the act of parliament by which the dock estate was vested in the plaintiffs, affirmatively imposed upon them a liability to poor rates, in respect of that part of the dock estate which is situate at Birkenhead.

The first question was identical with that raised in the first above-mentioned case. The second question was waived during the argument. And with regard to the third question, it does not require to be further noticed, by reason of the case having been determined upon the first question.

Bovill and *Mellish*, for the appellants in the first case and the respondents in the second case, after referring to *The Queen v. the Churchwardens and Overseers of Chirton*, nom. *The Tyne Commissioners v. the Overseers of Chirton* (1 E. & E. 516; s. c. 28 Law J. Rep. (N.S.) M.C. 131), *The Trustees of Birkenhead Docks v. the Overseers of Birkenhead* (2 El. & B. 148), *The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780),

The Queen v. the Trustees of the River Lea (19 J.P. 319) and *Adamson v. the Clyde Navigation Trustees* (a Scotch case unreported), *The Queen v. Badcock* (6 Q.B. Rep. 787; s. c. 14 Law J. Rep. (n.s.) M.C. 58) and *The Queen v. the Overseers of Longwood* (13 Q.B. Rep. 116; s. c. 18 Law J. Rep. (n.s.) M.C. 65), argued that there was no difference as to the liability to be rated between the trustees of the Mersey Docks and the trustees of any other docks. *The Queen v. the Harrogate Commissioners* (15 Q.B. Rep. 1010; s. c. 20 Law J. Rep. (n.s.) M.C. 25). The same general principle pervades all these cases, and the later decisions are all uniform from 1845. There is no exemption under the Statute of Elizabeth of property held for public purposes, unless held by the Crown or for the Crown. Looking at the contention on the other side, the marginal note in *The King v. the Commissioners of Salter's Load Sluice* (4 Term Rep. 730) is not according to the decision, which was, that the trustees were not occupiers, or if occupiers, not for their own benefit; and if that case is the law, all the other cases are wrong, for in all the other cases the trustees were occupying in a similar manner to the trustees in that case. *The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) was decided on the ground that there was a direction to lower the rates, and any other application of the rates would be in direct violation of the act. That case governed *The King v. the Trustees of the River Weaver Navigation* (7 B. & C. 70, note (c)). An election must be made between one class of cases or the other. The question is, what is the proper construction of the statute of Elizabeth, and there is no such exemption in the statute as contended for on the other side. Then the acts relating to the Mersey Docks contain no exemption from the rate or any prohibition to the trustees to apply the dock-rates towards the poor-rates, and no repeal of the Statute of Elizabeth with respect to dock companies. The construction of the Statute of Elizabeth in *The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) cannot be sustained. The trustees are bound to discharge their legal liabilities; there is no exemption on the ground of public purposes. *The Queen v. the Churchwardens and Overseers of Chirton* (1 E. & E. 516; s. c. 28 Law J. Rep. (n.s.) M.C. 131) governs the present cases. If any benefit is derived from the occupation, it is immaterial whether the occupier receives as a trustee or not—*The Corporation of Manchester v. the Overseers of Manchester* (17 Q.B. Rep. 859), *The Mayor of Liverpool v. the Overseers of West Derby* (6 El. & B. 704; s. c. 25 Law J. Rep. (n.s.) M.C. 112). The trustees are occupiers within the Statute of Elizabeth.

[The LORD CHANCELLOR.—If we accede to your proposition, what will become of the case of *The King v. St. Luke's Hospital* (2 Burr. 1053)?]

There the trustees were merely nominal owners; there was no profit arising; so, also, in *The King v. St. Bartholomew's Hospital* (4 Burr. 2435).

Sir Fitzroy Kelly and *Quain* (Parker with them), for the respondents in the first case and the appellants in the second case.—The question is, what is the true construction of the statute of Elizabeth as applied to the present case? To render property liable to be rated there must be an occupation from which the occupier must or may derive a benefit; where the occupation is attended with no profit to the occupier or others, there is no liability to be rated. So, where the property is held for public purposes for benefit of the community at large, then, according to the true construction of the Statute of Elizabeth, that is not a property which is liable to be rated—the Taunton Market case, *The Queen v. Badcock* (6 Q.B. Rep. 787; s. c. 14 Law J. Rep. (n.s.) M.C. 68). Then, how do the present cases stand on the basis of authority? Except the cases of *The Queen v. the Trustees of the River Lea* (19 J.P. 319) and *The Queen v. the Churchwardens and Overseers of Chirton* (1 E. & E. 516; s. c. 28 Law J. Rep. (n.s.) M.C. 131), no authority is to be found for a period of 250 years to controvert our proposition, and those cases are distinguishable. The construction contended for would exclude works held by public boards for public purposes. *Early's case* (2 Bulst. 354) points

to this conclusion, as well as *Dalton's Country Justice*, 148 (edit. 1697), tit. 'Poor,' *The King v. the Inhabitants of St. Thomas's Southwark* (2 Stra. 745), *Viner's Abridgment*, tit. 'Poor,' E. 5, and the case of *St. Luke's Hospital* (2 Burr. 1053). The distinction is between actual occupation and beneficial occupation. In *The King v. St. Bartholomew's Hospital* (4 Burr. 2435) the corporation were as much in occupation as the trustees of the Mersey Board, but derived no benefit. In *The King v. Gardener* (Cowp. 79) and *Robson v. Hythe* (Cald. 310) the rate was on account of benefit derived. *The Earl of Bute v. Grindall* (2 H. Black. 265) is important, as shewing that even Crown property may be rated in the hands of a *de facto* occupier who derives an actual benefit. In *Lord Amherst v. Lord Somers* (2 Term Rep. 372) such a distinction was taken—*The King v. Hurdiss* (3 Term Rep. 497). All these cases turn on the question whether the person rated is an occupier within the statute. *Eckersall v. Briggs* (4 Term Rep. 6) distinguishes an occupation for a public purpose from a private occupation. *The King v. the Mayor of London* (Term Rep. 21) was decided on the ground that it did not appear that the persons rated were not beneficial owners. In *The Salter's Load Sluice case* (4 Term Rep. 730) the occupation was for public purposes, and therefore the occupier was not rateable. *The King v. Parrot* (5 Term Rep. 593) was a case of beneficial occupancy; and *The King v. Terrot* (3 East 506) of beneficial enjoyment—*The King v. The New River Company* (1 M. & S. 503). Everything in the present case is inconsistent with the idea of beneficial ownership, and the present case was decided before on that ground. One regular course was followed in *The Governors of the Bristol Poor v. Waite* (5 Ad. & E. 1; s. c. 5 Law J. Rep. (N.S.) M.C. 113), *The King v. the Inhabitants of St. Giles, York*,¹ *The Queen v. the Mayor of Liverpool* (9 Ad. & E. 435; s. c. 8 Law J. Rep. (N.S.) M.C. 41), *The Queen v. the Guardians of the Wallingford Union* (10 Ad. & E. 259; s. c. 8 Law J. Rep. (N.S.) M.C. 89) and *The King v. the Beverley Gasworks* (6 Ad. & E. 645; s. c. 6 Law J. Rep. (N.S.) M.C. 84). If the *Liverpool case* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) and *The Salter's Load Sluice case* (4 Term Rep. 730) were wrongly decided, they have caused fifty other cases to be wrongly decided. If *The Queen v. Badcock* (6 Q.B. Rep. 787; s. c. 14 Law J. Rep. (N.S.) M.C. 68) had not been referred to on the other side, we should have cited it as an authority in our favour upon the principles of liability to rating as there laid down by Lord Denman. It establishes *The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) and *The Salter's Load Sluice case* (4 Term Rep. 730). In the *Queen v. the Harrogate Commissioners* (15 Q.B. Rep. 1010; s. c. 20 Law J. Rep. (N.S.) M.C. 25) Lord Campbell says nothing against *The Liverpool case* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) or *The Salter's Load Sluice case* (4 Term Rep. 730). *Crease v. Sawle* (2 Q.B. Rep. 862) is an authority as to not hastily setting aside decided cases. *The Birkenhead case* (2 El. & B. 148) was decided on narrow and technical grounds, and proceeds on the assumption that the occupation was within the statute of Elizabeth, and it would be monstrous to overrule *The Liverpool case* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) on such an authority. *The Queen v. the Trustees of the River Lea* (19 J. P. 319) and *Adamson v. the Clyde Navigation Trustees* must fall to the ground with *The Birkenhead case* (2 El. & B. 148), as they were decided on its authority, as also *The Queen v. Chirton* (1 E. & E. 516; s. c. 28 Law J. Rep. (N.S.) M.C. 131). If *The Birkenhead case* (2 El. & B. 148) was rightly decided, it does away with the distinction between an occupation for public purposes and a beneficial occupation. The docks would not be liable to be rated under the 6 & 7 Will. 4. c. 96. The warehouses authorized to be erected by the 4 Vict. c. 30. and the subsequent acts being rendered expressly liable to rates by such acts, shews that the legislature considered the remaining property was not liable to be rated. It is quite clear that property held beneficially is liable to be rated,

(1) 3 B. & Ad. 579; s. c. nom. *The Trustees of the York Lunatic Asylum v. the Churchwardens of St. Giles, York*, 1 Law J. Rep. (N.S.) M.C. 50.

and that property not held beneficially is free from such liability. If the Liverpool Docks are not liable to be rated, the Birkenhead Docks are not liable, as they are held on the same trusts, and not beneficially. The rate is not a liability attaching to the property, but to the person in respect of his occupation—*Theed v. Starke* (8 Mod. 213), *Case v. Stevens* (Fitz. 298). The trust now before the House is a much wider trust than those in the cases which appear to be against us; it is one for the benefit of the whole community.

Mellish, in reply.—There is no case before *The Salter's Load Sluice case* (4 Term Rep. 730), in which there was an exemption on the ground of the occupation being for public purposes. To be free from the liability to rates, either there must be no revenue, or a statutory enactment that no portion of it is to be applied for rates. There is no distinction between the present case and the case of *The Queen v. Chirton* (1 E. & E. 516; s. c. 28 Law J. Rep. (N.S.) M.C. 131), which is an express authority in our favour.

The LORD CHANCELLOR put the following questions to the Judges.—First, “Are the Mersey Docks and Harbour Board ‘occupiers’ of the docks vested in them within the true meaning of the word ‘occupier,’ in the statute of 43 Eliz.?”

Secondly, “If they are occupiers within the statute, are they exempted from liability to be rated for relief of the poor by the operation or effect of the statutes, 4 Vict. c. 30, 9 & 10 Vict. c. 119, 11 Vict. c. 10, 18 & 19 Vict. c. 174, and 21 & 22 Vict. c. 92, or any of them, or by reason of the purposes for which they occupy the same, or on any other ground appearing in the special case?”

Thirdly, “Does the act of 20 & 21 Vict. c. 162. (the act of 1857) impose upon the board a liability to poor-rate in respect of the docks, estate, and property vested in the board, or any and what part thereof, by virtue of the 26th and 27th sections of the last-mentioned act?”

On the 7th of July, 1864, the following opinions were delivered.—

BLACKBURN, J.—My Lords, the opinion which, with your Lordships’ permission, I am about to read, contains the joint answers to your Lordships’ questions of the Lord Chief Baron, Mr. Justice Williams, Mr. Justice Mellor, Mr. Baron Pigott, and myself.

To the first question put to us by your Lordships in these causes, we answer that, in our opinion, the Mersey Docks and Harbour Board are occupiers of the docks in question within the true meaning of that word as used in the statute of 43 Eliz. c. 2.

Our reasons for that opinion are as follows: The statute 43 Eliz. c. 2. sect. 1. requires the overseers of every parish to raise by “taxation of every inhabitant, parson, vicar, and other, and of every occupier of” various kinds of real property, and *inter alia* of “lands in the parish, in such competent sum as they shall think fit,” a stock for setting the poor of the parish to work, and for the relief of the poor of the parish.

Though the words of this enactment might seem to give the overseers a discretion to tax each inhabitant in such arbitrary sum as they might think fit, it has long been settled that the taxation of the different persons must be equal and in proportion to the value of their respective means. It would appear, from the passages cited at your Lordships’ bar from *Dalton’s Country Justice*, that this was determined very shortly after the statute was passed. It has always been so held, and the Legislature, by the Parochial Assessment Act (6 & 7 Will. 4. c. 96), has affirmed this principle by enacting that no rate shall be valid unless made “upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants’ rates and taxes, and tithe commutation rentcharge, if any, and

deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."

In order, therefore, that a valid rate may be imposed, it is essential that the occupation be of value beyond what is required to maintain the property; for if the occupation be of so little value that the hypothetical tenant (under the Parochial Assessment Act) would either give no rent, or a rent which, after deducting the average annual expense of the maintenance, would leave no overplus, there is nothing to rate.

The question whether replevin lies has been waived, and therefore it is not necessary further to consider whether in such a case the more proper expression would be that the person in possession of the property was not an occupier at all within the meaning of the statute of Elizabeth, so that the overseer had no jurisdiction to make the rate, and consequently that the levying of it might be resisted in replevin or trespass; or whether, as seems to have been the opinion of the Court of Queen's Bench in *The Overseers of Birmingham v. Shaw* (10 Q.B. Rep. 868; s. c. 18 Law J. Rep. (N.S.) M.C. 89) and *The Queen v. Bradshaw* (29 Law J. Rep. (N.S.) M.C. 176), he is an occupier, whom as such the overseers have jurisdiction to tax, though on appeal the rate must be reduced to nothing.

But that question having been waived, this is now immaterial. Which-ever may be the true mode of enunciating the position, it is clear that there can be no valid rate unless the occupation be such as to be of value, and if the words "beneficial occupation" are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the bar), it is clear that a beneficial occupation is essential as the foundation of the rate; but it is equally clear that, if the phrase be understood in this limited sense, the Mersey Docks and Harbour Board have a beneficial occupation; for they actually occupy land as docks, and in virtue of that occupation receive payments from the shipping using the docks, at present, greatly in excess of what is necessary to maintain the docks. Hereafter the charges on shipping may be reduced so as greatly to diminish the revenue derived from this occupation; possibly at some future time to render it no greater than the sum requisite to maintain the docks; but whilst the dues on shipping are maintained at their present rate, it is clear that the hypothetical tenant would give for the occupancy of the docks as at present enjoyed by the Mersey Docks and Harbour Board a rent greatly in excess of what would be necessary to maintain the docks in a state to command that rent.

Where there is an actual demise of property to an occupier who pays rent to the owners of the property the tenant, if a subject, is rateable, without any regard to the purpose to which the rent is applied. It is immaterial whether the landlord enjoys the rent himself, or is obliged to pay it away as interest to mortgagees, or even (as in the case with the tenants of Crown property) pays it into the Consolidated Fund, or the privy purse of the Sovereign. The occupier in each case is rateable. And if the matter were now for the first time to be determined without reference to the decisions, it would seem that where the owners of the property are themselves in occupation and receive the value, the amount of which is measured by the rent which the hypothetical tenant would give, the purposes to which that amount is applied ought to be as immaterial as if there had been a real demise at that rent; and the occupiers, if subjects, ought to be rated, whatever be the object for which the property is occupied, unless some special enactment exempted them. But the decisions have now settled that there is an exemption; and the important question in the present case is, what is the nature of the occupation and of the purposes which bring the occupiers' case within that exemption? And on this question the decisions are to some extent inconsistent, and it is necessary to examine them.

The Crown, not being named in the statute of Elizabeth, is not bound by it; and consequently the overseers cannot impose a rate on the Sovereign in respect of lands occupied by Her Majesty, nor on those occupied by her servants for Her Majesty.

The exemption depends entirely on the occupier and not on the title to the property. The tenants of Crown property, paying rent for it, are rateable, like all other occupiers; and it has even been determined that where apartments in Hampton Court, a royal palace, were gratuitously assigned to a subject, who occupied them by permission of the Sovereign, but for the subject's benefit, the subject was rateable in respect of her occupation of this royal property—*The Queen v. Lady Emily Ponsonby* (3 Q.B. Rep. 14). On the other hand, where a lease of private property is taken in the name of a subject, but the occupation is by the Sovereign or her servants on her behalf, the occupation being that of Her Majesty, no rate can be imposed—*Lord Amherst v. Lord Sommers* (2 Term Rep. 372).

So far the ground of exemption is perfectly intelligible; but it has been carried a good deal further, and applied to many cases in which it can scarcely be said that the Sovereign or the servants of the Sovereign are in occupation. A long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police, and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of State, such as the Post Office—*Smith v. Birmingham* (7 El. & B. 483); the Horse Guards—*Lord Amherst v. Lord Sommers* (2 Term Rep. 372); or the Admiralty—*The Queen v. Stewart* (8 El. & B. 360),—in all which cases the occupiers might strictly be called the servants of the Crown; but also to property occupied by local police—*The Justices of Lancashire v. Shelford* (El. B. & El. 230); to county buildings occupied for the Assizes and for the Judges' lodgings—*Hodgson v. the Local Board of Health of Carlisle* (8 El. & B. 230); or occupied as a county court—*The Queen v. the Township of Manchester* (3 El. & B. 336; s. c. 23 Law J. Rep. (N.S.) M.C. 48); or for a gaol—*The Queen v. Shepherd* (1 Q.B. Rep. 170; s. c. 10 Law J. Rep. (N.S.) M.C. 44).

In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes of that kind which, by the constitution of this country, fall within the province of Government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered *in consimili casu*. These decisions are uniform, and it was not disputed at the bar, that the exemption applies so far; but there is a conflict between the decisions as to whether the exemption goes further.

There are several cases relating to charities which were mentioned at your Lordships' bar, but were not much pressed, nor, at it seems to us, need they be considered now; for, whatever may be the law as to the exemption of property occupied for charitable purposes, it is clear that the docks in question can come within no such exemption.

There is, however, one case on this subject, that of *The King v. St. Luke's Hospital* (2 Burr. 1053), which it is necessary to notice on account of the effect which, in *The King v. the Commissioners of Salter's Load Sluice* (4 Term Rep. 430), was attributed by Lord Kenyon to part of what fell from Lord Mansfield in that case. In *The King v. St. Luke's Hospital* (2 Burr. 1053) the question before the Court was whether Joseph Mansfield was rateable as occupier of St. Luke's Hospital; but the Court entered into the larger question, whether there was any one who could be charged as occupier; saying very truly, that unless there was some one who could be so charged no rate could be imposed. Lord Mansfield, as to that, is reported to have said, "As to the lessees, mere nominal trustees

cannot be esteemed occupiers or rated as such." In the subsequent case of *The King v. St. Bartholomew's Hospital* (4 Burr. 2435), Lord Mansfield says that the Corporation of London "are not *de facto* the occupiers of St. Bartholomew's Hospital: the poor are the occupiers; but *they* are not rateable." This may perhaps shew that Lord Mansfield only meant to lay down the position that those in whom the legal estate is vested are not necessarily the occupiers; which is, no doubt, true; no one could contend that the person in whom a term assigned to attend the inheritance had vested, could be rated as occupier, in point of law, of the estates *de facto* occupied by his *cestui que trust*. But if Lord Mansfield meant (as it rather seems that Lord Kenyon thought he did), that the persons in actual valuable occupation of property are not rateable if they occupy in a merely fiduciary character, it is a position which cannot be maintained. The counsel for the Mersey Dock and Harbour Board, at your Lordships' bar, did not attempt to maintain any such general position; they limited themselves to contending that such was the law where it was a public trust; for which they cited authorities which they said must be overruled unless that position was maintained. And we think they were justified in so saying; but we also think that there are conflicting decisions which must be overruled if it is maintained.

The first case in which the position was advanced that trustees occupying valuable property, but prohibited from taking any individual benefit from it, were not rateable, seems to have been *The King v. the Mayor of London* (4 Term Rep. 21), decided in 1790. There Mr. Justice Buller in his judgment says, "Now it has been objected that they are not liable to this rate, because they hold it on a public trust; but, in the first place, it does not appear to be the case of a trust at all, and if it did, perhaps the consequence contended for would not necessarily follow." It certainly seems that the doctrine contended for was not at that time, 1790, considered as established.

The King v. the Commissioners of Salter's Load Sluice (4 Term Rep. 430) was decided in 1792. In the argument the clauses of the act under which the Commissioners held were referred to, and argued on; but Lord Kenyon's judgment does not appear to have proceeded on the ground that their effect was to prohibit the payment of poor-rate. He says, "The trustees have a bare naked trust, not coupled with any interest. If any interest resulted, either to the Commissioners or to the owners of the adjoining land after the public purposes of the act were answered, these tolls might have been rated. But it is admitted that all the money which is collected under this act of parliament must be expended for the purposes of the act, and therefore, upon the ground upon which the Court proceeded in *The King v. St. Luke's Hospital* (2 Burr. 1053), namely, that there was no occupier, these Commissioners are not liable to be rated."

The counsel for the parish and township in the cases at your Lordships' bar did not attempt to deny that this decision was in favour of their opponents; they admitted (and we think quite properly admitted) that the decision was against them, but they denied that it was law. The counsel for the Mersey Board were fully justified in relying on this case, as entitling them to the benefit of Lord Kenyon's judgment; but we think that when they proceeded to argue that the decision acquired additional authority because it was acquiesced in, they fell into a fallacy. When the Court of Queen's Bench has decided in favour of a rate, those who are rated may, if they are so advised, bring replevin, and (subject to the question whether replevin lies in such case) may carry the case up to the House of Lords; and, therefore, where a decision in favour of a rate is not disputed further, it may properly be said to be acquiesced in. But when the Court of Queen's Bench has decided against a rate, and quashed it, there is no way whatever in which the parish officers can raise the question again; and acquiescence in a decision cannot add any weight to it, when there is no possible way of disputing it.

The next cases to be found in the reports in which any similar point arose

were those of *The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) and *The King v. the Trustees of the River Weaver Navigation* (7 B. & C. 70) in 1827. It appears that in 1806 the Liverpool Sessions made an order excluding the Liverpool Docks from a rate for the relief of the poor of the parish of Liverpool, subject to a case intended to obtain the opinion of the Court of King's Bench on the question whether the Corporation of Liverpool were rateable as occupiers of the docks; and that in 1808 the order of Sessions was confirmed, but under what circumstances does not appear.

The late Lord Abinger was counsel for the parish, both in that case and in the case of 1827; and the attorneys of the Corporation of Liverpool in 1827 could not be ignorant of the circumstances attending the confirmation of the order of Sessions in 1806. Yet on the argument in the case, reported in 7 Barn. & Cress., neither side alludes to what, if a decision at all, must have been precisely in point. It seems, therefore, probable that, though the rule confirming the order in 1808 is not drawn up as by consent, the former case was compromised, and that there was no decision of the Court in 1808.

However this may be, there can be no doubt that the Court of King's Bench, in 1827, acted upon the authority of *The King v. Salter's Load Sluice* (4 Term Rep. 430); Lord Tenterden saying, in *The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780), "Here the trustees were not occupiers in the ordinary sense of the word, and no profit was received for the use of any person;" and Mr. Justice Bayley saying, "The principle of this decision is applicable to the case of *The King v. the Trustees of the River Weaver Navigation* (7 B. & C. 70). There the surplus tolls remaining over and above the expenses of supporting the navigation were to be applied to the repairing and maintaining of bridges and highways. Those were public purposes, and as no part of the monies received could be applied to private purposes, those monies were not rateable in the hands of the trustees."

There is no dispute that those two decisions, if they are to be followed, are decisive in favour of the Mersey Docks and Harbour Board, at least in the first of the cases at your Lordships' bar, and reduce the case of *The Overseers of Birkenhead* (2 El. & B. 148) to that point mentioned in your Lordships' third question.

The next case to which it is necessary to call attention is that of *The Governors of the Bristol Poor v. Waite* (5 Ad. & E. 1), decided in 1836. In that case the governors of the Bristol poor had taken property for the purpose of putting out their poor there. A rate had been imposed on them in respect of this occupation, and was levied by distress. The governors of the Bristol poor brought replevin for the purpose of questioning the validity of this rate. In the judgment of the Court the point raised is said to be "whether the plaintiffs were such occupiers of the property as to be rateable to the poor." And the decision was that they were. The Judges who decided this case probably did not suppose that they were deciding anything inconsistent with the decisions in *The King v. Salter's Load Sluice* (4 Term Rep. 430), and *The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780), and *The King v. the Trustees of the River Weaver Navigation* (7 B. & C. 70), which appear not to have been cited on the argument, or brought to their notice. But we do not see how the cases can stand together. The governors of the poor of Bristol were as much bare naked trustees having no personal interest in the occupation of this property as the Commissioners of Salter's Load Sluice; and if the one set of trustees were on that ground not occupiers, we do not see how the others could be occupiers: and if the application of the surplus funds of the Weaver Navigation to the bridges and highways of Cheshire, so as to be in relief of the county rate, was a public purpose rendering the trustees of that navigation not rateable, it is difficult to see why the application of whatever value was derived from the lands occupied by the governors of the Bristol poor to the maintenance of the poor of Bristol, and

so in relief of the poor-rate of the city of Bristol, was not a public purpose also. We think that in this case the Court of King's Bench, probably without being aware of it, came to a decision inconsistent with, and therefore shaking the authority of, *The King v. Salter's Load Sluice* (4 Term Rep. 430), *The King v. Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780), and *The King v. the Trustees of the River Weaver Navigation* (7 B. & C. 70).

The decision in *The Governors of the Bristol Poor v. Waite* (5 Ad. & E. 1) has been repeatedly acted upon, and never questioned that we know of. As the decisions in this case, and those which followed it, were decisions in favour of the rate, and consequently might have been questioned in replevin, the acquiescence in them does add something to their authority.

The Municipal Corporation Act (5 & 6 Will. 4. c. 76.) restricted the power of the municipal corporations named in Schedules A. and B. to that act, over what had been their private estates, and compelled him to pay the net proceeds into the Borough Fund, which was applicable first to the payment of the existing debts of the corporation, and then to the corporation expenses; and the surplus, if any, for the public benefit of the inhabitants, and the improvement of the borough. The Court of Queen's Bench, in *The Queen v. The Mayor, &c. of Liverpool* (9 Ad. & E. 435), decided, in 1839, that the effect of this enactment was to render the corporations no longer liable to be rated in respect of any property occupied by them. The reason given by the Court for this decision was that they found "the principle settled by the decisions already made, and felt it to be their duty to act upon them, and not upon the apprehension of any inconvenient or unforeseen consequences, to question or weaken their authority." They proceed to state the cases of *The King v. Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) and *The King v. the Trustees of the River Weaver Navigation* (7 B. & C. 70), and say that, "We feel it to be impossible substantially to distinguish these cases, and especially the latter, from the present. The extent and approximation to something like national benefit are in kind, and almost in degree, the same. The public in the one case is the same town of Liverpool, in the other the county of Chester." The Court do not explain why the same argument did not avail in *The Governors of the Bristol Poor v. Waite* (5 Ad. & E. 1), where the city of Bristol was held *not* to be the public; but they did not intend to depart from that decision, and in the same year acted upon it, in *The Queen v. the Guardians of Wallingford* (10 Ad. & E. 259), in which latter case an attempt but, as it seems to us, not a successful one, is made to reconcile the decision with that in *The Queen v. the Mayor, &c. of Liverpool* (9 Ad. & E. 435).

Mr. Justice Crompton, in *The Queen v. Chirton* (1 El. & El. 516; s. c. 28 Law J. Rep. (N.S.) M.C. 131), stated that the decision in *The Queen v. the Mayor, &c. of Liverpool* (9 Ad. & E. 435) created at the time great surprise. We think, however, that the conclusion come to by the Court in that case does logically follow from the decisions in *The King v. Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) and *The King v. the Trustees of the River Weaver Navigation* (7 B. & C. 70), and that the Court in that case had to choose whether they would consider it a *reductio ad absurdum*, and say that decisions leading to such a conclusion must be wrong in principle, or to say that, the decisions being binding on them, they must hold that the conclusion was not wrong. They adopted the latter course, apparently not at that time perceiving that it was inconsistent with the principle of their own decision in *The Governors of the Bristol Poor v. Waite* (5 Ad. & E. 1). A few years later, the Court of Queen's Bench, in several cases to be presently cited, adopted the former course, and the question now pending in your Lordships' House seems to us to be, in substance, which set of decisions are to be followed in future?

The effect of the decision in *The Queen v. the Mayor, &c. of Liverpool* (9 Ad. & E. 435) was immediately nullified by the 4 & 5 Vict. c. 48; but that enactment did not declare the decision erroneous. On the contrary, the act

was couched in language which, though not *declaring* the decision to be law, indicates that the framers of the act thought that it was law; and the fact that an act couched in such terms was passed by the legislature affords an argument, of more or less weight, that the error of the Court, if it was one, was acquiesced in, and had become *communis error*.

This is, we think, the latest authority in point of date relied on by the counsel for the Mersey Docks and Harbour Board.

The next case in order of date was *The Queen v. Badcock* (6 Q.B. Rep. 787), in 1845. In the judgment of the Court the conflicting cases are cited. The Court does not attempt to reconcile them; but observes that in all the cases where the occupation was held to be of such a public nature as to exempt the property from rateability, "the public, as such, unlimited by the bounds of county, borough, or parish, had a direct interest in the benefit which the application of the funds produced," and that the case then before them did not come within that principle. The passage here cited has been repeatedly quoted with approval as giving the true principle of exemption. It does include all the cases already cited, in which the occupation was for the purposes of government. But the principle thus laid down cannot be made to embrace either *The King v. the Trustees of the River Weaver Navigation* (7 B. & C. 70), where the funds were applicable to the relief of the county rate of Cheshire, or *The Queen v. the Mayor, &c. of Liverpool* (9 Ad. & E. 435), where the funds were brought into the borough fund in relief of the borough rate in that particular borough.

In *The Queen v. the Overseers of Longwood* (13 Q.B. Rep. 116; s. c. 18 Law J. Rep. (N.S.) M.C. 65), in 1849, the Court of Queen's Bench, acting upon the principle laid down in *The Queen v. Badcock* (6 Q.B. Rep. 787), held that the Commissioners of the Huddersfield Water Works were rateable to the relief of the poor.

All the cases which we have hitherto cited were decided before Lord Campbell took his seat upon the Bench. It is right to notice this, for it has often been supposed, and indeed was said in the argument at your Lordships' bar, that the decisions in his time, on the subject of the exemption from rates, were innovations introduced in consequence of his strong individual opinion that the exemptions from rateability had been carried further than was warranted by law or reason; but we think that the cases which we have cited shew that before he came upon the Bench, that opinion had been entertained and acted upon, and that in consequence the decisions had got into such a state as to be inconsistent with each other; so that it had become necessary to overrule one set of the inconsistent decisions, unless the law was to be administered without any reference to principle, deciding each case as it arose, according as the facts might be supposed to approximate more nearly to those in the one set of decisions or the other.

Several cases were decided in Lord Campbell's time which closely resembled that of the Huddersfield Commissioners (*The Queen v. Longwood*), and which were decided in the same way without rendering it necessary to go further than had been done in that case, until, in 1852, the case of *The Overseers of Birkenhead v. the Trustees of Birkenhead* (2 El. & B. 148) arose. Mr. Justice Crompton was a party to that decision, and, in *The Tyne Improvement Commissioners v. Chirton* (1 El. & El. 516; s. c. 28 Law J. Rep. (N.S.) M.C. 131), he has given some account of the deliberations on that case (though his observations were misunderstood by the reporter), and he repeated it during the argument in the Exchequer Chamber of the case at bar. It appears that this learned Judge was at first startled at being called upon to act on a principle in direct opposition to the considered decision of the Court of Queen's Bench, in *The Queen v. the Mayor, &c. of Liverpool* (9 Ad. & E. 435), though he had always thought that decision wrong; and that he was the more unwilling to act in direct contradiction to that case, because the legislature, in the 4 & 5 Vict. c. 48, when enacting that the decision should no longer be practically

operative, did not express any disapprobation of the principle of the decision, but rather used language seeming to assume that it was good law; and he doubted whether the case should not be followed, though not approved of, leaving it to the legislature to correct it. The rest of the Court thought that the time had come when the Court could no longer halt between two sets of decisions, but must follow that which was law; and Mr. Justice Crompton ultimately agreed with them. Lord Campbell, in his judgment (perhaps out of deference to the doubts which Mr. Justice Crompton had at first entertained), seeks to avoid expressly overruling the previous decisions; and suggests that, perhaps, *The King v. the Commissioners of Salter's Load Sluice* (4 Term Rep. 430) and *The King v. Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) may be distinguishable on the ground that the private acts in those cases were construed by the Courts as amounting to a prohibition to pay poor-rate. But the counsel on both sides at your Lordships' bar agreed that no such distinction could be maintained; and we think that neither Lord Kenyon nor the Court of King's Bench in Lord Tenterden's time proceeded on any such ground. And in the subsequent cases of *The River Lea Navigation* (19 J.P. 919) and *The Tyne Improvement Commissioners v. Chirton* (1 El. & El. 516; s. c. 28 Law J. Rep. (N.S.) M.C. 131), in 1859, no such distinction was made. The Court of Queen's Bench in that last case acted upon the broad principle that though, where the property was occupied for public purposes, "such as," says Lord Campbell, "a post-office or a military store dépôt, where the purposes for which the property is occupied are purposes created by the Government of the country," there was no rateable occupier, the occupation of a public dock was not an occupation for such public purposes, and that the Commissioners occupying such a dock were rateable in respect of the value of that occupation, estimated according to the rule laid down in the Parochial Assessment Act, unless an exemption was conferred by some subsequent statute; and that the enactments in the Tyne Improvement Acts as to the application of the rates received (which are in substance the same as those in the Liverpool Acts), did not amount to such an exemption; and Mr. Justice Crompton, after stating his former doubts when the *Birkenhead* case was argued, said that he now thought that case (2 El. & B. 148) laid down the proper rule. This, we think, must be considered as the rule now acted upon in practice in the Court of Queen's Bench.

Such being the state of the authorities, it seems to us no longer possible to support the decisions relied on by the counsel for the Mersey Docks and Harbour Board. We quite agree that it is very desirable to adhere to decided cases, though this principle may be carried too far. It has been forcibly remarked by an American author of repute (1 Phillips on Insurance, 393.—Note g.) that where the objection to the decisions is "inconsistency with admitted fundamental principles, it is an adhering to an inconsistency and contradiction, and tends to reduce jurisprudence from a science to an aggregation of dogmas." Still the inconvenience caused by the unsettling the law and disturbing what was quiet is so great, that we agree that even a Court of error should be slow to reverse decisions which, though originally wrong, have long been uniform. When such is the case, it may often be proper to persevere in the error, and leave the remedy to the legislature. It may be that, if the attention of the Court of King's Bench had in 1836 been called to the case of *The King v. Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) and *The King v. the River Weaver Navigation* (7 B. & C. 70), before they decided *The Governors of the Bristol Poor v. Waite* (5 Ad. & E. 1), this principle, which is strongly laid down in *Crease v. Sawle* (2 Q.B. Rep. 862), would have led them to decide *The Governors of the Bristol Poor v. Waite* (5 Ad. & E. 1) otherwise than they did. But all this inconvenience has been already incurred; the recent decisions have been such as to disturb the quiet state of things, and a decision of your Lordships' House affirming *The King v. Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) and the non-rateability of the Liverpool

Docks must reverse the decision in *The Tyne Commissioners v. Chirton* (1 El. & El. 516; s. c. 28 Law J. Rep. (n.s.) M.C. 131), and render the docks in the Tyne rateable. And such a decision, though not necessarily reversing the numerous decisions based on *The Governors of the Bristol Poor v. Waite* (5 Ad. & E. 1), by which poor-houses and gasworks and waterworks in the hands of public trustees have been held rateable, must greatly shake their authority and disturb a principle of rating now generally adopted throughout the country. The balance of convenience, if that be a legitimate consideration, is now in favour of adhering to the more recent decisions. And if we view the case on principle, without regard to the decisions either way, it seems to us clear that the Mersey Docks and Harbour Board ought to be rated.

The counsel referred to many expressions in the local acts, shewing that the Mersey Docks were thought likely to confer great public benefit, and to be very advantageous to the commerce of this country; and there is no doubt that that expectation has been realized, and that these docks are of great public benefit; but not more so than the docks in the river Thames, all of which are in the hands of private companies, and are undoubtedly rateable.

The rate is imposed, not in respect of the value of the benefit conferred on the public, or that portion of it which uses the dock, but is on the occupiers of the docks in respect of the value to them derived from the payments taken for that use. And we think it impossible to point out any real distinction in this respect between the occupation of a dock formed by a company under an act of parliament incorporating the Companies Clauses Act and the Harbours, Docks, and Piers Clauses Act, 1847, and the occupation of the Mersey Docks by the Mersey Docks and Harbour Board.

A company forming a dock under an act of parliament incorporating these acts is bound to maintain the docks, and to keep harbour masters and other officers there, and to allow the public to use the dock on payment of the rates, and to allow Her Majesty's vessels to use it without making any payment; and by these means they confer a benefit on the public; the company, by virtue of its occupation, receives the rates on shipping using the docks, and the amount thus received is applicable to keeping up the docks, and then to paying interest on the loans, the amount of which is limited, and then in paying dividends on the share capital; and it is common to have a maximum limit put on the rate of the dividend; when that maximum dividend is reached, the rate must be lowered. It is indisputable that a company thus occupying a dock is an occupier, and rateable as such. Now if, without in any way altering the mode in which the docks are enjoyed by the public, or altering the rates leviable, or changing the harbour-masters and others who manage it, we change the name of the body who occupy it from that of "the company" to that of "the board"; and if, instead of "the company" paying to the shareholders a maximum dividend on their capital, the "board" pay to the same individuals the same identical sums, but call them "interest on bonds" instead of "maximum dividend on share capital," what difference does this make? If *The King v. Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) is to be supported, it makes this difference, that what was formerly an occupation in respect of which the company was rateable has by this change of name, without any change in the thing, become an occupation for public purposes, for which the board is not rateable. If the decision in *The Tyne Commissioners v. Chirton* (1 El. & El. 516; s. c. 28 Law J. Rep. (n.s.) M.C. 131) is to be supported, the change in name makes no difference in the rateability.

We think the latter the correct view of the law, and therefore we answer your Lordships' first question in the affirmative.

We now proceed to answer the second question put by your Lordships. And we are of opinion that there is nothing in the matters referred to in your Lordships' questions to exempt the board from being rated in respect of their occupation.

We have already, in answering your Lordships' first question, given our reasons for thinking that the purposes to which the rates are applicable are

not such as to exempt them from rateability; and we are further of opinion that the effect of the statutes applicable to the Liverpool Docks is not such as to exempt them from the payment of poor-rate. There are no negative words prohibiting the application of the rates to payment of the poor-rate. And we think, in conformity with the decision in *The Tyne Commissioners. v. Chirlton* (1 El. & El. 516; s. c. 28 Law J. Rep. (N.S.) M.C. 131), that enactments directing that the revenue shall be applied to certain purposes and no others are directory only; and mean that after all charges imposed by law on the revenue have been discharged, the surplus or free revenue, which otherwise might have been disposed of at the pleasure of the recipients, shall be applied to these purposes.

We have only, therefore, to consider the reasons on which the Court of Exchequer Chamber based their decision in the first of the present cases; and with very great respect for those who concurred in that judgment, we think that they acted on a principle sound in itself, but not applicable to the case before them.

Where an act of parliament has received a judicial construction putting a certain meaning on its words, and the legislature in a subsequent act in *pari materia* use the same words, there is a presumption that the legislature used those words intending to express the meaning which it knew had been put upon the same words before; and, unless there is something to rebut that presumption, the act should be so construed, even if the words were such that they might originally have been construed otherwise. And if the decision in *The King v. Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) had been that certain words used in the former acts had amounted to an exemption from poor-rate, and those same words had been repeated in the subsequent acts, it would, on this principle, have been a fair inference that the legislature intended by using the same words to give the exemption. But this is not the case here. The legislature had by former acts conveyed to the trustees the docks to be held for certain purposes. The Court of King's Bench had decided that, as an incident of law, those who held land for such purposes were not rateable to the relief of the poor. When the legislature again in fresh acts used the same language, it shewed that they intended to convey the land to be occupied for the same purposes; and that if the law did annex non-rateability as an incident to such an occupation the legislature had no objection. But it did not afford any argument that the legislature intended to annex that incident in case it should be discovered that it was not annexed by law. And the clauses enacting that the warehouses should be rated carry this argument no further.

During the course of the argument at your Lordships' bar the Lord Chancellor put the case of an express recital in the act, to the effect that it had been decided in *The King v. Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) that the dock trustees were not liable to poor-rate in respect of land occupied by them, and that it was expedient that no such exemption should be given to them in respect of the occupation of new warehouses acquired under the new act, and then after recital an enactment in the terms in which it is now expressed. And he asked the counsel at your Lordships' bar two questions; First, whether such a recital could be construed to amount to a declaratory enactment that the decision in *The King v. Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) was good law? Secondly, whether the acts framed as they were could have a greater effect than they would have had if framed with such an express recital? The counsel for the Mersey Docks and Harbour Board were not able to give any answer to those questions that would support the decision of the Court of Exchequer Chamber. Mr. Justice Blackburn (the only Judge who, being a party to the decision in the Exchequer Chamber, was also present at the argument at your Lordships' bar) admits that he cannot answer them, and his inability to do so has led him to change the opinion which he entertained when in the Exchequer Chamber. We have no reason to believe that the other Judges who joined in that judgment have changed their opinion. We have most sincere deference for their judgment; and as we have had no opportunity of hearing what answer they would have made to the way the case

has been put in your Lordships' House, it is with diffidence that we have formed our opinion that they have misapplied the ground of their decision; but entertaining that opinion, we are bound to express it.

We therefore answer your Lordships' second question in the negative.

The answers which we give to the first and second questions put by your Lordships in effect answer the third question. In our opinion the liability to poor-rate is imposed on the Board by the general law, and not by virtue of the sections of the act referred to. We therefore answer your Lordships' last question in the negative.

BYLES, J.—In answer to your Lordships' first question, I am of opinion that the Mersey Docks and Harbour Board are not occupiers within the true meaning of statute 43 Eliz.

No doubt they are occupiers in the strict legal sense of that word, that is to say, they are in possession of the land, and are the proper parties to bring an action of trespass. But the sense in which your Lordships use the word "occupiers," is the sense in which it is used in the earlier leading cases on the subject, and that sense must be borne in mind in order to understand those cases.

I conceive that the occupation, to be an occupation within the statute, must be a beneficial one. The rate is to be raised "according to the ability of the parish," and "by taxation," both which expressions import, first, that the occupation is to produce profit or pecuniary benefit to the occupier himself, or some one whom he represents, and secondly, that each assessment is to be in proportion to that benefit. This construction is fortified by the consideration that the statute, when it was passed, authorized an assessment in respect of personal as well as of real property.

Accordingly, such has been the construction of the statute from the earliest times; indeed, it may be said that such was the contemporaneous exposition. The date of the statute is 1601. It was stated at your Lordships' bar that the first edition of *Dalton's Justice* was published a year or two after that date, and that the author in that edition says, that the overseers are to raise the rate by taxing the occupiers, "proportioning them to an annual benefit." I have not had access to the earlier editions of this work, but certainly those words are repeated in the fifth edition published in 1635.

It seems, therefore, plain from the object of the act, from its words, and from the earliest exposition, that the occupier must in order to be rateable enjoy a beneficial occupation.

It is not essential that this occupation should be for the individual benefit of the occupier himself; it may be for the benefit of another; it may be for the benefit of a plurality of other persons,—of a considerable number of other persons,—or even of a number not certainly defined, but limited by locality or other circumstances. Yet I conceive that if the property be occupied for the benefit *not* of a number of individuals more or less defined, but for the benefit of the public at large, then it is not rateable. This conclusion seems to me to be the result of a long series of authorities.

I do not rely on the exemption of the Crown; for that exemption would take place on the principle that the Crown is not bound by an act of parliament, unless named therein. But even this exemption is merely personal, for tenants of the Crown occupying for their private benefit are rateable.

Whether occupiers for the service of the general Government are exempt on the ground that they represent the Crown may be doubtful. It should rather seem that they are exempt, because they occupy for public purposes. Thus the Birmingham Post Office was held not rateable, Lord Campbell treating it as clear, but expressing regret "that property taken for public purposes is not rateable,"—*Smith v. the Guardians of Birmingham* (7 El. & B. 483). Upon the same ground an occupation by the Horse Guards, *Lord Amherst v. Lord Sommers* (2 Term. Rep. 372), was held not rateable; Mr. Justice Buller and Mr. Justice Ashhurst laying it down as law not only that the possessions of

the Crown were not rateable, but that the possessions of the public were not rateable, and that in the case then before them the plaintiff was exempt, "because he was like a trustee for the public, deriving no benefit for himself."

The exemption is not confined to premises occupied for the purposes of the general government; it extends to occupations for the purposes of local government also. Thus buildings occupied by the local police, "held," say the Court, "for public purposes,"—*The Justices of Lancashire v. Shelford* (El. B. & El. 230); a shire hall—*Hodgson v. the Local Board of Carlisle* (8 El. & B. 230); the county courts—*The Queen v. Manchester* (3 El. & B. 336; s. c. 23 Law J. Rep. (N.S.) M.C. 48) a county gaol—*The Queen v. Shepherd* (1 Q.B. Rep. 170; s. c. 10 Law J. Rep. (N.S.) M.C. 44); reformatory schools supported by voluntary subscriptions open to several counties, and within the statute 17 & 18 Vict. c. 86—*Shepherd v. the Churchwardens of Bradford* (33 Law J. Rep. (N.S.) C.P. 252), are all exempt from poor-rates.

The exemption extends to trusts and charities for the benefit of the public at large, though entirely unconnected with Government. Public hospitals are exempt. St. Luke's Hospital was held not rateable on the ground that there was no beneficial occupier—*The King v. St. Luke's Hospital* (2 Burr. 1053), so was *St. Bartholomew's Hospital* (4 Burr. 2435). I conceive that the exemption of hospitals and other charities stands on the ground, not that they are charities, but that they are public charities, and that there is no beneficial occupier except the public; and so the Court of Queen's Bench held when they decided that Bethlehem Hospital was not rateable—*The King v. Bethlehem Hospital* (10 Q.B. Rep. 868; s. c. 18 Law J. Rep. (N.S.) M.C. 89); so also they held in a recent case—*The Queen v. Stapleton* (33 Law J. Rep. (N.S.) M.C. 17); and the Court of Common Pleas also in the case of *Shepherd v. the Churchwardens of Bradford* (33 Law J. Rep. (N.S.) C.P. 252). Both Courts in these two cases draw a distinction between private and public charities, holding the first rateable and the last not rateable. "The premises," say the Court of Queen's Bench, in the first case, "are occupied for the purposes of a highly laudable charity, but one of a strictly private nature." The same distinction was taken by the Court of Queen's Bench in other cases, particularly *The Queen v. the Licensed Victuallers' Society* (1 Best & Sm. 76), and *The Queen v. the Baptist Missionary Society* (10 Q.B. Rep. 884; s. c. 18 Law J. Rep. (N.S.) M.C. 194).

On the same ground of dedication to public purposes repose also the exemption of churches and other places of religious worship. Even before the recent statute churches and chapels were exempt from rates, if no profit to individuals was actually made by letting the pews—*The King v. Woodward* (5 Term Rep. 79); *The King v. Agar* (14 East, 256). So that it is a mistake to suppose that the exemption of churches and chapels depends merely on the statute 3 & 4 Will. 4. c. 30. That statute, which applies to church-rates as well as poor-rates, and probably with an original and especial view to the former, extended the then existing exemption by exempting from rates all places dedicated exclusively to public religious worship, even when the pews are let, and profit is thus made of the building.

In *The King v. the Mayor of London* (4 Term Rep. 21), where the question arose whether certain trustees of a barge-way and toll-gate should be rated, Mr. Justice Grose says, that "to exempt themselves from the rate, the trustees should have shewn that they were trustees for the public." In *The King v. Salter's Load Sluice* (4 Term Rep. 430) the property was held not rateable, because all the money collected must be expended for what Lord Kenyon calls the public purposes of the act.

The history of the property now under your Lordship's consideration in many ways confirms the position that property occupied for public purposes is not rateable; from the earliest construction of the Liverpool Docks in the time of Queen Anne down to the year 1806, they had never been rated; but in 1806 an attempt was made to rate them. The Sessions quashed the rate, and the Court of King's Bench (whether by consent or otherwise does not appear) confirmed the order of Sessions. The attempt, however, was repeated about

twenty years after, in 1827, and the case was then fully argued. The statutes were brought before the Court; those statutes directing then as now that certain burdens should be discharged, and that after their discharge, the tolls should be lowered. The Court of King's Bench held that there was no beneficial occupation in any person, and confirmed the order of Sessions, striking out the assessment—*The King v. Liverpool* (7 B. & C. 61; s. c. Dowl. & Ry. 780).

At the same time *The King v. the River Weaver Navigation* (Ibid. 70) was argued and decided in the same manner. "The surplus tolls of the navigation," said Bayley, J., "remaining over and above the expenses of supporting the navigation, are to be applied to the building and maintaining of bridges and highways. These are public purposes, and as no part of the monies received can be applied to private purposes, those monies are not rateable in the hands of the trustees."

These cases were followed by *The Queen v. the Corporation of Liverpool* (9 Ad. & E. 435), in which the law was again held to be clear, that property dedicated to public purposes was not rateable; and the doctrine was applied to the property of the municipal corporation of Liverpool situate within the precincts of the borough of Liverpool, because the General Municipal Corporation Act, 5 & 6 Vict. c. 76, had directed that all the surplus funds of the borough should be appropriated for the public benefit of the inhabitants and the improvements of the borough. In the next year the Court of Queen's Bench decided, on the same grounds, that the property of a municipal corporation was not rateable though situate without the precincts of the borough—*The Queen v. Exminster* (12 Ad. & E. 2; s. c. 9 Law J. Rep. (N.S.) M.C. 108). In both these cases all the previous decisions were canvassed and confirmed; the foundation of the judgment in both cases being the acknowledged proposition that property dedicated to public purposes is not rateable. The only question was, whether the benefit of the inhabitants of a particular borough, they being but a section of the public, was a public or a private purpose, and in both cases it was held that the property of a municipal corporation was property dedicated to public purposes, and not rateable.

These decisions caused the statute 4 & 5 Vict. c. 48. to be passed, the language of which is not only very strong to shew that the legislature itself considered that property dedicated to public purposes was and is not rateable, but seems to me to create a statutable bar to holding that even property owned and occupied by municipal corporations is rateable in cases beyond the scope of the enacting clause. I forbear to comment minutely on the language of the statute because of the length to which the observations would extend, but almost every line is deserving the attentive consideration of your Lordships. Two observations, however, I must be pardoned for making: first, the statute is not a declaratory, but an enacting statute; secondly, so far from reflecting on the correctness of the then recent decisions, it adopts and affirms them in certain cases, at the end of the proviso to the 1st section. The statute there continues the exemption from poor-rate in cases where the area of the borough and the area covered by a single poor-rate are co-extensive, because in such a case there is no reason for interfering with the existing law. To put the case in the clearest light: suppose, what has actually happened in some boroughs, and may be the case in many, that the value of the corporate property renders a borough rate unnecessary; and suppose that there is an entire poor-rate for the borough, which is also not an uncommon case (either because the borough includes but a single parish, or because the management of the poor in the borough is consolidated by a local act); in such a case I conceive that the municipal property is still by the express words of the statute not only exempt, but exempt not because the statute so enacts, but because it had been exempted by law before the act passed, and the exemption is recognised and continued.

The language, therefore, of the statute 43 Eliz., the whole current of the authorities I have cited to your Lordships, and many others with which I refrain from fatiguing your Lordships, as well as the language of the recent statute,

4 & 5 Vict. c. 48, seem to me to shew that land occupied for public purposes is not rateable.

On the other side, great reliance was placed by the appellants on the case of *The Governors of the Bristol Poor v. Waite* (5 Ad. & E. 1.). But that case seems to me reconcilable with the position that where the general public are the occupiers the property is not rateable, for in that case only a section of the public were the occupiers, that is to say, the representatives of the poor of a particular district. Indeed, this distinction between the former cases and the case of *The Governors of the Bristol Poor v. Waite* (5 Ad. & E. 1.) is drawn by the Court of Queen's Bench itself in *The Queen v. the Wallingford Union* (10 Ad. & E. 259). To what extent the property rated is occupied for the public at large is and always must be a question of degree, where it is extremely difficult to draw the line, and where it is likely there will be conflicting decisions.

The conflict of the case of *The Governors of the Bristol Poor v. Waite* (5 Ad. & E. 1.), if any, is with *The Queen v. Liverpool* (9 Ad. & E. 435) and *The Queen v. the Inhabitants of Exminster* (12 Ad. & E. 2; s. c. 9 Law J. Rep. (n.s.) M.C. 108), where property was held not rateable. But even with respect to this apparent conflict it may be observed, that the occupation was in *The Queen v. the Corporation of Liverpool* (9 Ad. & E. 435) for the benefit of all the inhabitants of a district, and in the case of *The Governors of the Bristol Poor v. Waite* (5 Ad. & E. 1) it was only for a portion of the inhabitants, that is to say, the poor of the district. And if your Lordships have to choose between these authorities, I have already called your Lordships' attention to the fact that *The Queen v. Liverpool* (9 Ad. & E. 435) and *The Queen v. the Inhabitants of Exminster* (12 Ad. & E. 2; s. c. 9 Law J. Rep. (n.s.) M.C. 108) are recognized by the legislature as law, and are continued in some cases as the then existing law up to this moment by the authority of the statute.

The decision in *The Governors of the Bristol Poor v. Waite* (5 Ad. & E. 1) was followed as to the Taunton Market in *The Queen v. Badcock* (6 Q.B. Rep. 787), as to the Huddersfield Waterworks in *The Queen v. Longwood* (13 Q.B. Rep. 116; s. c. 18 Law J. Rep. (n.s.) M.C. 65), and as to the Harrogate Waterworks in *The Queen v. the Harrogate Commissioners* (15 Q.B. Rep. 1010; s. c. 20 Law J. Rep. (n.s.) M.C. 25).

These cases are all subject to the same observation as the case of *The Bristol Poor v. Waite* (5 Ad. & E. 1). The question was whether the occupation was for the public at large or for the partial benefit of a section of the public—see the observations of the Court of Queen's Bench in *The Queen v. St. George the Martyr, Southwark* (10 Q.B. Rep. 852; s. c. 16 Law J. Rep. (n.s.) M.C. 129).

The decision in *The Overseers of Birkenhead v. the Trustees of the Birkenhead Docks* (2 El. & B. 148) is really no authority on this point, because it proceeded entirely on the ground that there did not then appear to be, as now there is, a statutable obligation to reduce the tolls when their produce should exceed the expenses. It is quite true, however, that the Court, or at least the Lord Chief Justice, did indicate a wish to depart from the authorities as to the rateability of property dedicated to public purposes.

That case was followed by *The Tyne Commissioners v. the Overseers of Chirton* (1 El. & El. 516; s. c. 28 Law J. Rep. (n.s.) M.C. 131), which was decided by Lord Campbell and Mr. Justice Crompton, on the ground that the parties benefited were only a particular section of the public, viz., those who used the docks. But Mr. Justice Wightman seems to rest his judgment on the ground that it did not appear that there could not be a surplus revenue; and Mr. Justice Hill, though he assents to the conclusion, does not give his reasons, which, for anything that appears, may have been the same as those which influenced Mr. Justice Wightman.

I cannot help thinking that these recent authorities, when the precise point decided in each case, and the ground on which the judgment proceeded, are carefully examined, will be found as authorities not to be at variance with the position that an occupation clearly and entirely for the benefit of the whole public is not rateable. But, whatever weight may be attributable to some of

them, or more properly to the expressions of some Judges, it seems to me very slight compared with the weight which ought to be attributed to the antiquity, number, and consistency of the authorities which shew that overseers cannot usurp the authority of Parliament in taxing the general public.

Then comes the next inquiry, is the property now under consideration occupied for the benefit of the public at large?

Primâ facie it should seem that it is so, for not only have all the Queen's subjects a right to use the docks at their free will and pleasure, paying their fair contribution to the expenses and nothing more, but all persons whatsoever, from what quarter of the globe soever they may come.

It is objected, first, that the use of the docks is not for all the public, but only for a section of the public, that is to say, for as many of them as have invested their capital in ships, or barges, or boats.

It might also be said that a navigable river cannot be a public highway, because it is only for those who have invested their capital in ships, or barges, or boats; or that a public turnpike-road, or, indeed, any public highway, is not a public carriageway or bridleway, because, when used as a carriageway or bridleway, it is only for those who possess or use carriages or horses.

It is objected, further, by the appellants, that the incumbrances on the docks have the effect of making them rateable. It is contended, as interest and a portion of the principal of the debt is annually paid to the bondholders out of the produce of the tolls, that, to this extent at least, there is a beneficial occupation by the board in trust for the bondholders; because it is said that if a tenant from year to year occupied the property and received the tolls without paying the instalments of the principal and the periodical interest of the debt, he would be willing to pay a rent, and that this theoretical rent is the criterion and measure of the rateable value of the occupation.

But I conceive that no tenant could be supposed to receive the tolls without paying the charges. The tolls are appropriated to the payment of the expenses, including charges of construction and repair, and never can by law exceed that limit. As soon as the tolls do exceed it, they are by law to be reduced. If the amount now paid every year to the bondholders had been actually incurred for construction and repair in that year, it is plain there could be no rent. But the payment made in each year is still but the cost of construction and repair proportioned to that year, and spread over several years and averaged. If the fact that the expenses have not been incurred within the year created a distinction, then a bricklayer's or mason's bill not paid within the year but charged on the next or following years would make the land in those years rateable. It can make no difference that the creditor is not the bricklayer or mason himself, but the assignee of the debt due to the bricklayer or mason.

It is quite true that when land is let to a tenant, the value of the occupation to the occupier is alone considered in estimating its rateable value, and charges on the reversion are not regarded and are not deducted. But the payments made out of the tolls in discharge of debts and interest in the case now before your Lordships are not charges on a supposed reversion; they represent what are in ordinary cases expenses annually incurred to enable the land to command the rent. They are like tithes, or tithe commutation rentcharge, which must be paid by occupier to prevent the tithe owner from entering; or like contributions to a sea wall to prevent the land from being overflowed; or like the annual or periodical expenses for repairs; all which are to be deducted in estimating the annual letting and rateable value of property (see 6 & 7 Will. 4. c. 96. and 25 & 26 Vict. c. 103).

It may, indeed, be said that the expenses incurred in permanently improving land, *e. g.*, in building a house on the land, are additions and not deductions from the rateable value, though the annual average repairs of that house when built are so. But when a private house is built, the disposable annual income derived from the land is increased, and therefore the rateable value of the land is augmented. But in the case before your Lordships the disposable annual

income from the docks is not, and never can be, augmented; for the tolls always must be reduced to such a point as to leave no disposable income.

The objection of the appellants that these charges are to be treated like mortgages or charges on the reversion of ordinary property, and not to be regarded in estimating rateable value, seems inconsistent with itself, for the argument rather seems to shew that they *are* to be regarded, not, indeed, as a deduction, but as causing an addition to the value, and that the docks when incumbered with debt are rateable, and when free from incumbrance are not rateable.

Again, if these docks are rateable on the ground of the debts and interest owing by them and secured upon them, then it will follow that in the case of turnpike-roads which are involved in debt (at least in those cases where the soil is in the Commissioners, as sometimes happens), the road will be rateable to the poor, because, being involved in debt, the bondholders receive interest.

It is objected, lastly, by the appellant that there is no substantial distinction between docks made by a joint-stock company and the docks now under consideration.

But if there be no legislative limit imposed on the tolls, or on the profits of the joint-stock enterprise, then the two cases are widely and obviously different. For in the case of a joint-stock company the land used for the undertaking may produce profit to the company, and on that ground would be clearly rateable. And even if the limits of profit be fixed by the legislature by imposing a maximum of tolls, still, in the case of a commercial joint-stock company, whatever margin of profit is left to the shareholders over and above the ordinary rate of interest on floating capital, confers a rateable value on the land.

On this principle and to this extent it is that a railway or any other joint-stock company is rateable in respect of its occupation of land. You take the gross income and deduct expenses, including in the deductions not only interest on the floating capital, but even tenants' profits thereon; and what is left after these deductions is profit to the shareholders, and that profit constitutes the rateable value of the railway. No one ever heard of augmenting the rateable value of a railway or other property by the sum payable as principal or interest on its debentures. What the shareholders receive for their profit derived from the occupation of the land forms the theoretical rent, and therefore the rateable value of the land; not what the creditors receive for their debts or interest.

In the Liverpool Docks there are no shareholders, and no profit can ever be received by any one; all that can be done is to keep down interest and pay the debts, neither of which payments constitute profit to any one. Whatever proportion of the tolls is not wanted for this purpose must, as already observed, be immediately taken off.

However, in a case of this nature, probably authority rather than general reasoning ought to decide the question. I do not understand your Lordships to ask, and therefore it would be officious and presumptuous to express any opinion on the effect of the precedents cited, in binding your Lordships as the supreme tribunal. But I conceive that a Judge sitting either in one of the superior Courts of law, or even in the Exchequer Chamber, would consider himself concluded by authority in answering your Lordships' first question. And for confirmation I venture to refer your Lordships to Mr. Justice Crompton's language as to the effect of the decision in pronouncing his judgment in the Court of Exchequer Chamber. He says, "with regard to the former *decisions*, I think that neither a Court of co-ordinate jurisdiction nor a Court of error ought to interfere in such a case." And independently of the respect due by our system of law to precedent, a Judge would have to consider some of the consequences which must follow from adopting, at this late period, a new construction of the statute of Elizabeth.

If a dedication to public purposes be consistent with rateability, then, for the future, public hospitals, like St. Bartholomew's Hospital, St. George's Hospital, the London Hospital, St. Thomas's Hospital, and other establishments of the like

nature in the metropolis and throughout the kingdom with a multitude of other public charities, become at once subject to poor-rates. Lunatic asylums like St. Luke's or Bethlehem in the metropolis, and county lunatic asylums, also become assessable at their letting value; though in many instances the exemption of such institutions is recognized by acts of parliament, providing that land taken for the purpose shall retain its rateability to the extent of the value of the land without the building upon it. Churches and chapels (but for the rent statute), would, even where the pews are not let, have become rateable; for property is to be rated, not at what a tenant does give, but at what he would give for it in its actual condition (6 & 7 Will. 4. c. 96). County gaols, county reformatories, county courts and courts of justice, not only in counties and cities, but in the metropolis also (not, indeed, in Westminster Hall, because that is one of the Queen's palaces), may become rateable. The property of the Crown in the occupation of the Crown, will, no doubt, still be protected from rateability; but old questions, now at rest, will re-appear as to other buildings occupied for public purposes, like the Horse Guards, the Admiralty, many buildings and residences at Portsmouth, Plymouth, Chatham, Milford Haven, and Greenwich, the British Museum, the National Gallery, Greenwich Hospital, the Custom House, the General Post Office, burial grounds, many of the apartments in Somerset House, the premises occupied by the Poor Law Commissioners and other public bodies, public bridges, public turnpike-roads, and the soil of many navigable rivers, if not of public highways themselves. In many of these instances money has been expended and money borrowed on the faith of precedent, the law having been considered as settled by its authorized expounders for so many years.

In the case now before your Lordships, as pointed out by Mr. Justice Hill, in the Court of Exchequer Chamber, new docks have been constructed, and large sums of money borrowed on the faith of the decisions in this and other cases.

If the fact that the indebtedness of the Board and the application of their revenues to the payment of principal and interest makes them liable to be rated, then, as I have already said, I think the principles on which the railways and other joint-stock enterprises throughout the kingdom have hitherto been rated will be unsettled.

In answer to your Lordships' second question, if at the time of the passing of the acts enumerated in the question it had been clear, on authority and principle, that the Liverpool Docks were rateable, then, I think, the words contained in the sections referred to would not have exempted them from rateability.

But that is almost an impossible supposition; for had that been so, such enactments could never have found their way into a succession of statutes. I conceive that these enactments are to be read, like every other written instrument, with reference to the existing and surrounding facts. Those facts are, that from the time of the first establishment of the docks in the reign of Queen Anne they had never been rated, except on two occasions, on both of which occasions they had been pronounced exempt from rates by the Court of Queen's Bench. Those two decisions had been acquiesced in, and acted on for fifty years since the first, and thirty years since the last decision. No one can doubt, I think, that the successive penmen who drew the acts, and all the parties to them, the Board, the Corporation, and the several parishes, took it to be clear, first, that an occupation not beneficial was not rateable, and secondly, that the docks (as distinguished from the warehouses) were not rateable on that ground. The opinion of the draughtsman of itself goes for little or nothing; but that opinion (in the presence of parties interested to dispute it) passed unchallenged five times through both Houses of Parliament. I think that circumstance amounts to a recognition by Parliament of the law, that a beneficial occupation is necessary to rateability, and that the occupation of these docks by the Mersey Board is not beneficial. It will, moreover, be observed that these acts

are not mere private acts, but public acts, and not merely public in a technical sense, but upon a matter affecting the general public.

I think, further, that the enactments disclose evidence of a bargain to which was needed and obtained the sanction of Parliament between, first, the lenders of money; secondly, the Board and their predecessors in estate; thirdly, the parochial authorities of Liverpool; and fourthly, the general public; the effect of which bargain is that a certain portion of the property is to be rateable, and the residue not rateable. And that opinion seems to have been entertained by the Court of Exchequer Chamber.

I may add, in conclusion, that the Court of Queen's Bench twice, and the last time after argument before four of the most eminent Judges who ever presided in that Court, had held these docks not rateable. And at this moment there stand the unanimous decisions of the Court of Queen's Bench in 1827; the unanimous decision of the Court of Common Pleas in 1862; and the unanimous decision of the Court of Exchequer Chamber in error from the Common Pleas, to the same effect.

In answer to your Lordships' third question, I am of opinion that the act 20 & 21 Vict. c. 162, ss. 26, 27, does not impose on the board any liability to poor-rates, which, but for those clauses, would not exist.

The words should seem, *primâ facie* to regard charges or liabilities upon the land, such as debts, and perhaps easements. It was stated at your Lordships' bar that there are from twenty to twenty-four charges on the land, properly so called, and independent of poor-rates, to which the words in that sense would be applicable. But the poor-rate, which, as I have already reminded your Lordships, originally affected personal property in the same way as real property, has repeatedly been held to be no charge on the land at all, but only on the person who occupies, in respect of the profits of his occupation—*Case v. Stevens* (Fitzgibbon, 298); *Theed v. Starke* (8 Mod. 213); *Stonehouse Bridge* (8 Mod. 356), *Earl of Bute v. Grindall* (2 H. Black. 265), *Rowls v. Gells* (Cowp. 453).

Moreover, the poor-rate is a personal charge which exists or does not exist, according to the character of the occupier, as he is or is not a person liable to be rated. Suppose these general words in a grant to the Crown, or in a deed conveying land to trustees of a court of justice, or of a church, it is plain that they would not impose on the grantee a liability to poor-rate if he were exempt from rates. Or suppose them to exist in a statutable conveyance to the Crown, to which the Crown is a party, *e. g.*, for fortifications; or in a statutable conveyance to any other clearly exempted occupier, I conceive that the words would not impose poor-rates on occupiers not otherwise liable to pay.

Again, the act of the following year, 21 & 22 Vict. c. 90. s. 3, while incorporating the General Lands Clauses Act, excepts section 133. of that general act, which excepted section provides for the preservation of the liability to poor-rates and land-tax in certain cases. But section 5. of the local act preserves the land-tax, but is silent as to the poor-rate; shewing, as I conceive, that the legislature intended to preserve the land-tax, but not the poor-rate.

Lastly, the act 20 & 21 Vict. c. 162. is an act for consolidating the docks at Liverpool and Birkenhead into one estate, and vesting the control of them in one public trust; and it would be singular if one portion of the property should be rateable, and one not rateable, under precisely similar circumstances. And this observation is strengthened by remembering that where such a distinction exists (as in the case of the warehouses), it is created by express words.

THE LORD CHANCELLOR.—My Lords, the questions raised in this appeal depend in a great measure on the inquiry—What is the occupation of real property which is liable to be rated under the 1st section of the act of the 43 Eliz. c. 2?

Independently of the decided cases, several of which are irreconcilable with each other, it would seem to be easy to answer this inquiry; and, having regard to the Parochial Assessment Act (6 & 7 Will. 4. c. 96), it may be said,

in answer, that, "Occupation to be rateable must be of property yielding, or capable of yielding, a net annual value, that is to say, a clear rent over and above the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain the property in a state to command such rent." It is in this sense that I understand the words "beneficial occupation" wherever it is said that to support a rate the occupation must be a beneficial one. For, on principle, it is by no means necessary that the occupation should be beneficial to the occupier. It is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings.

The only occupier exempt from the operation of the act is the King, because he is not named in the statute; and the direct and immediate servants of the Crown, whose occupation is the occupation of the Crown itself, also come within the exemption. But this ground of exemption does not warrant many decisions which have held that property used for public purposes is not rateable. So, also trustees, who are in law the tenants and occupiers of valuable property upon trust for charitable purposes, such as hospitals or lunatic asylums, are, in principle, rateable, notwithstanding that the buildings are actually occupied by paupers, who are sick or insane.

If the matter were *res integra*, I could not concur in the decision of Lord Mansfield, in the case of *St. Luke's Hospital* (2 Burr. 1053), in which he is reported to have said, that mere trustees cannot be esteemed occupiers, or rated as lessees, or with his conclusion in the case of *The King v. St. Bartholomew's Hospital* (4 Burr. 2435). But, with a slight verbal alteration, I entirely agree with the remark of the learned Judges in the present case, that if Lord Mansfield meant that the persons in the legal occupation of valuable property are not rateable, if they occupy in a merely fiduciary character, it is a position which cannot be maintained.

To these observations and decisions of Lord Mansfield, that which appears to me to be the erroneous doctrine of several subsequent decisions is to be attributed. This is plain on an examination of Lord Kenyon's judgment in the subsequent case of *The King v. the Commissioners of Salter's Load Sluice* (4 Term Rep. 430). Lord Kenyon refers to the decision in the case of *St. Luke's Hospital* (2 Burr. 1053), and adopts the position that trustees, who have a bare naked trust, not coupled with any interest, are not liable to be rated; and he uses language which, with the decisions of Lord Mansfield, has introduced the notion, that if valuable property be in the possession of trustees, who are bound to apply the whole of the proceeds to public but not Government purposes, that is, in works or purposes for the better accommodation or use of the public, they are not liable to be rated.

There is nothing in the act of Elizabeth, or in the reason of the thing, to warrant this conclusion. No exemption is thereby given to charity or to public purposes, beyond that which is strictly involved in the position that the Crown is not bound by the act. And it is a remarkable fact, that whenever these opinions of Lord Mansfield and Lord Kenyon have not been presented to the Court of Queen's Bench, the Judges have adopted the correct view of the statute. Thus, in *The King v. Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780), decided in the year 1823, and in the case of *The King v. the Trustees of the River Weaver Navigation* (7 B. & C. 70), decided in 1827, the *Salter's Load Sluice case* (4 Term Rep. 430) was cited and relied on; and the Court of Queen's Bench adopted the language of Lord Kenyon and followed his decision. But in the case of *The Governors of the Bristol Poor v. Waite* (2 El. & B. 148), decided in 1836, the *Salter's Load Sluice case* (4 Term Rep. 430) does not appear to have been referred to; and the Court recurred to the correct view of the statute of Elizabeth, and held that the governors of the Bristol poor, who had taken some buildings and land on lease for the occupation of their poor, although they were bare trustees, and held for a public purpose only, were such occupiers of property as to be liable to be rated to the poor. This case, in its turn, has been followed in other decisions as an authority; and it might have been supposed that the authority of the *Salter's Load Sluice case*

(4 Term Rep. 430) and its two satellites, *The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) and *The King v. the Trustees of the River Weaver Navigation* (7 B. & C. 70), had come to an end. But in the year 1839, the Court of Queen's Bench, in the case of *The Queen v. the Corporation of Liverpool* (9 Ad. & E. 435), returned to its old allegiance; and again set up the authority of *The King v. Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) and *The King v. the River Weaver Navigation* (7 B. & C. 70). This last case of *The Queen v. the Corporation of Liverpool* (9 Ad. & E. 435) was decided on the principle that since the Municipal Corporation Act the property of a municipal corporation is held upon trust for the purposes of the borough fund; and, therefore, that the corporation of Liverpool were bare trustees of the property in question for public purposes. The mischief of this decision was remedied by the act of the 4 & 5 Vict. c. 48; but, unfortunately, that act did not declare the law.

Some subsequent decisions of the Court of Queen's Bench have been marked with much timidity. They have, in effect, departed from the grounds of the decisions in the *Salter's Load Sluice* case (4 Term Rep. 430) and its attendant cases; but have, at the same time, attempted, by very questionable distinctions, to save whole the authority of those cases. Thus, in the cases of *The Queen v. Badcock* (6 Q.B. Rep. 787) and *The Queen v. the Overseers of Longwood* (13 Q.B. Rep. 116; s. c. 18 Law J. Rep. (N.S.) M.C. 65) there is an attempt to distinguish between the interest of the unlimited public and the interest of the public limited by the bounds of a county, borough, or parish.

At last, in the case of *The Tyne Commissioners v. Chirton* (1 El. & El. 516; s. c. 28 Law J. Rep. (N.S.) M.C. 131), the Court of Queen's Bench recurred to that which is, in my opinion, the true principle, namely, that the only ground of exemption from the statute of Elizabeth is that which is furnished by the rule, that the Sovereign is not bound by that statute; and that consequently, when valuable property (that is, property capable of yielding a net rent above what is required for its maintenance,) is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the Government of the country, and are therefore to be deemed part of the use and service of the Crown.

If this be the true criterion of exemption from rateability where the property is valuable, it is clear that the Mersey Docks are liable to be rated.

In this country, many works tending greatly to the convenience and benefit of the public, and in that sense public works, are the result and creation of private enterprise, being made or performed by money subscribed by the public, on the terms, or in the hope of receiving such interest out of the proceeds of the works as will, in the judgment of the subscribers, make the investment a profitable one. Such is the condition of the Mersey Docks, which are in truth property used and occupied for the profit and benefit of a number of persons; and it is the same thing in substance as if the docks had been demised by the subscribers to the trustees on the terms of maintaining the docks and paying to the subscribers a rent equivalent to the interest on their bonds.

I am therefore clearly of the same opinion, with the majority of the learned Judges, that the Mersey Docks and Harbour Board are occupiers of the docks and harbour within the true meaning of the word "occupier" in the act of Elizabeth.

The answer to the second question put to the learned Judges is, in effect, a mere consequence of the answer to the first question; for it cannot be pretended that the statute of Elizabeth has been repealed, either expressly or impliedly, by any of the statutes which apply to the Liverpool Docks, or that the liability of the trustees as occupiers, which is the result of the true interpretation of the act of Elizabeth, has been discharged or altered by anything contained in the local statutes. On this head it is unnecessary to say more than that I concur with the observations of the majority of the learned Judges in their elaborate opinion delivered by Mr. Justice Blackburn.

The result is, that I humbly move your Lordships to reverse the order of

the Court of Exchequer Chamber in the case of *Jones v. the Mersey Docks and Harbour Board*, but to affirm it in the case of *The Mersey Docks and Harbour Board v. Cameron*.

LORD CRANWORTH.—My Lords, I concur with my noble and learned friends in thinking that judgment ought to be given for the plaintiffs in error.

I have given full attention to the opinions of the learned Judges who assisted us at the hearing; and concurring as I do, in that delivered by Mr. Justice Blackburn, on behalf of himself and four of the other five Judges, I do not feel it necessary to go into the question at length. That very able opinion seems to me to exhaust the subject.

By the statute of Elizabeth, the overseers are directed to raise the money necessary for the relief of impotent poor by taxation of (*inter alios*) every occupier of lands in the parish.

That the defendants in error are occupiers of lands in the parish of Liverpool cannot be doubted, and so, unless there be something to exempt them, they are rateable.

The argument on their behalf has been, that though they are occupiers, their occupation is not a beneficial occupation; and the statute, it was contended, contemplated only such an occupation as is beneficial to the occupier, or to some person or persons for whose behoof the occupier is occupying.

If by *beneficial* occupation is meant any occupation of something valuable, something in its own nature *beneficial* to some one, I think it is fair to consider that word as impliedly included in the statute. It was not meant to impose the duty of contributing to the relief of the poor on any one merely because he might be the occupier of a barren rock, neither yielding nor capable of yielding any profit from its occupation.

But I can discover nothing, either in the words or in the spirit of the act, exempting from liability the occupier of valuable property, merely because the profits of the occupation are not to be enjoyed by him, or by any one on whose behalf he is occupying, but are to be devoted to the benefit of the public.

In the opinion of the five Judges, delivered by Mr. Justice Blackburn, that learned Judge has traced with great care and accuracy the progress of the decisions on this subject; and I should be merely wasting the time of the House if I were to proceed to go over again what has been so well done by him. The Court seems to me to have fallen into error in the time of Lord Kenyon, if not in that of Lord Mansfield, in proceedings which unfortunately were incapable of being questioned in a court of error. The decisions so made were followed in similar proceedings in the time of Lord Ellenborough and Lord Tenterden. The doctrine on which they rested was shaken in some cases which occurred when Lord Denman was Chief Justice, and eventually were in substance overruled when Lord Campbell presided in the Court of Queen's Bench.

In these circumstances, thinking, as I do, that there is nothing in the statute of Elizabeth expressly or impliedly exempting from rateability the occupier of valuable property merely because the benefit of the occupation is to go to the public, I think your Lordships ought not to consider yourselves fettered by any decisions of the Courts below, but that you ought to lay down the law as you think it ought to have been laid down if this question had arisen before any of those decisions had been pronounced. I therefore concur in the motion of my noble and learned friend on the woolsack.

To avoid all misconception, I wish to add, that there are certain cases to which the observations I have made do not apply. The Crown not being named is not bound by the act. It follows, therefore, that lands or houses occupied by the Crown, or by servants of the Crown, or for the purposes of the Crown, are not liable to be rated; and I conceive that it is from a confusion between property occupied for public purposes and property occupied by servants of the Crown that this mistake has arisen. This principle exempts from rates, not only royal palaces, but also the offices of the Secretaries of

State, the Horse Guards, the Post Office, and many similar buildings. On the same ground, police courts, county courts, and even county buildings occupied as lodgings at the assizes for the Judges, have been held exempt. These decisions, however, have all gone on the ground, more or less sound, that these might all be treated as buildings occupied by servants of the Crown and for the Crown, extending in some instances the shield of the Crown to what might fitly be described as the public government of the country. In none of these cases was exemption conceded on the ground contended for in the present case. And I cannot but think that the error which has crept into the decisions has arisen from confusing cases like the present with those in which the interests of the Crown or its servants were concerned.

LORD CHELMSFORD.—My Lords, it is impossible in entering upon the consideration of these appeals to refrain from an expression of surprise that there should arise at the present day, after more than two centuries and a half from the time of the passing of the act, a necessity for interpreting any part of the 43 Eliz. c. 2; and yet, from the numerous cases which have been cited in the argument at your Lordships' bar, it is evident that the exact meaning of the important word "occupier" in the rating clause of that act must be regarded as hitherto an unsettled question.

Those who have established the liability of the docks to be rated to the poor-rate have, with respect to the Liverpool Docks, to contend against the authority of a decision, probably in 1808, but certainly in 1827, upon the very subject in question in one of these appeals. The latter decision was expressly founded upon a case determined more than thirty years before, and which has since been regarded and acted upon as an unquestionable authority. Under these circumstances, the counsel for the parishes might expect that the House would feel the same reluctance to disturb these decisions as was expressed by Lord Chief Justice Tindal in *Crease v. Sawle* (2 Q.B. Rep. 862), and would say with him, "It would be extremely inconvenient, and indeed mischievous, to overrule a class of cases which have been much discussed and sanctioned by many eminent Judges, and which are now constantly acted upon, because we might not feel perfectly satisfied with the reasons assigned for their decision. If we could permit ourselves to disregard these authorities on that account, we might feel disposed on that ground to reject others which have put a construction on the 43 Eliz. c. 2. which we were by no means sure it ought to bear if we were now for the first time called upon to explain the meaning of its language."

Mr. Justice Crompton, in delivering the judgment of the Court of Exchequer Chamber in the case of *The Mersey Docks and Harbour Board v. Jones* (30 Law J. Rep. (N.S.) M.C. 239), said, "With reference to the former decisions, I think that neither a Court of co-ordinate jurisdiction nor a Court of error ought to interfere in such a case. If there is any hardship, it must be left to the legislature." By this last observation the learned Judge seems to have considered that this House, as well as the Courts of original and appellate jurisdiction, ought to yield implicitly to the authority of long-established decisions. But the same reasons for acquiescence do not apply to the different tribunals. The Courts rightly abstain from overruling cases which have been long established, because, if they did so, they would only disturb without finally settling the law. But when an appeal from any of their judgments is made to this House, however they may be warranted by previous authorities, the very object of the appeal being to bring those authorities under review for final determination, the House cannot, upon the principle of *stare decisis*, refuse to examine the foundation upon which they rest. This would, in my opinion, have been the duty of your Lordships, even if the current of the decisions had been uniform; but as various cases have been decided which, with all the endeavours to reconcile them, must still be regarded as conflicting and contradictory, it is absolutely necessary to

determine what for the future shall be considered to be the law with reference to rating docks, and works of a similar character.

The 43 Eliz. c. 2. enacts, "That the overseers are to raise by taxation of every inhabitant, &c., and of every occupier of lands, houses, &c., in such competent sums as they shall think fit, according to the ability of the parish," the requisite fund for the purposes of the act.

The words, "to rate in such sum as they shall think fit," do not mean—as Lord Chief Justice Tindal says, in *Marshal v. Pitman* (9 Bing. 601)—that they are to have a power to rate arbitrarily, but "to rate the occupier according to the value of his occupation, the inhabitant according to his visible personal property." Or, as was said in *Early's case* (2 Bulst. 54), the overseers are to make their taxations and assessments well and truly, and in an equal manner, according to the *visible* estates, real and personal, of the inhabitants within their town.

Primâ facie, therefore, a liability to the rate would seem to attach upon every occupation from which benefit is derived; and no occupier can claim an exemption unless he can find it in the act itself, or it arises from some principle of law applicable to all cases.

With respect to exemption arising from the act itself, it is obvious that as the occupier is to be assessed according to his ability, if he derives no benefit of any kind from his occupation, he has no ability in respect of it, and consequently cannot be rateable. The other exemption, which does not arise from the act itself, but which is founded on a general principle of law, applies only to the Crown, which, not being named in the act, is not bound by it.

I am unable to find any grounds of exemption from liability to the poor-rate, either in the act itself, or in any principle of law apart from the act, except the two which I have mentioned; and there is nothing to indicate the intention of the legislature that lands and houses occupied for what in some of the cases is rather loosely called "public purposes," as contradistinguished from private benefit, should not be liable to the rate.

Lord Campbell, in the case of *The Birkenhead Dock Trustees v. the Birkenhead Overseers* (2 El. & B. 148), says, that the exemption on the ground of public purposes takes its origin from the marginal note to the report of the case of *The King v. the Commissioners of Salter's Load Sluice* (4 Term Rep. 430). If this is so, it is a remarkable fact, that in following that case as an authority, the Courts should have been misled by confining their attention to the marginal abstract, which certainly conveys a very imperfect if not an inaccurate idea of the grounds of the decision. The term "public purposes" is only employed by Lord Kenyon in the *Salter's Load Sluice case* (4 Term Rep. 430) incidentally. The reason given for the judgment, is the absence of beneficial occupation. His Lordship says, "The Commissioners have a bare naked trust, not coupled with any interest." And again, "Upon the ground upon which the Court proceeded in *The King v. St. Luke's Hospital* (2 Burr. 1053) there was no occupier," by which he must have meant no beneficial occupier, for he adds, "The Commissioners were mere trustees to superintend the execution of the act, without any personal advantage." This reference to the case of *St. Luke's Hospital* (2 Burr. 1053) shews that the leading idea in the mind of the Court was the want of a beneficial occupier, although there does not seem to be a very close analogy between the case of an hospital supported by voluntary subscriptions, from which no person who could be regarded as an occupier derived any pecuniary benefit, and the receipt of tolls as a compulsory incident to the occupation by the Commissioners of the Salter's Load Sluice.

The first case in which an occupation for "public purposes" was expressly stated as the ground of exemption from liability to poor-rate is *The King v. the Trustees of the River Weaver Navigation* (7 B. & C. 70), to which the principle of the decision in the case of *The King v. the Inhabitants of Liverpool* (7

B. & C. 61; s. c. 9 Dowl. & Ry. 780) (the judgment brought into question by this appeal) was held to be applicable.

In the case of *The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) Lord Tenterden proceeded on the ground of there being no beneficial occupation, with respect to which he said the case of *The King v. the Commissioners of Salter's Load Sluice* (4 Term Rep. 430) is decisive. But in *The King v. the Trustees of the River Weaver Navigation* (7 B. & C. 70) Mr. Justice Bayley said, "The surplus tolls remaining over and above the expenses of supporting the navigation were to be applied to the repairing and maintaining of bridges and highways. Those were public purposes, and as no part of the monies received could be applied to private purposes, these monies were not rateable in the hands of the trustees."

In *The King v. the Mayor, &c. of Liverpool* (9 Ad. & E. 435), the Court followed the cases of *The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) and *The King v. the River Weaver Navigation* (7 B. & C. 70), without expressing any opinion as to the grounds of these decisions, observing, "That they felt it to be impossible substantially to distinguish the case before them from these cases, and especially from the latter, and that if they found the principle settled by decisions already made, they felt it to be their duty to act upon them, and not upon the apprehension of any inconvenient or unforeseen consequences to question or weaken their authority."

In the case of *The Queen v. the Inhabitants of Exminster* (12 Ad. & E. 2; s. c. 9 Law J. Rep. (N.S.) M.C. 108) the Court adhered to their decision in *The Queen v. the Mayor, &c. of Liverpool* (9 Ad. & E. 435), without any further explanation of the grounds of their judgment.

But in a more recent case, *The Queen v. St. George's, Southwark* (10 Q.B. Rep. 852; s. c. 16 Law J. Rep. (N.S.) M.C. 129), Lord Denman said, "Whether a person is rated as occupier, holder or possessor of the premises, or as using them, the occupation, holding, possessing or using them must be beneficial to the parties so rated. It has been settled, by several cases, that the possessors or occupiers, as trustees of property otherwise rateable, the profits of which they were bound by act of parliament to apply to public or charitable purposes, were not rateable to the poor in respect of such property." Now, although Lord Denman, in the case of *The Queen v. the Mayor, &c. of Liverpool* (9 Ad. & E. 435), seems to hint at some distinction between the cases of *The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) and *The King v. the Trustees of the River Weaver Navigation* (7 B. & C. 70), yet it would appear (especially from his last-mentioned observations) that he considered them to rest upon the same foundation, and that the counsel on both sides at your Lordships' bar were correct in saying that there was no case decided upon the ground of public purposes which was not resolvable into beneficial occupation. But if this is so, it will be impossible to accept the explanation by which decisions apparently inconsistent with the judgment in *The King v. Salter's Load Sluice* (4 Term Rep. 430) and the cases which followed it have been attempted to be reconciled with them.

To these cases it is necessary now to turn. The first of them which broke in upon the series of decisions hitherto considered is the case of *The Governors of the Poor of Bristol v. Waite* (5 Ad. & E. 1). In deciding this case as they did, the Judges were probably not aware that they were disregarding the authority of previous decisions, as the *Salter's Load Sluice* case (4 Term Rep. 430) and the other cases founded upon it are not noticed in the argument or in the judgment. But in *The Queen v. the Guardians of the Wallingford Union* (10 Ad. & E. 259), where those cases were cited, the Court followed the case of *The Governors of the Poor of Bristol v. Waite* (5 Ad. & E. 1), without any attempt to reconcile it with what had been previously decided.

In the case of *The Queen v. Badcock* (6 Q.B. Rep. 787), however, Lord Denman, in giving judgment, reviewed the authorities which appeared to be conflicting, on the one side the series which followed *The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780), and on the other

that which commenced with *The Governors of the Poor of Bristol v. Waite* (5 Ad. & E. 1), and observed that in all the first class the public, as such, unlimited by the bounds of county, borough or parish, had a substantial and direct interest in the benefit which the application of the funds produced; in the latter the ratepayers, or at most the inhabitants of certain parishes, were alone concerned in the benefit, direct or indirect. This distinction was afterwards approved of and adopted by Mr. Justice Coleridge in the case of *The Queen v. the Commissioners of Harrogate* (15 Q.B. Rep. 1010; s. c. 20 Law J. Rep. (n.s.) M.C. 25).

The attempts thus to reconcile the discordant decisions will be regarded as having been completely unsuccessful, when it appears that in the first class, instead of all the cases being instances in which the public at large, "unlimited by the bounds of county, borough, or parish," had an interest, there are found the cases of *The King v. the Trustees of the River Weaver Navigation* (7 B. & C. 70), in which the surplus funds were applied for the general purposes of the county of Chester, and of *The King v. the Mayor, &c. of Liverpool* (9 Ad. & E. 435) and *The Queen v. the Inhabitants of Exminster* (12 Ad. & E. 2; s. c. 9 Law J. Rep. (n.s.) M.C. 108), in which the public beyond the bounds of the borough had no interest in the benefit produced by the application of the funds. And the distinction fails altogether if the term "public purposes," as distinguished from "private purposes," is to be resolved into the question of beneficial occupation, because it would then appear to be immaterial whether the public purposes, which exclude the idea of private benefit, were of a local or of a general character.

The desire of the Court, however, not to be bound by the former decisions, and yet not to be compelled expressly to overrule them, is exhibited in a very striking manner in the case of *The Queen v. the Harrogate Commissioners* (15 Q.B. Rep. 1010; s. c. 20 Law J. Rep. (n.s.) M.C. 25), where it was held, that in order to exempt property from liability to poor-rate on the ground of its occupation for public purposes, the benefit must be exclusively public, and that if the occupation was in some degree beneficial to the whole public, yielding additional benefit also to a limited district or community, the property was rateable; as if it could make any difference in point of principle when the occupation is for public purposes, that one portion of the public derives a greater benefit from the application of the funds produced than the rest.

After these fruitless endeavours to reconcile the decisions, a case arose in which it seemed absolutely necessary to determine whether *The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780), and the cases which followed it, were to be submitted to as authorities for the future, or were to be set aside and disregarded. In the case of the trustees of *The Birkenhead Docks v. the Overseers of Birkenhead* (2 El. & B. 148), the question to be decided was, whether the Commissioners of the Birkenhead Docks were liable in respect of their occupation to be rated to the poor-rate. It certainly requires some ingenuity to discover any difference between the Birkenhead Docks and the Liverpool Docks, the latter of which had been decided in the case of *The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) not to be rateable. But Lord Campbell held, that the cases were distinguishable. He said that "the decision in *The King v. the Commissioners of Salter's Load Sluice* (4 Term Rep. 430) could be rested only on the clause in the local act, which directed the tolls to be applied and disposed of for the several uses and purposes of the said act, and to no other use and purpose whatsoever." The question was, whether "this amounted to a prohibition to apply the tolls to the payment of the poor-rate, and adopting this construction he added, "we think that the decision in the *Liverpool case* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780) can only be supported by similar reasoning."

It is clear, however, that the cases in question were not decided on any such ground, and it could have been assumed by Lord Campbell only from his desire to escape from the necessity of submitting to them, by suggesting

a distinction without denying their authority. That distinction was, that in the *Birkenhead case* (2 El. & B. 148) the obligation to lower the tolls, which was much relied upon in the *Liverpool case* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780), was entirely wanting. It might have been supposed that the decision of the *Birkenhead case* (2 El. & B. 148) having proceeded upon this ground, when the subsequent case of *The Tyne Improvement Commissioners v. the Overseers of Chirton* (1 El. & El. 516; s. c. 28 Law J. Rep. (N.S.) M.C. 131) was brought before Lord Campbell and the Court of Queen's Bench, in which case the local acts for making a dock, expressly required the Commissioners, "in the event of any surplus remaining after the appropriation of the rates to the purposes of the act, to lower the rates to the extent of such surplus," he would have adhered to the distinction, and have held the case to be governed by the authority of *The King v. the Inhabitants of Liverpool* (7 B. & C. 61; s. c. 9 Dowl. & Ry. 780). But instead of taking this course, he said that "to hold the dock exempt from rateability they should have to overrule *The Birkenhead Dock Trustees v. the Birkenhead Overseers* (2 El. & B. 148), and that the only distinction between the cases was that in the *Birkenhead case* (2 El. & B. 148), the Commissioners had power to raise the rates again after having reduced them."

In this unsatisfactory state of the authorities it is evident that the two classes of decisions which have been subjected to this examination cannot stand together, and that it is necessary for your Lordships to determine which of them is agreeable to law. It must not be overlooked that in favour of the exemption of the docks from liability to poor-rate there is the recital in the act of the 4 & 5 Vict. c. 48, which strongly indicates the opinion of the legislature that the cases which had held the property of municipal corporations not to be liable to poor-rate, had been rightly decided. But, as Lord Campbell said in *The Queen v. the Inhabitants of Houghton* (1 El. & B. 510; s. c. 22 Law J. Rep. (N.S.) M.C. 89), "a mere recital in an act of parliament, either of fact or of law, is not conclusive, and we are at liberty to consider the fact or the law to be different from the statement in the recital." The question of course depends upon the true meaning of the word "occupier" in the 43 Eliz. c. 2. The words of the act are as general as possible: "every occupier according to his ability." And Lord Denman, in the case of *The Governors of the Poor of Bristol v. Waite* (5 Ad. & E. 1), seems to give a correct description of the effect of those words, when, after adverting to the meaning of the term "beneficial occupation," he says, "Without affecting the precision of an exact definition, it would probably be nearer the truth to say, that a presumptive liability arising from occupation is to be explained away in each case." It is impossible not to agree with the observations made by his Lordship in the case of *The Queen v. Sterry* (12 Ad. & E. 84; s. c. 4 P. & D. 122), that "no one can review the numerous decisions" (which cases somewhat like the one then before him had occasioned) "without regretting that the Court was ever induced to depart from the simple test, which the subject-matter of occupation would in every case have afforded. Whether the occupation was in respect of private or public or charitable purposes, it would have been wiser to have disregarded, and whenever the subject-matter was found productive to any one, to have rated the actual occupant in respect of that produce." I cannot help thinking that the test here suggested was the one intended by the legislature. By the act, the taxation is to be on every occupier "according to the liability of the parish." The productive occupation of the several occupiers within the parish make up its aggregate ability. If an occupier derives no benefit of any description from his occupation, it forms no part of the general ability of the parish, but if it is productive (although not profitable) there is nothing in the act which requires the overseers to follow the produce in its subsequent application. The receipt of it constitutes the visible ability of the occupier. As was said, by Lord Tenterden, in *The King v. the Inhabitants of St. Giles's, York* (3 B. & Ad. 579), "If any profit be made, the application of it when made is immaterial as to the question of

'rateability.' This seems to be the true distinction which ought to have guided the decisions, and not that between private benefit and public purposes, from the adoption of which all the contrariety in the cases on the subject of beneficial occupation has arisen.

It is to be observed, that the term "beneficial occupation" is nowhere to be found in the act of Elizabeth, and it must have been used in the different cases as synonymous with "ability." In this sense the decisions with regard to St. Luke's and St. Bartholomew's Hospitals, and to chapels and rectory-houses where no pew-rents are received, are perfectly intelligible. In none of them could any person in the character of occupier be said to derive any benefit from the occupation. But that the absence of private benefit is no ground of exemption appears from the cases in which trustees of chapels who received profit from letting the pews, although they applied it entirely to the purposes of the chapel, were held rateable; and in the recent case of *The Queen v. Sterry* (1 El. & B. 510; s. c. 22 Law J. Rep. (N.S.) M.C. 89) the trustees of a school, purchased from funds raised by charitable subscriptions and bequests, were held rateable in respect of the school, because no child was admitted to the school without an annual payment of 12*l.*, although the average annual expense with respect to each child was 20*l.*

The *Salter's Load Sluice* case (4 Term Rep. 480) gave the key-note to all the subsequent decisions, which held that the *prima facie* liability of an occupier no longer existed when it was shewn that the profits connected with his occupation were applicable to public purposes. Lord Kenyon, in founding his judgment upon *The King v. St. Luke's Hospital* (2 Burr. 1053) must have intended to decide that in the case before him there was no beneficial occupier, although he did not advert to the distinction that in the case of *St. Luke's* (2 Burr. 1053) there was nothing received by any one by reason of the occupation, while the Commissioners of the Salter's Load Sluice were empowered to take tolls for the navigation which was vested in them.

The exemption of an occupier, whose occupation is applicable to public purposes, was thus almost incidentally introduced; and, having been so, it was accepted, without much consideration, in the subsequent cases. At last, some decisions having taken place which were hard to be reconciled with each other, it became necessary to define with some precision the true principles which ought to govern cases of this description. The distinction was then proposed between general and local public purposes. The difficulty, not to say the impossibility, of reconciling the cases by a distinction of this sort, has been already shewn. If, as before observed, the ability of the occupier means the personal benefit derived from his occupation, it is as much excluded where the profits of his occupation are applicable to limited public purposes as where they are to be applied to the benefit of the public at large.

I am of opinion that, under the words of the 43 Eliz. c. 2. every occupier of a tenement yielding profit is within the rating clause of the statute, although the tenement be a public work for the general good of the realm, and the profit be directed to be applied exclusively to its maintenance.

Having thus expressed my opinion that the Mersey Docks and Harbour Board are liable to be rated for the Liverpool as well as for the Birkenhead Docks, it is unnecessary to consider the effect of the different acts of parliament, by which the trustees were expressly made liable to parochial rates "in respect of warehouses to be built in like manner as the same are or would be payable in respect of warehouses the occupancy of which is beneficial." The provisions of these acts certainly appear to indicate the opinion of the legislature that without them the warehouses would have been exempt from liability to poor-rate as part of the docks enjoying that exemption. But if this liability existed before, the acts cannot have the effect of taking it away (not by express enactment, but) by mere implication.

It is quite true, as Mr. Justice Byles has said, that the act of the 20 & 21 Vict. c. clxii. having consolidated the docks at Liverpool into one estate, and vested the control of them in one public trust, it would be singular if one

portion of the property should be rateable and one not rateable under precisely similar circumstances. This undoubtedly would be the result if the decisions of the two cases appealed against were to stand; and the remark exhibits in a striking manner the impossibility of reconciling the decisions which, on the one hand, have exempted the Liverpool Docks from liability to poor-rate, and on the other have rendered the Birkenhead Docks liable to it.

By reversing the judgment in the case of the Liverpool Docks, and by affirming the judgment in that of the Birkenhead Docks, the decisions will at last be brought into uniformity, and the statute 43 Eliz. c. 2. will, in my opinion, receive its proper construction, and have its consistent effect and operation.

LORD KINGSDOWN.—My lords, I concur with my noble and learned friends in the opinions they have expressed.

The order of the Court of Exchequer reversed in the case of Jones v. the Mersey Docks and Harbour Board, and affirmed in the case of the Mersey Docks and Harbour Board v. Cameron.

[IN THE COURT OF COMMON PLEAS.]

Nov. 17, 1865.

WIGAN, appellant, v. STRANGE, respondent.

35 L. J. M.C. 31; L. R. 1 C.P. 175; 13 L. T. 371; 14 W. R. 103;
12 Jur. N.S. 9.

Stage-Play—Music and Dancing—Licence—25 Geo. 2. c. 36.—6 & 7 Vict. c. 68.

THEATRE.—*The respondent was the proprietor of a house of public resort, licensed for music and dancing under 25 Geo. 2. c. 36, and afforded therein to the public an entertainment of the following nature: there were an orchestra, stage and scenery, as in a theatre; a body of female dancers descended from rocks on to the stage, and danced with daggers in mimic warfare; this dance ended by some standing over others as if in triumph, and retiring on the approach of another set of female dancers with palm-leaves; the dancers then formed an avenue to receive another dancer, who danced a pas seul; and the whole concluded by a grouping of all the dancers with palm-leaves and other stage properties:—Held, that whether or not this was a stage-play requiring a licence under 6 & 7 Vict. c. 68. was a question of fact and not of law.*

Held, also, by the majority of the Court, that if they had been obliged to decide the question of fact, they should have concluded that this was such a stage-play.

This was a case stated by one of the Metropolitan Police Magistrates. under the 20 & 21 Vict. c. 43, for the opinion of the Court.

CASE.

This was a summons under the statute 6 & 7 Vict. c. 68. ss. 2. and 23 (Theatre Act), on a complaint by Horace Wigan against Frederick Strange, that he the said Frederick Strange, on the 20th of May, 1865, at a certain house and place of public resort, called the Royal Alhambra Palace, Leicester Square, in the parish of St. Martin-in-the-Fields, in the county of Middlesex, did unlawfully have and keep the said house and place of public resort for

the public performance of stage-plays, without authority by virtue of letters patent from Her Majesty or any of her predecessors, and without licence from the Lord Chamberlain of Her Majesty's household for the time being.

On the hearing, at the Police Court, Great Marlborough Street, on the 2nd of June, 1865, the following facts were proved.—

The Alhambra has an extensive and lofty interior, to which in evenings the public is admitted on payment at the doors. It is a place of public resort not licensed by the Lord Chamberlain, but is licensed for music and dancing by the county Justices, under the 25 Geo. 2. c. 36. What would be the pit in an acknowledged theatre is there a large space occupied by tables, at which refreshments are served. In the place where boxes are in an acknowledged theatre are places resembling private boxes and balconies, with a reserved part like stalls, all which are for the use of spectators. There is an orchestra with a full band of musical performers, a stage and proscenium, lighted by foot and side lights, a curtain called a *tableau curtain*, wings and grooves for scenes to stand in, lowered from above and fixed below. There are side-scenes composed of many pieces, with drops and flies. There are various platforms, so supported and inclined as to enable persons to come down from a considerable height at the back of the building to the stage, and which are painted to represent rocks. A cascade of water falls among them from a place 30 feet high; on the wings and scenes at the back are painted palm-trees; the whole representing an oriental landscape, with a waterfall among rocks. Sixty or seventy females, dressed in the ordinary costume of ballet-dancers, came down through a large opening at the top of the platform, painted as rocks, and danced down them to the stage; they were not dressed alike; some had gold tissue skirts over white; those who first descended danced on the stage in a serpentine figure, so as to occupy the whole front of the stage till all had come down. When all were down, they defiled to the right and left; four were placed on each side in front of the proscenium with property, namely, sham musical instruments, in their hands, supposed to be playing them to the dancers. The dancers began to dance the *pas des poignards*, each lady, armed with two daggers, charging through each other's ranks, striking right and left with the daggers in mimic warfare, then advancing in front as far as the foot-lights. This performance of the dagger-dance ended in several of the females standing over others, as if in triumph, and retiring, when others came forward, holding property, namely, sham palm-leaves, in their hands, and danced, waving them, and formed an avenue, as expecting an arrival. Then a lady dancer, who at regular theatres would be called a *première danseuse*, passed down the avenue formed by the other dancers, who retired while she performed a *pas seul* with gestures. The other dancers then formed groups, placing the palm-leaves so as to represent the opening of a flower. Others had a property called a palisade, and danced with it so as to represent a basket of flowers. Several more *pas seuls*, having been executed by the *première*, the rest went through other evolutions, and the performance concluded. That performance is in the theatrical profession called a *ballet divertissement*, and could not be presented without the stage accessories above described; without them it would be mere rehearsal.

A witness from the Lord Chamberlain's office, called a Reader of Plays, styled it an entertainment of the stage. A ballet of action has a story. A *ballet divertissement* has none, but cannot be performed without pantomimic action and gestures. It is not confined to the steps of the dancers. Dancing quadrilles on the stage would be without such gestures. This dagger-dance was brought out originally at Drury Lane Theatre, being then danced by Almas in an Egyptian scene, as at the Alhambra in an Oriental. A *ballet divertissement* can be described, so as to enable a copy of the directions for it to be sent to the Lord Chamberlain, according to 6 & 7 Vict. c. 68. s. 12. The ballet of 'Ondine,' with all its details, has been so described. The Lord Chamberlain has not required copies of the directions of such ballets to be sent in till

recently. He has interfered at the Italian Opera, where complaints have been made of the costumes of the female ballet-dancers.

On the 11th of January, 1865, I convicted the defendants on nearly similar evidence, after considering the 10 Geo. 2. c. 28. s. 2, and 25 Geo. 2. c. 36. s. 2—*The King v. Handy* (6 Term Rep. 286), *Gallini v. Laborie* (5 Term Rep. 242). That conviction was quashed by the Middlesex Quarter Sessions in April, 1865.

The complainant being dissatisfied with that result applied for the present summons on evidence of another performance at the Alhambra at a later date, which the Magistrate did not feel competent to refuse, and granted the summons above set forth. After hearing counsel for the defendant, the Magistrate thought it his duty to act in conformity with the decision of the superior Court, *videlicet*, the Quarter Sessions for Middlesex, though entertaining a different opinion, and dismissed the summons, but on request by the complainant granted him a special case under 20 & 21 Vict. c. 43. for the opinion of this Court.

The question for the opinion of this Court is, whether the performance above described was legal without the licence of the Lord Chamberlain.

If this Court shall be of opinion that the Magistrate ought to have convicted the defendant, the parties seek that the summons shall stand, and that this case be remitted to make such order as to this Court shall seem fit.

Tindal Atkinson, Serj. (*Bosanquet* with him), on behalf of the appellant.—The question is whether a certain ballet performance at the Alhambra requires the licence of the Lord Chamberlain under 6 & 7 Vict. c. 68. s. 2. The history of the legislation on this subject will be found in a note to *The King v. Neville* (1 B. & Ad. 489). The old statute relating to dramatic performances is the 10 Geo. 2. c. 28, which limited theatres to Westminster; but the numerous applications for theatres in other places, and consequent multiplication of local statutes, led to the passing of the 28 Geo. 3. c. 30, which gave to Justices in other places the same powers of licensing as the Lord Chamberlain had in Westminster. These statutes were repealed by the 6 & 7 Vict. c. 68, under which the appellant contends there ought to be a licence from the Lord Chamberlain. The respondent will contend that a licence under 25 Geo. 2. c. 36, the statute relating to music and dancing, is sufficient. It is submitted, however, that *Gallini v. Laborie* (5 Term Rep. 242) is on all fours with the present case; there it was held that a ballet was a stage performance within 10 Geo. 2. c. 28. But *The Queen v. Handy* (6 Term Rep. 286) will be relied on by the other side; that case only decided that tumbling was not within the statute, and there is a manifest distinction, because in tumbling there is nothing dramatic. In *De Begnis v. Armistead* (10 Bing. 109; s. c. 2 Law J. Rep. (N.S.) C.P. 214) the ballet seems to be put on the same footing as the opera. In the case of *Day v. Simpson* (18 Com. B. Rep. N.S. 680; s. c. 34 Law J. Rep. (N.S.) M.C. 149), though only reflections were presented, yet, as the action was dramatic, the performance was held within the statute. Again, in *Russell v. Smith* (12 Q.B. Rep. 217; s. c. 17 Law J. Rep. (N.S.) Q.B. 225) it was held that a song might be dramatic within the statute. It is apprehended that 25 Geo. 2. c. 36. does not apply to dancing by hired performers but only to dancing by the public themselves. The definitions of "ballet" given in the *Encyclopædia Britannica* and in *Webster* would include such a performance as that described in the case. So would the definition of "pantomime" given by *Ogilvie*. The performance in the present case was essentially dramatic; there was a representation of the triumph of peace over vengeance, with all the accessories of the stage. Unless this kind of performance is within the act, there is no summary way of stopping immoral dances, and the object of the statute is frustrated.

Poland, on behalf of the respondent.—The respondent has a licence for music and dancing under 25 Geo. 2. c. 36, and this is sufficient. It is said on the other side that this statute was not intended to apply to paid performers, but it is submitted that it applies to an entertainment of dancing provided by

the owner of the place, and authorizes public dancing, whether by the public or by performers, and this was conceded in argument in *Clarke v. Serle* (4 Esp. 25). Again, in *Guaglieni v. Matthews* (34 Law J. Rep. (N.S.) M.C. 116), Cockburn, C.J. said, "I quite agree that it is not necessary that the public should themselves dance to bring the case within the statute." In *Gallini v. Laborie* (5 Ibid. 242) there was neither a licence under the one statute or the other, and so the performance was illegal in either view. This is pointed out by Lord Kenyon, in the case of *The Queen v. Handy* (6 Term Rep. 286), as the reason why the matter was very imperfectly considered. In 10 Geo. 2. c. 28. "stage-play" is defined, and in the definition in the present act, "melo-drama," "burletta," and "pantomime" are added, and it is important to observe that the word "ballet" is omitted from both; from the latter even where the words were added. A ballet with a whole plot, regularly carried out, might perhaps be a stage entertainment; it is not requisite here to contend that it would not, for here there is no such plot. Again, it is impossible to send a copy under section 12, for a copy of a dance cannot be sent, but only a description.

[BYLES, J.—But you may say the same as to a pantomime.]

That consists of a tale and a regular plot, till the transformation scene. The case of *Lee v. Simpson* (3 Com. B. Rep. 871; s. c. 16 Law J. Rep. (N.S.) C.P. 105) shews it is something with a story, and the observations in the judgment apply here.

[ERLE, C.J.—That case only shews that the law of copyright applies to the words only, and not to the comic parts.]

"Stage-play" is the governing word in the statute. As to *Day v. Simpson* (18 Com. B. Rep. N.S. 680; s. c. 34 Law J. Rep. (N.S.) Q.B. 225), there was a regular plot regularly carried out. So in *Thorne v. Colson* (3 Law Times, N.S. 697) there was a story acted. Lastly, the question is one of fact for the Magistrate to decide, and that decision should be in plain terms, as there is an appeal to the Quarter Sessions.

Tindal Atkinson, Serj., in reply.—The facts contained in the case are a complete answer to the contention that there is no plot; there is a difference between dancing by the public and such dancing as this.

[BYLES, J.—The difference between mute action and mute acting.]

That is so; here it was mute acting, like a pantomime.

ERLE, C.J.—This is a proceeding against the respondent for representing a stage-play without a licence from the Lord Chamberlain. The Magistrate refused to convict, and has stated the facts, and asked the opinion of this Court as to whether he ought to have convicted, and requested us to send the matter back to him if so. After an attentive consideration, it seems to me that the question is one of degree, and is therefore more a question of fact than of law. Subject to a doubt as to whether I can appreciate the scene without having seen the performance itself, as I can best understand the facts stated by the Magistrate, I am inclined to think that his decision was right, and that there ought not to be a conviction. But the question is one of degree. As to where dancing ceases to be lawful and becomes a stage-play, I cannot give a definition. In the old statute, 10 Geo. 2. c. 28, the words were, "interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein"; and in the case before Lord Kenyon doubt was expressed as to what came within that statute. In the statute 25 Geo. 2. 36. the legislature seems to have provided an agreeable entertainment for those who, on the score of expense, or for other reasons, do not attend the performances at the theatres, by allowing at houses of public resort music and dancing, if the Magistrates license them. The defendant in literal terms is by his licence confined to music and dancing, and it is contended that he has added such ingredients of a dramatic performance as to make his entertainment an entertainment of the stage within the meaning of 6 & 7 Vict. c. 68. A great

deal has been said about the danger that will ensue to the interests of morality if such an entertainment as this is held not to be within the statute. As to the cause of morality, I do not see how it is in danger; no interest of morality is at stake, but the simple question is, whether this cheap amusement is to be continued or stopped; whether or not the respondent is entitled to give an entertainment which certainly might be given at a theatre. Dancing and music are clearly lawful without the Lord Chamberlain's licence, but a stage-play is not. The statement of the case enters into a very minute detail of the number of women, a descent from rocks by female dancers, the appearance of a dancer of a superior order, and a dance with daggers and palm-branches. If nothing more than this appeared, I could not say that this was in the nature of a stage-play, but the Magistrate adds, that the dagger-dance ended by some of the females standing over the others, as in triumph, and retiring, when others came forward with palm-leaves. This is very near to a dramatic performance, and a line is to be drawn. The Magistrate uses two terms of art, a *ballet divertissement*, where there is no train or ideas or story, but only an agreeable entertainment, and a ballet of action, which has a story, and which may contain all the emotions of tragedy or comedy. I could not pretend to give an opinion on this statement whether, as a matter of fact, this entertainment fell within the one class or the other; and certainly if I am asked as a matter of law, I cannot as a matter of law say it is a stage-play.

WILLES, J.—I am of the same opinion. A difficulty has been put as to whether it is not impossible to tell the exact nature of the entertainment here described without seeing it. I can get over this however to a certain extent, but I am unable to say, shortly of laying down a definition, that this was an entertainment of the stage. My first impression was that a representation on the stage was the test. But on consideration, I think it is rather a matter of fact than of law. As a matter of fact, I thought, and still think, that this is an entertainment of the stage, but I cannot say it is so as a matter of law, and therefore I cannot say the Magistrate ought to convict. A consideration of the words of the statute shews the force of the argument of Russell in *The Queen v. Handy* (6 Term Rep. 286). On some stages one has seen performances of the highest order of genius, on others the mere performances of a booth. Again, one has seen on the highest stages the performance of a Paganini and of a Van Amburgh and his lions. We cannot therefore construe the statute and decide the present case to be within it by the simple consideration of whether what is described in the case is what is represented ordinarily on a stage. The words "entertainment of the stage" are to be construed, I think, to include performances *ejusdem generis* with tragedy, comedy, &c., entertainments of a dramatic character. Now a ballet with a connected story would, I think, be an entertainment of the stage; a mere dance on a stage might not be so. An instance might be given on the one hand of a statue represented on the stage with no story; this would not properly be a dramatic entertainment. On the other hand, *Tarantella*, where there is an actual representation of a complete story and plot put on the stage, would be one. Reading the case by the best light I can, I certainly think that this entertainment was of the latter class. There were not merely the accessories of the stage, but there were persons who may be taken to represent a combat, a triumph, and a reconciliation under a superior influence. But yet a person looking at it before the principal *danseuse* appeared, might regard it as only accessory to that, so that its principal characteristic would not be dramatic. I can conceive this, and, therefore, I think that whether it comes within the statute or not is a question of degree. For these reasons (though with great deference to my Lord), as to the question of fact, I own I should have agreed with the Magistrate if I had been obliged to adjudicate on it; but as to the question of law, I agree with my Lord.

BYLES, J.—This is a question of degree, and it is very difficult to draw

the line. I conceive that ordinary dancing would not be within the statute, whereas a representation by dumb show (as a pantomime) of the events or actions of human life would be, and not the less so because the actors perform while dancing. Here there is a descent from rocks, an attack, a success, and a reconciliation, with all the theatrical accessories, and as a question of fact, therefore, I should think that this entertainment was within the statute; but whether it is as a matter of law is another thing.

KEATING, J.—I agree in the conclusion which has been arrived at, that this is a question of degree, and resolves into one of fact. I agree with my Lord as to the difficulty of drawing a line. It is not, however, necessary to do so in consequence of the conclusion we have arrived at. But as the rest of the Court have expressed their opinion on the question of fact, I will express mine, and I am bound to say that, if I had to decide, I should have thought that this performance was within the statute, and was a dramatic representation, for the reasons given by my Brothers Willes and Byles, and, with all deference to my Lord's opinion, I concur with them. Here there was a representation by pantomimic gestures, short and few perhaps, but still amounting to a dramatic representation of the triumph of peace over war, or some similar event. I therefore take the same view as to the facts as my Brothers Willes and Byles, but I agree with my Lord as to its being a question of degree, and therefore of fact.

Judgment for the respondent.

[IN THE COURT OF EXCHEQUER.]

June 6, 9, 23, 1865.

PEARSON, *appellant*, v. THE LOCAL BOARD OF HEALTH OF
KINGSTON-UPON-HULL, *respondents*.

SAME v. SAME.

35 L. J. M.C. 36; 3 H. & C. 921; 13 L. T. 180.

Statute, Construction of—17 & 18 Vict. c. ci. (*Kingston-upon-Hull Improvement Act, 1854*), sections 97, 99, 101, 103.—*Public Health Act, 1848* (11 & 12 Vict. c. 43.) section 53.—*Local Government Act, 1858*, (21 & 22 Vict. c. 98.) section 34.—“*Building*”—Penalty for building before Approval of Plan by Local Board, and for using a Dwelling-house without their previous Consent.

LOCAL GOVERNMENT.—The 53rd section of the *Public Health Act, 1848*, (which requires certain particulars to be stated for the approval of a local board by any person intending to construct any building) was repealed by the 34th section of the *Local Government Act, 1858*.

The 101st section of the *Kingston-upon-Hull Improvement Act, 1854*, enacts, that in addition to the particulars required by the 53rd section of the *Public Health Act, 1848*, the person intending to construct any building shall furnish the local board with a plan on a certain scale, and that the plan shall not be carried into execution until approved by the local board.

The 99th section of the *Kingston-upon-Hull Improvement Act, 1854*, enacts, that every house to be built or rebuilt at the corner of any street shall have a back yard or back area thereto, if the local board shall deem it right, of such dimensions as they shall determine, and every house to be thereafter constructed on vacant ground, not being at the corner of a street (and not

being the site of any house erected thereon immediately previous to such construction), shall have a back yard or other vacant ground and area open from the ground upwards, of not less than 8 feet, extending from the main building for the whole length of such building, provided that within that space or area the pantry, coal-house and privy, not exceeding 9 feet in height, and not covering more than 48 superficial feet of the above area, may be there constructed.

Under one of the by-laws, which the board were authorized to make by the 34th section of the Local Government Act, 1858, fourteen days' notice was required to be given to them by any person intending to build, together with a plan shewing a section of the building and the space around; during which fourteen days the board should either approve of the plan or alter it, as they should think fit; and any plan not altered during that period is to be considered approved.

On the 21st of October the appellant laid a plan before the board, shewing sufficient spaces at the side of his proposed building, provided the 99th section did not oblige him to have a certain open space at the back. On the 22nd the surveyor of the board informed him that, as there was not sufficient space at the back, the plan was not approved of by the works committee, but was referred to a sub-committee. The proceedings of the works committee were approved of on the 24th of October, within the fourteen days; and the appellant was further informed, on the 19th of November, that the sub-committee had inspected the site of the building, and that the decision of the works committee of the 21st of October was confirmed. The appellant, notwithstanding, proceeded with his building.

Held, that the appellant in so doing had committed an offence under the 101st section.

The 97th section of the Kingston-upon-Hull Improvement Act enacts, that any building built or rebuilt after the commencement of the act, except on the site of a building used immediately before as a dwelling-house, &c., shall not, without the previous consent of the local board, be used as a dwelling-house, except during such time as there is adjoining to it or occupied therewith a street or a clear open space in and to the full extent of the front thereof, of not less than 20 feet in width.

The 103rd section enacts, that if any sewer, drain, privy, cesspool, ashpit, building or work be made or suffered to continue contrary to any of the provisions of this act, or if any person, without the consent of the local board, make, rebuild, clear out, unstop, or in anywise alter any sewer, &c., which has been ordered by them not to be so made, &c., every person so offending shall for every such offence forfeit a sum not exceeding 5l., and for every day after the first day during which the offence continues, a sum not exceeding 10s.

The appellant having been found, on the facts stated, to have committed an offence under the 97th section,—Held, by Pollock, C.B., Bramwell, B. and Channell, B., that though the appellant was guilty of an offence under the 97th section, he was not liable to the penalty, because "using a building as a dwelling-house" is neither "making" a building, nor "suffering it to continue," within the meaning of the words in the 103rd section.

Held, by Martin, B., that the offence prohibited by the 97th section was clearly intended by the legislature to be subject to the penalty imposed by the 103rd section, and that the appellant was therefore rightly convicted.

CASES stated by the Police Magistrate of the borough of Kingston-upon-Hull, under the 20 & 21 Vict. c. 43.

FIRST CASE.

At a petty sessions holden at the police court for the said borough on the 3rd and 13th of February, an information was preferred by the respondents against the appellant, under the 101st section of the 17 & 18 Vict. c. ci. (the Kingston-upon-Hull Improvement Act, 1854,)—charging that he did, on the 22nd of November, 1864, at the said borough, being “the person intending to build” certain houses in Villa Place, there situate, and having furnished to the respondents a correct plan of such proposed buildings, as required by the statute in such case made and provided, unlawfully commence such buildings before the said plan had been approved of by the said local board,—was heard and determined by me, and upon such hearing the appellant was duly convicted before me of the said offence, and I adjudged him to forfeit and pay the sum of 40s., and also the sum of 14s. for costs; and that if the said several sums should not be paid forthwith, the same were to be levied, &c.

The appellant was charged, before me, by the respondents, with two offences. The offence charged in the first summons was, that, having furnished to the respondents a plan as required in the 101st section of the said act, he had carried into execution and commenced the buildings referred to in such plan *before* the plan was approved by the respondents. The exact words of the 101st section are: “That, in addition to the particulars required to be stated for the approval of the local board by the 53rd section of the Public Health Act, 1848, there shall be furnished to such board by such person intending to build or rebuild any house, or construct any building, a correct plan or plans of the proposed building, drawn to a scale of not less than 1 inch to every 8 feet of the work, shewing the particulars required by the said act and this act, and which plan shall not be carried into execution nor the building commenced until the same plan shall have been approved by the local board.”

The second summons, to which it is also necessary to refer, was for an offence against the 99th section of the same act, and charged the appellant with having neglected to provide yards or areas, of the dimensions required by that section, at the back of the houses built by him, being the same houses or buildings mentioned in the first summons. The words of the 99th section are: “That every house to be hereafter rebuilt, and every house to be hereafter built at the corner of any street or place shall have a back yard or back area thereto, if the local board shall in such case deem it right that any such back yard or back area should be made, and in that case such back yard and back area shall be of such dimensions as the local board shall determine, and every house to be hereafter constructed on vacant ground (not being situate at the corner of a street or place, or not being the site of any other house erected thereon immediately previous to such construction) shall have a back yard or other vacant ground and area, open from the ground upwards, of not less than 8 feet, extending from the main building for the whole length of such building; provided that within that space or area the pantry, coal-house and privy, not exceeding 9 feet in height, and not covering more than 48 superficial feet of the above area, may be there constructed.”

I find that the plan produced, now annexed to this case, was deposited by the appellant at the office of Mr. Sharpe, as surveyor of the local board, on the 20th of October, 1864, and that it was a ground-plan and shews sections of rooms. That it was laid before the works committee of the board on the 21st of October, and was not approved, and was referred by the works committee to the streets and lighting sub-committee. I find also that on the 22nd of October, 1864, Mr. Sharpe gave to the appellant a notice in writing, produced before me (not under the seal of the board), in the following words:

“Sir,—I beg to inform you that your plan for the erection of four houses in Villa Place was presented to the works committee yesterday; but

it appearing that there would be no open space of 8 feet behind such houses, it was resolved that such plan be not approved, but referred to the streets and lighting sub-committee. I am, yours, obediently,

"J. Fox Sharpe, Surveyor."

I also find that the said proceedings of the works committee were confirmed by the local board on the 24th of October, 1864, and I find that on the 18th of November the minutes of the proceedings of the sub-street committee were brought before the works committee and confirmed.

I also find that Mr. Sharpe, the surveyor, gave the appellant a notice, under the seal of the board, dated the 19th of November, 1864, in the following words:

"Sir,—I beg to inform you that the streets and lighting sub-committee, to whom your plan was referred for the erection of certain houses in Villa Place, having inspected the site, it was resolved—that the decision of the works committee of the 21st of October last, that such plan be not approved, 'be confirmed.' I am yours, obediently,

"J. Fox Sharpe, Surveyor."

Notwithstanding the notice of the 22nd of October and the 19th of November, the appellant, about the 22nd of November, commenced his buildings, and this having been brought before the works committee, legal proceedings were, on the 2nd of December, authorized by the works committee against him. I find also that these proceedings of the works committee were subsequently, on the 29th of December, 1864, confirmed by the local board.

In this case I find that by-laws in the year 1860 in fact made by the local board, and confirmed by the Secretary of State, under the power contained in the 34th section of the Local Government Act, 1858,—the 5th and 6th of which by-laws are as follows:

5. "Fourteen days at least before beginning to dig or lay out the foundations, &c. the person intending to build shall give notice thereof, with a plan, &c. shewing the structure of the walls, and the space about the building for securing a free ventilation of air, &c. to the local board, and whoever offends against this by-law shall forfeit a sum not exceeding 5*l.*, and also 40*s.* for every day during which the offence is continued."

6. "During that period of fourteen days, the board shall either approve the plan and section, or alter the same as they think necessary for the purposes of the Public Health Act, 1848, and the statutes incorporated therewith, and any plan which is not altered during that period shall be considered as approved by the local board."

And I find, also, that on certain occasions after the passing of such by-laws, buildings may have been authorized by the board to be made in accordance therewith, but I do not find that any such authority has been given within a considerable period now last past; I find also that a person who called on behalf of the appellant at the surveyor's office, prior to the commencement by the appellant of the buildings in Villa Place, received from the clerk at such office a paper copy of the by-laws similar to that annexed to this case, but was expressly told that such by-laws were "not the regulations of the board," which must guide the appellant in the buildings in Villa Place, then about to be undertaken by him; and I find, further, that such copy of the by-laws was not furnished to him by or by the authority of the respondents.

And I find also that the printed regulations of the board as to buildings are entirely distinct from the by-laws, and that it is stated by the appellant, on the particulars delivered by him to the board when he deposited his plan, and now annexed to the said plan, that the printed regulations of the board had been delivered to J. P. Marshall, and that such J. P. Marshall was the agent of the appellant. I find also that such regulations as to plans are in accordance with the provisions of the Hull Improvement Act, section 101, and

not in accordance with No. 6. of the by-laws. I find also that the local board did proceed in this case solely in pursuance of the 101st section of the Local Improvement Act, and did not act, nor ever had any intention of acting, under the by-laws. And I find that the appellant was fully aware when he commenced his buildings in Villa Place that the plan deposited by him was objected to by the local board, and did not receive its approval because it did not shew that there would be a back yard or other vacant ground or area behind each building, such area being alleged by the local board to be necessary under the 99th section of the Improvement Act; and I also find that there is no evidence before me indicating that the appellant did believe at the time he commenced his building in Villa Place aforesaid that the course to be pursued by him as to the depositing and approval of his plans was regulated by the by-laws.

In reference to the offence charged under the 99th section of the Hull Improvement Act, I find that the appellant's buildings have no back yards, or back vacant ground or back area of any kind, but that there is a vacant space at the side of each house, 16 feet by 8 feet, the depth of the house being 16 feet, and that such open area is covered by buildings to the extent of 40 feet, such building not exceeding 9 feet in height.

I find therefore that the appellant has left the full open space named in the Hull Improvement Act at the side of each house, but has left no space at the back. The local board contend such open space must of necessity be at the back to insure a compliance with the law; if such was the intention of the legislature, the expressions used in the 99th section of the Hull Improvement Act do not convey that meaning in a clear manner. In an earlier part of the same section both the terms "back yard" and "back area" are made use of; but in the latter portion of the section the words are, "shall have a back yard or other vacant ground and area open, &c.," which may well admit of the construction that "such other open ground and area" may be at the side, as in the plan deposited by the appellant, and not at the back.

I find the appellant guilty of having committed an offence under the 101st section of the Hull Improvement Act by attempting to carry his plan into execution before it was approved. As to the offence charged under the 99th section, I was not satisfied that the appellant had not complied with the literal requirements, and therefore I find him not guilty of that charge.

The questions upon which the opinion of the Court of Exchequer is desired are: Whether, upon the above statement of facts I came to a right decision on the 99th section; and whether (without regard to the correctness of whether I am right or not in my decision as to the construction of the said 99th section) I am right in my decision that in point of law the plan of the defendant was not approved by the board, and that the appellant may be legally convicted under the 101st section of the Hull Improvement Act for commencing his buildings before his plans had received the approval of the board.

T. P. Thompson, for the appellant, contended that the matter was not within the 103rd section, for the word "building" there must be confined to buildings *ejusdem generis* as those mentioned immediately before, and that the Magistrate had no jurisdiction to convict the appellant, or to adjudge him to pay any penalty; that the appellant did not commit any offence against the provisions of the 99th section, for though the word "back" is found associated with "yard" in the 99th section, it is not found with "other vacant ground"; that he had committed no offence against any of the respondents' by-laws; that the plan of the appellant's proposed buildings (not having been altered by the respondents during the period of fourteen days after it had been furnished to them by the appellant) must be considered to have been approved by them within the meaning of the said local act and of the respondents' by-laws, by which the respondents were bound; and that, as the 101st section

of the local act provided that further particulars should be stated, in addition to those required by the 53rd section of the Public Health Act, and as the 53rd section of the last-mentioned act was repealed by the act of 1858, the 101st section of the local act was entirely inoperative as to such further particulars, and did not apply to the case. He cited *Whitmore v. Wenlock*,¹ *Powell v. Farmer* (34 Law J. Rep. (N.S.) C.P. 71), *The King v. Mosley* (2 B. & C. 226), and *Brown v. Holyhead Local Board* (32 Law J. Rep. (N.S.) Exch. 25; s. c. 1 H. & C. 601).

On the other side,

Mellish (with him was *Philbrick*) contended that the 101st section of the act of 1854 was, at the time of the alleged offence, unrepealed and existing, and that on the facts the appellant clearly was guilty of an offence against the same; that the 53rd section of the Public Health Act, 1848, was, at the time of the alleged offence, unrepealed and existing law in Hull, by virtue of the Hull Improvement Act; that the last-mentioned act is to be read as if the incorporated sections of the Public Health Act were repeated at length therein, and that such enactments are not repealed or affected by the general words of the Local Government Act; that, even if the 53rd section of the Public Health Act were repealed, the appellant was properly convicted under the 101st section of the local act, the repeal of the former section in no way involving a repeal of the latter; that the by-laws referred to by the appellant were in no sense binding in or applicable to the present case, and, even if they were, that they could not override the express provisions of the 101st section of the local act; that in any view of the by-laws the respondents could elect to proceed, and were justified in proceeding, under the powers of the 101st section of the Local Government Act Amendment Act, 1861, section 29; that on the facts the appellant was aware that the by-laws were not the regulations for buildings prescribed by the respondents; that there being sufficient evidence that the respondents had not approved of the appellant's plan before he commenced building, there is nothing in point of law which would compel a decision contrary to the facts; that on the facts the appellant was guilty of an offence under the 99th section of the local act, the houses in question having no back yards or areas; and that, on the proper construction of the 99th section, the back yard or vacant space must be at the *back*, and extend along the whole length of the building, and spaces at the *sides* neither literally nor in spirit satisfy the section, which requires a free and uninterrupted space for the circulation of air and ventilation behind all houses, and that therefore the appellant was rightly convicted under the 103rd section.

MARTIN, B.²—My Brother Channell and myself are both of opinion that the Justice was right, and that the conviction should be affirmed. Now the charge against the defendant was that he had commenced a building before a plan, which he had submitted to the local board, had been approved of by them, according to the 101st section of the Kingston-upon-Hull Improvement Act, 1854. For the purpose of understanding that act, we must have recourse to an act for promoting public health, passed in the year 1848. This seems to be the first of these acts, and the 53rd section of it enacts, that fourteen days at least before beginning to dig or lay the foundations of any new house, the person intending to do so shall give to the local board of health a notice of his intention, together with a level of the cellars or lowest floor, and the situation of the house, and a variety of other matters, and until that notice is given, the building or rebuilding of any house is prohibited; then the 101st section of the Kingston-upon-Hull Improvement Act, 1854, enacted

(1) 13 Law J. Rep. (N.S.) C.P. 55 (same case nomine *Whitmore v. Bedford*, 5 M. & G. 9), per Tindal, C.J. and Maule, J.

(2) This first case was argued before Martin, B. and Channell, B., who proceeded to give judgment on the 9th of June, immediately after the conclusion of the argument in the second case.

that in addition to the particulars required to be stated for the approval of the local board by the 53rd section of the Public Health Act, 1848, there shall be furnished to such board by the person intending to build any house a correct plan of the building, drawn to a certain scale, and which plan shall not be carried into execution nor the building commenced until the same plan shall have been approved of by the local board. Then by the Local Government Act, 1858, section 34, it was enacted that the 53rd section of the Public Health Act should be repealed, and in lieu thereof it was enacted,—That every local board may make by-laws with respect to certain matters, that is to say, the level of streets, the structure of walls, the sufficiency of space with respect to drainage; and then the section says, that they may further provide for the observance of the by-laws by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans with their secretary by persons intending to construct buildings, and as to inspection by the local board, provided that no such by-laws shall affect any building which shall be erected before the date of the act.

The local board of Hull acted upon that power, and made by-laws which were approved of by the Secretary of State on the 14th of August, 1860. The 5th and 6th by-laws enact that fourteen days at least before the beginning to dig or laying the foundation for a new building, the person intending so to build shall give to the local board a written notice thereof, together with a plan and section of the intended building, shewing the structure of the walls and space about the building for securing a free circulation of air, and the proposed arrangements for ventilation, together with the intended drainage of the building, and the water-closets, privies, ashpits, and cess-pools in connexion with the building, and that whoever offends against the by-laws shall forfeit to the local board a sum not exceeding 5l., and a further penalty not exceeding 40s. for every day during which the offence is continued after notice from them in writing in this behalf. And that during such period of fourteen days the local board shall either approve the plan and section or alter the same as they think necessary for the purposes of the Public Health Act, 1848, and the statutes incorporated therewith, and any plan or section which is not altered during that period shall be considered approved by the local board.

Now what took place in this case was, that upon the 21st of October the appellant, who proposed to build certain houses within the jurisdiction of this Hull Act, laid a plan before the respondents shewing four houses proposed to be erected, and spaces which were sufficient within the 99th section of the Hull Improvement Act, provided it was not obligatory upon him to have certain open spaces at the back. Those open spaces were sufficient in size, but they were at the side of the houses.

Now, that being done, upon the 22nd of October a letter was written to him by the surveyor of the Hull local board to this effect: "Your plan for the erection of four houses in Villa Place was presented to the works committee yesterday; and it appearing there would be no open space behind such houses, it was resolved that such plan be not approved of, but be referred to the streets and lighting sub-committee." It is also found that the proceedings of the works committee were confirmed by the local board on the 24th of October, 1854, which was within the fourteen days. Whether the result of the watching and lighting sub-committee was in opposition to the committee who caused the letter of the 22nd of October to be written we do not know; but after the expiration of the fourteen days what was done by the sub-committee was approved by the works committee, and that was again approved by the local board itself. The appellant thought fit, notwithstanding the letter informing him thereof, to proceed to build, and the question is, has he committed an offence within the 101st section?—and we are of opinion that he has.

Now the points made for the appellant were, first, that the 101st section of the local act was in effect repealed. We think that is not so, for the board

is to be furnished with other particulars, in addition to those required to be stated for the approval of the local board by the 53rd section. It seems to us that the repeal of the 53rd section does not at all affect the absolute enactments of the 101st section. The result of repealing the 34th section of the 21 & 22 Vict. c. 98. is, that though it be repealed, by-laws may be made in lieu thereof; and such by-laws were made. At first it was supposed that those by-laws had not been acted upon. I own it seems to me that the by-laws have been complied with almost to the letter. It is contended that it was not enough for the respondents within fourteen days to state that they disapproved of the plan; but that they ought also to have altered it. Now how by possibility could they alter it? It was impossible to do that; and it seems to me it was quite sufficient for them to say, "We disapprove, and we insist that your open space should be at the back of the house, and not at the side; and inasmuch as you have no means of giving an open space at the back of the house, when we tell you that, we tell you that no alteration can be made in it, and that in our judgment, if this house is permitted to be erected in the way you propose, it will be a contravention of the act." I own, it seems to me they have complied with this by-law in the only way in which they could have complied with it. If they could have altered the plan so as to have shewn an open space at the back, it may be they ought to have done so, although it would have left the intermediate space between the two proposed buildings unoccupied. In my judgment they have substantially complied with the by-law, and within fourteen days of the deposit of the plan they have altered it by stating their disapproval of it—"We will not permit this open space to be at the side, but we will insist upon it being at the back."

It was argued for the appellant that the 99th section does not enact that the yard or open space shall be at the back. One would desire in a matter of this kind that everything really should be enacted in such language that those who run may read, and it is unfortunate that there were any such words introduced as "vacant ground or area," which have raised this discussion. I think the act ought to be construed, with a view of ascertaining what was the real meaning of the legislature, taken with the circumstances, and then of acting upon it so as to impose a penalty in respect of that not being done which the legislature has enacted should be done; and I should say that the open space should be at the back of the house, because it was to extend from the main building for the whole length of the building; and that, coupled with the 97th section, what the legislature really desired was that there should be an open space of 20 feet in front and at the back, so that there should be a thorough ventilation. In my judgment, therefore, there was an offence against the 101st section, and I think it is clear that the building was made contrary to the provisions of this act, for it was made contrary to a provision which enacted that before anything was done it should be approved of by the local board.

I think, when the local board had the jurisdiction, which is clearly given to them in this case, to exercise a judgment with respect to the matter, that the appellant had no right in the face of that disapproval to go on and erect this building; and, if the local board were wrong, I suppose the appellant could have proceeded in the Court of Queen's Bench to compel them to act in pursuance of the statute. I do not think he had a right to take the matter into his own hands, and in direct defiance and disapproval of the local board to proceed to build.

For these reasons I think the conviction of the Justice was correct, and that we ought to answer so much of his questions in the affirmative, and in support of this conviction. It is not necessary for us to give an absolute conclusive judgment upon the 99th section; and it would require a very strong argument to convince me that the respondents are not right, and that the vacant ground and area must be at the back.

CHANNELL, B.—I agree with my Brother Martin in thinking that the

conviction in this case should be affirmed. The information charges that the appellant, being a person intending to build certain houses described in the information, furnished to the respondents a correct plan of such proposed building, as required by the statute; but that he unlawfully commenced such building before the said plan was approved of by the said local board. The question is, whether the appellant, on the facts before us, can be said to have been guilty of that offence so as to render himself liable to a penalty.

Now the penalty, if imposed at all, is imposed by the 103rd section. I will consider presently the question whether the words of the 103rd section are large enough and distinct enough to hit the offence which the information charges against the appellant. But the offence under the act charged in the information is that of commencing the building before the plan which the appellant had submitted to the board of health had been approved of by them. That seems to me to render it necessary to consider the two sections of the act together, the 101st section and the 99th section. Now, it was said that the 101st section had dropped altogether, that the machinery contemplated by the 101st section could no longer be carried out, and that it must be considered as now excluded from our consideration, on the ground that the 101st section provided that, in addition to certain particulars required to be stated by the 53rd section of the Public Health Act, there should be also furnished such other particulars as are required by the Hull Improvement Act. Then it was said that by an act which passed in the year 1858, the 53rd section of the Public Health Act had been repealed, and that the necessary and unavoidable consequence of the repeal of the 53rd section was to render entirely nugatory the 101st section of the Hull Act, so far as that act required additional particulars to be delivered. I cannot accede to that argument. It appears to me that of the particulars which were delivered, the plan required to be delivered by the 101st section was one, and one which the Board of Health had not approved of; then the case is so far an offence under the act, although a doubt may arise as to how far the provisions of the Board of Health Act are preserved and continued stringent and operative by virtue of the by-laws that were made.

Now, then, we must consider the 99th section, and, if I were called upon to give a decisive opinion upon that point, I should adopt the argument suggested for the respondents, namely, that this pointed to a yard at the back of the house, and not to an open space at the side. I agree that with respect to the words "shall have a back yard," there, "yard" is associated with the word "back"; but when we come to the next words, "or other vacant ground," we do not find the words "at the back," and so far as that goes, it gives rise to the doubt that has been forcibly pressed upon us for the appellant. But, although those words, so far considered, let in a little doubt and difficulty, they are, to my mind, considerably (if not entirely) cleared up by the other words to be found in the next line, "extending from the main building for the whole length of such building." I, therefore, agree that when we look at the other clauses of the act, which seem to throw some light upon the subject, it was intended to provide for a yard or open space at the back, and not for one at the side. This is giving a construction to the act which would tend to carry out its main object, viz. the erection of many houses in the same line, fronting what may be called a street,—houses adjoining and contiguous to each other; and I think the object of the act will be best attained by holding it to apply to the area or yard at the back.

Supposing that to be the construction of the act, the case is still attended with some doubt and difficulty; but it seems to me that the offence which this information charges is established as against the appellant, because the matter was one upon which the board of health had a right to express their opinion; and if they had a right to take this matter into their consideration, and disapproved of the plan, then it appears to me that the offence charged

in the information is sufficiently established to call upon us to support the conviction.

Then comes in the still further question, namely, was the plan, in point of fact, disapproved of? I do not propose to repeat what my Brother Martin has said upon the subject; but it appears to me upon the facts that there was a notification to the appellant that the plan which he had sent in to the board of health was one which they would not approve of. One argument for the appellant was, that, applying the provisions of the by-laws, the plan was not disapproved of within fourteen days, but that it must be taken to have been approved of. I think there is sufficient evidence to shew that a competent body of competent authority did, within fourteen days, disapprove of the plan submitted, although it was sent to another committee to consider; the concurrence of the second body in the disapproval of the first, could not, in my opinion, render the disapproval communicated by the first other than a disapproval within the section.

There is only one other question to be considered, namely, whether, supposing an offence upon these facts is made out, there is any section in the act which enables the Magistrate to convict summarily in the penalty. I am not at all blind to the force of the argument for the appellant as to the meaning which ordinarily would be attached to the word "building" in the 103rd section. I concur in the view that the word "building" could not properly receive that construction which the respondents contended for, in order to support this conviction. If I were limited to the view to be gathered from the 103rd section only, I should certainly feel the force of the argument; but admitting the maxim of *noscitur à sociis* in construing words such as "building," I feel quite at liberty to go into the earlier sections of the act, and not to limit the word "building" simply to that interpretation which ought to be put upon it if I looked only at the words which precede it in the 103rd section. I think the 96th, 97th and 98th sections fully entitle us (without infringing the ordinary rule of construction) to put a larger construction upon the word "building" than would apply solely to the 103rd section. There is much weight also in the argument suggested for the respondents, that in a given order the statute proceeds to deal with the different matters,—sewers in one, drains in the other, and so on; and, lastly, "buildings"—buildings implying much more, and involving the 96th, 97th and 98th sections; and, therefore, we are clearly entitled to hold that the word "building" carries with it that meaning which would support this information. I come to this conclusion with satisfaction to myself, believing that it does not infringe any well-known settled rules of law, and that we are carrying out what I cannot doubt was the intention of the legislature.

MARTIN, B.—We are of opinion (whether he was right or wrong in his decision as to the construction of the 99th section) that the Justice's decision is, in point of law, right; and that the appellant's plan was not authorized by the board; and that he was legally convicted under the 101st section for commencing to build without the consent of the board.

Conviction affirmed.

SECOND CASE.

At a petty sessions, holden at the said police court, on the 17th day of March, 1865, an information preferred by the respondents against the appellant, under the 97th section of the said Kingston-upon-Hull Improvement Act, 1854, charging that the appellant did, on the 9th day of March, 1865, at the borough of Kingston-upon-Hull, unlawfully cause to be used as a dwelling-house, a certain building in Villa Place, within the district of the respondents, without their previous consent, there not being, or adjoining or belonging thereto, or occupied therewith, either a street or a clear open space in and to the full extent of the front thereof, not less than 20 feet in width, was heard and determined by me; and upon such hearing, the appellant was duly

convicted of the said offence, and I adjudged him to pay the sum of 10s. and costs, and in default of payment, &c.

If the Court should consider it desirable, it may be assumed that I find all the facts found by me in the case submitted to the Court, as to the offence under the 101st and 99th sections of the act, as facts also found in this case.

The facts found by me as to the case under the 97th section are as follows. The words of the 97th section of the act are: "That any building after the commencement of this act built, or any buildings after the commencement of this act rebuilt, except on the site of a building used, immediately before pulling down thereof, as a dwelling-house, or any part thereof respectively, or any building before the commencement of this act built, and not then used as a dwelling-house, or any part thereof, shall not, without the previous consent of the local board, be used as a dwelling-house, except only during such time as there is adjoining or belonging thereto or occupied therewith either a street or a clear open space in and to the full extent of the front thereof, and of *not less than 20 feet in width.*"

I find that the appellant has recently built four dwelling-houses in Villa Place, not on the site of any dwelling-house previously pulled down; that legal proceedings have recently been taken by the respondents against the appellant for commencing such four houses before the plan of such houses had received their approval. That subsequently to the conviction of the appellant in such proceedings, the appellant completed his houses and has since caused the same to be used as dwelling-houses without the previous consent of the respondents. I find, also, that there are houses in Villa Place opposite to the four houses recently erected by the appellant, and that such opposite houses were built prior to the passing of the Hull Improvement Act, 1854, and have been continuously and are now occupied by different tenants. I find, also, that Villa Place is entered from the Hessle Road, and such entrance for the space of 56 feet is 10 feet 6 inches wide, and bounded on the west side by a dead wall, and on the east side by the west end of a dwelling-house which faces the Hessle Road; that Villa Place commences at the end of such 56 feet from the Hessle Road, and previously to the erection of the said four houses by the appellant consisted on the west side of a row of ten houses, and on the east side of open palisadings which were the boundaries of gardens belonging to certain houses which were in a parallel line to, but at a distance of 60 feet and upwards from, the row of houses on the west side of Villa Place; that from such palisades to such row of houses on the west side of Villa Place there was a space of 17 feet; that there are no houses on the east side of the said space of 17 feet in a line with such palisades, except those recently built by the appellant; that such 17 feet space is bounded on the west side by the said row of ten houses, and on the east side by the palisades and boundaries of the said gardens, and by the said four houses built by the appellant, which are in a continuation of the line of such palisades; that part of such 17 feet is appropriated as gardens or inclosures in front of the said row of ten houses on the west side of Villa Place of the width of 4 feet, which said gardens are bounded on the east for the whole length of such ten houses by an iron railing set in stone, and part of such 17 feet is appropriated as a flagged footway, of the width of 2 feet or thereabouts, adjoining such iron railing for the whole length of such row of houses, and the remainder of such space of 10 feet 6 inches bounded on the east in part by the said palisades in front of the gardens, on the east side of such road, and in the other part by the said four houses built by the appellant. I find, also, that at the end of such ten houses farthest from Hessle Road there is a wall built partially across such space of 17 feet to the extent of (the said small 4 feet gardens and flaggings) 6 feet or thereabouts, leaving a gateway of the width of 10 feet or thereabouts (in continuation of the road, 10 feet 6 inches wide, already described), through which carts and carriages can pass to the parts beyond; that at present the

parts beyond are not built upon on the west side, and carts and carriages passing through such gateway as aforesaid can turn so as to go back to the Hessle Road; but I have no evidence before me as to the ownership of such parts beyond, nor as to the right of carts and carriages having business at any of the houses in Villa Place to pass through such gateway for the purpose of turning as aforesaid.

Upon these facts, I decided that there was neither a street, nor a clear open space adjoining or belonging to the said four houses or occupied therewith, in and to the full extent of the front thereof, and of not less than 20 feet in width, the only space in front thereof (including garden, flagging and roadway) being only 17 feet from the appellant's dwelling-houses to the opposite dwelling-houses.

The questions for the Court are: First, whether upon the above statement of facts there was, in point of law, adjoining or belonging to the said four houses, or occupied therewith, a street; secondly, whether, if so, it is necessary that such street, to the full extent of the front of the said four houses, should be of not less than 20 feet; thirdly, whether upon the above statement of facts, I was right in my decision that, in point of law, an offence has been committed by the appellant by causing his houses to be used without the previous consent of the respondents.

This case was argued, on the 9th of June (previously to the judgment in the first case), before Pollock, C.B., Martin, B., Bramwell, B., and Channell, B., by—

T. P. Thompson, for the appellant, who contended that the case was not within the 103rd section, for "using a building as a dwelling-house" was not "making" it, or "suffering it to continue," within the meaning of the penalty clause, and that therefore the Magistrate had no jurisdiction to convict the appellant; that the appellant had committed no offence under the 97th section of the act, as that part of the section under which he had been convicted does not apply to the user of buildings built for dwelling-houses; that there was no evidence (nor was it found as a fact) that the appellant used any of the houses as dwelling-houses; that Villa Place was a street within the meaning of the exception in the 97th section, and that it was not necessary for the purposes of that exception that the street should be 20 feet wide; and that, the plan of the appellant's buildings not having been altered by the respondents during fourteen days after they had received it from the appellant, they must be considered as having approved of it, and as having given their consent to it. He commented on the hardship of restraining a man thus in the use he might make of his property, citing the words of Pollock, C.B., in *Shiel v. the Mayor of Sunderland* (30 Law J. Rep. (N.S.) M.C. 215).

Mellish (with whom was *Philbrick*), for the respondents, contended that there was not, on the facts found in the case, a street in front of the appellant's four houses, such as is required by the act; that, even if there was a street, it was not of the width required by the 97th section; that, on the facts found, the appellant had caused his houses to be used contrary to the provisions of the 97th section.

[The Court intimated that they were clearly of opinion that the appellant had committed an offence under the 97th section.]

That being so, the appellant was rightly convicted in the penalty, for the words in the 103rd section were clearly intended by the legislature to include all offences enumerated in the previous sections to the 103rd, and, among them, the offence of which the appellant has been guilty under the 97th section.

Cur. adv. vult.

Judgment was delivered as follows on the 23rd of June.—

BRAMWELL, B.—In this case my Lord Chief Baron, my Brother Channell

and myself are of opinion, I believe I may say on the same grounds, that our judgment should be given for the appellant; that is to say, that the conviction cannot be sustained. I may say that every point was disposed of upon the hearing, except one, upon which we think judgment should be given for the appellant.

The matter may be very shortly stated. The offences under the 97th section of the Kingston-upon-Hull Improvement Act are not comprehended in the penalty clause, the 103rd section. The offence under the 97th section, which the appellant has committed, is an offence of "using as a dwelling-house, without the consent of the local board, a house without a street or clear open space, to the full extent in front thereof, of not less than 20 feet in length." Of that he has been convicted; and we think the penalty clause does not apply to it, for this reason: the penalty clause says, "any sewer, drain, privy, cesspool, ashpit or building" (which, we think, would apply to a house) "to be made, or suffered to continue, contrary to any of the provisions in this act," then the person shall be subject to a penalty. We think that the expressions there shew that there can be no "suffering to continue" contrary to the act, except there be a "making" contrary to the act, and that if a person could not be liable to the penalty of 5l. for every such offence, neither can he be liable every day, after the first, during which it continues, to a sum not exceeding 10s. In other words, we think there is no offence within this section, unless it is an offence where the building can be "made" contrary to the act, as well as "continued," and where the offender, or some offender, would be liable for an original making, as well as the same offender or some other for a continuing. We think—I was going to say with some confidence—that the using of a building as a dwelling-house without this prescribed space is certainly not a making (and it could not be a making within the 103rd section), and therefore cannot be a continuing contrary to the provisions in the 103rd section of that act. We think, therefore, that the penalty clause does not apply to that offence of which the appellant has been convicted, and the only proceedings that can be taken against him are those which can be taken in the case of a man infringing an act of parliament where no specific penalty is provided for the offence.

CHANNELL, B.—I concur in the judgment just delivered. It is the judgment of the Lord Chief Baron and myself, as well as of my Brother Bramwell. I wish only to add this: that I have given the case great attention, and it has been one to me of a very anxious kind; but, having decided as we did upon the argument, that the appellant had committed an offence against the act (under the 97th section), I was extremely desirous, if I could, to concur in the view which my Brother Martin has taken, because, having decided the appellant to be guilty of the offence, it would be most desirable to bring him under the 103rd section, so as to hold him liable to the penalty, and not to leave him (as he is now left) to the process of an indictment because his offence is not within the 103rd section. But, for the reasons upon which the judgment mainly proceeds, I confess I think that the language of the 103rd section is not large enough to include this case, and I am therefore obliged to concur in the judgment of the Lord Chief Baron and my Brother Bramwell.

MARTIN, B.—I own I very much regret this decision, as it seems to me to be the result of a most astute verbal criticism upon a clause in the act which was clearly intended, as it appears to me, to cover this case. It is merely held not to do so in consequence of an alleged defect of language in it. The facts are these: It is made an offence, by the 97th section of the Hull Improvement Act, to use as a dwelling-house, without the consent of the local board, a house which has not adjoining to it a street or open space of not less than 20 feet. That is the offence, and the statement of the learned Magistrate which was submitted to us, shews clearly that this was

a house of that character, and was directly contrary (and admittedly contrary) to the plain enactment of the legislature. The question is, whether or not the building, by using this house as a dwelling-house, is a building "made or suffered to continue," contrary to the terms of the section imposing the penalty. I think it was. It seems to me that if it was used as a dwelling-house, it was thereby made a building for dwelling in, contrary to the statute, and that if a part had been an office or an outhouse, or anything of that sort, and if it had been converted into this dwelling-house, and had not this required space of 20 feet before it, it would be thereby made a building, that is to say, a building for dwelling, which would be contrary to the act.

I am satisfied the legislature intended to impose a penalty upon all offences contrary to the provisions contained in the sections from 88. to 102. inclusive, and in my judgment it would be mercy to the appellant and to others similarly circumstanced so to hold, rather than subject them to the peril of indictments to be preferred and to be carried on at the expense of the town of Hull. I am quite prepared to hold that the offence was within the 103rd section³; and it appears to me, therefore, that I should affirm the conviction.

Judgment for the appellant.

[IN THE COURT OF QUEEN'S BENCH.]

Nov. 8, 1865.

THE QUEEN *v.* THE INHABITANTS OF THE PARISH OF
ST. LEONARD, SHOREDITCH.

35 L. J. M.C. 48; 6 B. & S. 784; L. R. 1 Q.B. 21; 13 L. T. 278; 14 W. R. 55;
12 Jur. N.S. 292.

See *R. v. Stepney Guardians*, [1885] E. R. A.; 54 L. J. M.C. 12; 52 L. T. 959 (C. A.).

Order of Removal—Irremovability—Break of Residence—9 & 10 Vict. c. 66. s. 1.—24 & 25 Vict. c. 55. s. 1.

POOR LAW.—*A pauper resides in the parish where his or her place of habitation is, whether such habitation consists of a house or lodging or of a place of shelter in the open air.*

The residence of a pauper in a parish, within the meaning of the statutes 9 & 10 Vict. c. 66. s. 1. and 24 & 25 Vict. c. 55. s. 1, is not broken by reason of the involuntary and temporary absence of the pauper from the parish by night, when the pauper has the intention of returning—and does return in the day-time—from day to day.

A pauper lived for more than three years in lodgings in a parish, and then, from want, was compelled to give them up, and wandered, houseless, about the parish. She slept one night on a door-step in the parish, and for the next twenty-one days wandered about, chiefly in the parish, and went at night to sleep at a refuge for the houseless poor out of the parish, returning in the day to the parish:—Held, that her residence was not broken.

(3) The 103rd section enacts that if any sewer, drain, privy, cesspool, ashpit, building or work be made or suffered to continue contrary to any of the provisions of this Act, or if any person without the consent of the local board make, rebuild, clear out, unstop, or in anywise alter any sewer, &c., which has been ordered by them not to be so made, &c., every person so offending shall for every such offence forfeit a sum not exceeding 5*l.*, and for every day after the first during which the offence continues a sum not exceeding 10*s.*

This was a CASE stated by the Middlesex Quarter Sessions, on an appeal, heard before them, wherein the churchwardens of the poor of St. Dionis Backchurch, in the city of London, were appellants, and the churchwardens and overseers of the poor of the parish of St. Leonard, Shoreditch, were respondents, against a warrant or order of removal made by one of the stipendiary Magistrates of the metropolis sitting at Worship Street, for the removal of Sarah Broad, widow, from the parish of St. Leonard, Shoreditch, to the parish of St. Dionis Backchurch. The Sessions quashed the order of removal, subject to a case setting forth the following facts:

The last legal settlement of the pauper was in the parish of St. Dionis Backchurch (the appellants). The only ground of appeal was that the pauper resided in the respondent parish, and in the union in which that parish is included, for three years next before the application for the order of removal. The application for the order of removal was made on the 25th of February, 1864. The pauper had resided at various places in the respondent parish for about sixteen years previous to and until the month of September or October, 1863; but in such month of September or October, in consequence of illness, whilst lodging in the last-mentioned parish, she went into St. Bartholomew's Hospital, in the city of London, but left at her last-mentioned lodging such articles of furniture as she then had, intending to return to it. The pauper remained in the hospital till near Christmas, 1863; and on the day on which she left the hospital she returned to her lodging, and then sold her articles of furniture in order to pay the rent which had accumulated and other debts. She then left her lodging, and resided in the parish of St. Leonard, Shoreditch, with the person who bought her furniture, for a week, when, being destitute, she wandered about in the parish of Shoreditch and out of it, and slept on the steps of a house in that parish the night before she obtained shelter in a refuge for the houseless poor, where she slept for twenty-one successive nights, her ticket of admission having been renewed at the end of the first seven days, and again at the end of fourteen days, such renewal being necessary according to the rules of the refuge. The refuge is situated out of the parish of Shoreditch, in the adjoining parish of St. Luke. It is supported by voluntary subscriptions, and is opened during the winter for the purpose of receiving houseless persons, who are sheltered there and are provided with a sleeping place and a ration of bread. During the period of her being thus sheltered, she, in the day-time, wandered about, chiefly in the parish of Shoreditch, until she met a gentleman who knew her, and endeavoured to procure her admission into the Shoreditch workhouse; but she was refused admission there, and then slept for two nights in the parish of Shoreditch, but on again applying was admitted into the workhouse of that parish.

It was contended, on behalf of the appellants, that upon these facts the said pauper was irremovable, by virtue of having resided in the respondents' parish for more than three years next before the application for the order of removal.

It was contended, for the respondents, that the residence had been broken.

The Court of Quarter Sessions were of opinion that the pauper had no intention of permanently leaving the parish of Shoreditch, but that she was driven to do so in the manner herein stated by being destitute and houseless, and they quashed the order of removal.

The question for the opinion of the Court was,—Whether the pauper was irremovable from the respondent parish by virtue of having resided therein for more than three years next before the order of removal. If such question was answered in the affirmative, the order of Sessions, quashing the order of removal, was to be confirmed; if in the negative, the order of Sessions was to be quashed, and the order of removal to be confirmed.

Huddleston, for the appellants, in support of the order of Sessions.—

The pauper resided more than three years in the parish of St. Leonard, Shoreditch, and there was no break in that residence under the circumstances. The fact that she slept at night at the refuge out of the parish was compulsory, and the day-time of that period she spent chiefly in the respondent parish.

Taylor, for the respondents, in support of the order of removal.—There was a break of residence during the twenty-one days the pauper slept at the refuge out of the respondent parish, because, inasmuch as she had at that time no place of abode, lodgings or otherwise, in the parish, her place of sleeping must be taken to be her place of residence. It is necessary for the continuance of the residence constructively that when the pauper was physically out of the parish she should have had some place of abode in the parish in which she had a right to reside if she had so desired—*The Queen v. the Guardians of Stourbridge Union* (34 Law J. Rep. (N.S.) M.C. 179).

[BLACKBURN, J.—The distinction between that case and this is, that there, during the time constituting the break of residence, the pauper was physically away from the parish; but here the pauper was, during the day-time, wandering about actually in the parish of Shoreditch. COCKBURN, C.J.—The pauper had no place of residence out of Shoreditch to go to. BLACKBURN, J.—Must it not be taken that the pauper's residence in St. Leonard's continued till she acquired another?]

Her place of residence during the twenty-one days was where she slept—namely, at the refuge. Where a man sleeps is his home if he has no other place whereat he has a right to sleep. It is submitted that the pauper by sleeping out of the parish, even if it had been for only one night, having no place of abode at that time in the parish, has broken her residence in the parish.

[COCKBURN, C.J.—The place of sleeping is only evidence of residence; but here the pauper slept out of the parish involuntarily and under compulsion, and returned in the day-time to the parish. SHEE, J., referred to *Hartfield v. Rotherfield* (17 Q.B. Rep. 746).]

The cases of a break of residence in a prison or hospital are met by an express proviso in the 9 & 10 Vict. c. 66. s. 1; but for that proviso there would have been break of residence, according to *Hartfield v. Rotherfield* (17 Q.B. Rep. 746). It is submitted that to establish constructive residence in a parish there must be an intention to return. The absence must be temporary only, and there must be a place in the parish in which residence might rightfully be had at any time during the absence.

COCKBURN, C.J.—I think the order of Sessions was right, and that the pauper was irremovable from the parish of St. Leonard, Shoreditch. To constitute a residence for three years within a parish, within the statutes 9 & 10 Vict. c. 66. s. 1. and 24 & 25 Vict. c. 55. s. 1, it is not necessary that the residence should be in a house or place appropriated for the purposes of residence. There are, unhappily, people who are obliged to seek a necessary shelter in the open air, or, as has been suggested, under the dry arches of bridges. Such people have no other habitation, and sleep how they best can, and the parish of such habitation is then their place of residence, and for that purpose persons having their place of sleeping in the open air are precisely on the same footing as persons sleeping in a house or within walls. And I think such residence will not be broken by a temporary absence for convenience. In this case, for sixteen years this pauper lived in the parish of St. Leonard's. She was turned out of her lodgings in the parish and then wandered about, chiefly in the parish, without any place to sleep at in the parish. She slept one night on the steps of a house in the parish and then went for shelter and food to the refuge out of the parish, but not with the intention to abandon her parish of St. Leonard's, for she came back to the parish in the day-time, and as soon as she was compelled to leave the refuge she tried to get, and ultimately got, admission into the workhouse of that

parish, and continued there until the order was made for her removal. I think that under the circumstances there was no interruption of the residence in St. Leonard's, Shoreditch, any more than there would have been if the pauper had had a house in the parish and left it for a temporary purpose with the intention of coming back to it. It was said in argument that in all the cases where the residence had been held to be constructive, there was a place of residence in the parish during the temporary absence from it; and therefore that as such place of residence was wanting here the residence was broken; but I think that objection begs the question whether there can be a residence by sleeping in the open air. As, however, a residence of that nature is, in my opinion, as much a residence as if it were in a house, and as the absence here was only for a temporary purpose, the pauper has never broken her residence, and is irremovable.

BLACKBURN, J.—I am entirely of the same opinion. I think that under the circumstances there was no ceasing to reside. Where a person sleeps is a matter affording an important element in determining where a person resides; but is by no means conclusive on the point.

MELLOR, J.—I agree. Mr. Tayler's argument would lead to the conclusion that the most destitute people could seldom acquire irremovability.

SHEE, J., concurred, and referred to *The Queen v. the Directors of Brighton Poor* (4 El. & B. 236; s. c. 24 Law J. Rep. (N.S.) M.C. 41).

Order of Sessions confirmed.

[IN THE COURT OF QUEEN'S BENCH.]

Nov. 11, 1865.

DEARDEN, *appellant*, v. TOWNSEND, *respondent*.

35 L. J. M.C. 50; L. R. 1 Q.B. 10; 13 L. T. 323; 14 W. R. 53.
12 Jur. N.S. 120.

Referred to, *London, Brighton and South Coast Railway v. Watson*, [1878] E. R. A.; 47 L. J. C.P. 634; 3 C.P. D. 429; 39 L. T. 199; 26 W. R. 856 (C.P. D): affirmed, [1879] E. R. A.; 48 L. J. C.P. 316; 4 C.P. D. 118; 40 L. T. 183; 27 W. R. 614 (C. A.). Approved, *Saunders v. South-Eastern Railway Co.*, [1880] E. R. A.; 49 L. J. Q.B. 761; 5 Q.B. D. 456; 43 L. T. 281; 29 W. R. 56 (Q.B. D.). See *Dyson v. London and North-Western Railway*, [1881] E. R. A.; 50 L. J. M.C. 78; 7 Q.B. D. 32; 44 L. T. 609; 29 W. R. 565.

Railways Clauses Act (8 & 9 Vict. c. 20.)—*By-Law—Construction—Payment of Fare.*

CARRIERS.—*The 8 & 9 Vict. c. 20. s. 103. enacts that, if any person travel in any carriage of the company without having paid his fare, with intent to avoid payment thereof, or if any person having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, he shall forfeit, &c. A by-law was made by a railway company, under the powers of their special act and of the 8 & 9 Vict. c. 20. in the terms following: "No passenger will be allowed to enter any carriage used on the railway, or to travel upon the railway, without having first paid his fare and obtained a ticket. . . . Each passenger on payment of his fare . . . will be furnished with a ticket,*

specifying the class of carriage and the distance for which, or places for travelling between which, the payment has been made, . . . which ticket such passenger is to shew whenever required by the guard in charge of the train, or some other servant of the company, and which ticket such passenger is also to deliver up before leaving the company's premises, upon demand, to the guard, or other servant of the company authorized to collect tickets. Any passenger not producing his ticket as aforesaid, or not delivering up his ticket as aforesaid, will be required to pay the fare from the place whence the train originally started, and in default of payment thereof shall forfeit and pay a sum not exceeding 40s."

A passenger took at E. a return ticket from E. to S. and back. He travelled to S. and back again to E.; but instead of getting out at E., travelled, without taking a fresh ticket, to N. When he got out at N. he shewed his return ticket to E., and offered to pay the full local fare from E. to N. The company's officer demanded payment of the full fare from S. to N., which the passenger refused to pay.

Held, that under the above circumstances the passenger ought not to be convicted, under the above by-law, for not producing and delivering up a ticket to N., or for not paying his fare from S. to N., in the absence of any intention to defraud.

This was a case stated by Justices of the Peace for the county of Lancaster, under the statute 20 & 21 Vict. c. 43, for the opinion of this Court, under the following circumstances: George Dearden, the above-named appellant, was the station-master of the Lancashire and Yorkshire Railway Company, at their station at New Church, in Rossendale, in the county of Lancaster. Joshua Townsend, the above-named respondent, is a gentleman residing at the Home, in Rossendale aforesaid. At a petty session holden at Rawtenstall, in the said county, on the 29th of October, 1864, before four Justices of the Peace, an information was preferred by the appellant, as agent for and on behalf of the Lancashire and Yorkshire Railway Company, against the respondent, for that he, being a passenger in a certain carriage then being on the Lancashire and Yorkshire Railway, did not, on being required so to do by the guard, or other servant of the said railway company, authorized to collect tickets, produce and deliver up, before leaving the company's premises, upon demand, at the New Church Station, in the parish of Whalley, upon the said railway, his ticket as a passenger by the said train, to wit, from the Ewood Bridge Station, upon the said railway, to the New Church Station aforesaid, nor did he, the respondent, pay the fare from the place whence the train originally started, to wit, from Salford, in the said county, on being required so to do; contrary to the by-laws, made pursuant to the several acts of parliament relating to the Lancashire and Yorkshire Railway Company. The Justices dismissed the information, on the ground that the by-law given in evidence by the appellant to support the information did not apply to the case; but, upon the application of the appellant, stated and signed the following

CASE.

The Lancashire and Yorkshire Railway Company have duly made and published, under the powers of the said company and of the various statutes relating to the same, divers by-laws for the regulation of their several lines of railway; and by the by-law on which the present charge was framed. "No passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, without having first paid his fare and obtained a ticket, or (as the case may be) without having paid for and obtained a contract or season ticket, giving him authority to travel, during a stipulated period of time. Each passenger, on payment of his fare, or the price of his contract or season ticket, will be furnished with a ticket specifying the class

of carriage and the distance for which or places for travelling between which the payment has been made, which ticket (whether a contract or season ticket or otherwise) such passenger is to shew, whenever required by the guard in charge of the train, or some other servant of the company, and which ticket (if other than a contract or season ticket) such passenger is also to deliver up, before leaving the company's premises, upon demand, to the guard or other servant of the company authorized to collect tickets. Any passenger not producing his ticket as aforesaid (whether it be a contract or season ticket or otherwise), or any passenger not delivering up his ticket as aforesaid (if it be other than a contract or season ticket), will be required to pay the fare from the place whence the train originally started, and in default of payment thereof, shall forfeit and pay a sum not exceeding 40s."

The company are the proprietors of a line of railway between (amongst other places) the towns of Salford and New Church, both in the county of Lancaster. Upon the said line of railway, and between the stations of Salford and New Church, there is a station called Ewood Bridge, from which last mentioned station the company has been in the habit of issuing return tickets at reduced fares, to Salford and back.

The said respondent, upon the day mentioned in the information, duly took at Ewood Bridge a return ticket, of the first class, thence to Salford and back. He travelled upon the said line of railway to Salford and returned thence upon the return journey; instead of alighting at Ewood Bridge, and delivering up at that station his return ticket, he proceeded, in company with a friend, to New Church aforesaid, without re-booking or obtaining a fresh ticket, or the leave of any of the company's officers. No demand was made upon him at Ewood Bridge by any person for the production or delivery up of any ticket. On arrival of the train at New Church, the respondent produced and delivered up to the authorized servant of the company, his return ticket from Salford to Ewood Bridge, and then tendered to him in addition the full local fare charged by the company for the conveyance of a first-class passenger between the two stations, Ewood Bridge and New Church, but the same was refused.

The respondent did not produce or deliver up any ticket authorizing him to travel to New Church or any ticket whatever other than the said return ticket. The respondent, upon delivering up to the company's servant the return ticket, stated to him (as the fact was) that no other ticket issued by the said company was in his possession. The authorized officer of the said company thereupon demanded from the respondent the amount of the fare from Salford (the place whence the train had originally started) to New Church, which the respondent refused to pay, and has not since paid. The respondent repeatedly offered to the said officer the full first-class fare from Ewood Bridge to New Church, and was always ready and willing to pay the same. There was no intention on the part of the respondent to defraud the railway company, nor was any such intention charged in the information.

The question for the opinion of the Court is, whether under the circumstances of this case the determination of the Justices in dismissing the said information was erroneous in point of law.

Gray (Pope with him), for the appellant.—The respondent has brought himself within the terms of the by-law. The by-law is intended to apply to the case of a man who does not produce his ticket when properly demanded, whether because he has not got one or from any other cause. Then a man who does not produce a proper ticket is in the same position as one who has no ticket at all. This case, therefore, comes to the same thing as if the respondent had started from Ewood Bridge without a ticket, and thereupon, when he gets out at New Church he does not produce a ticket entitling him to travel to New Church, and thereupon becomes liable to pay his fare from Salford.

[COCKBURN, C.J.—If this be the true construction, it is a most unreasonable by-law.]

In *The Queen v. Frere* (24 Law J. Rep. (N.S.) M.C. 68; s. c. 4 El. & B. 598) a very similar by-law to this was deemed by Lord Campbell to be "an excessively reasonable by-law."

Mellish (*Holkar* with him), for the respondent.—In the first place, this by-law does not bear the construction put upon it, and, in the second place, if it did bear that construction, it does not apply to the facts of this case. The attempt to make it applicable would raise an important question as to its validity. These by-laws are framed under the powers given in the 8 & 9 Vict. c. 20, by the 108th and 109th sections of that act. The 108th section says that "it shall be lawful for the company from time to time, subject to the provisions in this and the special act contained, to make regulations for," amongst other purposes, "generally regulating the travelling upon, or using and working of the railway;" and by the 109th section, "for the better enforcing the observance of all or any such regulations, it shall be lawful for the company, subject to the provisions of the 3 & 4 Vict. c. 97, to make by-laws, and from time to time to repeal or alter such by-laws and make others, *provided that such by-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special act.*" Then the general act (8 & 9 Vict. c. 20. s. 103.) enacts that, "if any person travel, or attempt to travel, in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare, *with intent to avoid payment thereof*, or if any person having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying the additional fare for the additional distance, *and with intent to avoid payment thereof*, . . . every such person shall for every such offence forfeit to the company a sum not exceeding 40s." Now if the construction sought to be put upon this by-law be correct, the by-law has the effect of making that to be an offence without any intention to defraud which the act only makes an offence when the intention to defraud exists, and therefore the by-law would be repugnant to the provisions of that act, and void and illegal on that ground; but my contention is that, in reality, the by-law applies only to a person who has taken a ticket and has it in his pocket or possession, but who will not produce it when required, either because its production would put him to trouble or inconvenience, or because he wishes to use it to travel with again, and is intended to make contumacy of that description punishable by the penalty imposed thereby.

[MELLOR, J.—By-laws are only intended to be made for the convenient regulation of the traffic on railways, and not to give the companies the power to create penal offences.]

Further, when the by-law provides that the company shall provide the passenger with a ticket, which *ticket* the passenger is to shew, and which *ticket* he is to deliver up, and then enacts that any passenger not producing *his* ticket or not delivering up *his* ticket on demand, shall pay, &c., the language undoubtedly supposes that the passenger has his ticket and will not, for some reason or other, shew it.

COCKBURN, C.J.—I am of opinion that the Magistrates were right, and that this was a case in which the penalty could not be inflicted under the by-law in question. On the face of this case, this gentleman, the respondent, was perfectly innocent of any intention to defraud. He took a return ticket from Ewood Bridge to Salford and back, and on his return journey, circumstances occurred which made him wish to continue his journey beyond the station from which he had started. If the by-law, upon its proper construction, were applicable to this case, I should say that it would be bad, as being repugnant to the general act of parliament. That act provides in the

103rd section for this offence, by enacting that, "if any person having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance without previously paying the additional fare for the additional distance, *and with intent to avoid payment thereof*,"—such person shall be liable to a penalty. The intention of the person offending is therefore made by the statute an essential ingredient in the offence. But if the company by a by-law were to constitute the same state of facts an offence, and omit the element of intention, I think they would then not be making a by-law subject to the general act, but legislating in a sense repugnant to its provisions.

I am of opinion, however, that the construction which the appellant would put upon this by-law is not the true one, and that Mr. Mellish is right in his contention, viz. that it is meant to apply to persons who have taken a ticket and have it in their possession, but who will not produce it when required. No doubt if a person travelling on this railway will not produce his ticket when demanded by the guard or other authorized person, the company would be right in assuming that he had a ticket and would not produce it, and in requiring him to pay the fare from the place whence the train originally started; but here the respondent produces his ticket, such as had been given him by the company, when demanded. That was a ticket which authorized him to travel from Ewood Bridge to Salford, and back to Ewood Bridge. Then the question comes to this,—whether the respondent was travelling from Ewood Bridge to New Church without having previously paid his fare and obtained a ticket? But that offence is provided for by the statute, and thereupon the question of intention becomes material. The company cannot apply this by-law to such a state of facts as the present. For these reasons I think the Magistrates were right in refusing to convict.

MELLOR, J.—I am of the same opinion. When the by-law is narrowly examined, it appears not to be applicable to a person who has entered the company's carriage without a ticket. I think the by-law contemplates a person lawfully in the train with a ticket, and says that he is to produce his ticket when required and give it up. The 103rd section of the general act is intended to meet the case of persons travelling without a ticket; but to constitute an offence under that section there must be an intention to defraud. The section under which the by-law is framed gives power to the company to make regulations for various purposes; such as the speed and times of arrival and departure of trains, the loading and unloading of carriages, the receipt of goods, the prevention of the smoking of tobacco and other nuisances, and, lastly, for regulating the carrying on of the traffic on the railway; but it is no part of the intention of that statute to give the company power to create penal consequences to attach to a person travelling innocently without a ticket for part of his journey.

LUSH, J.—I think the Justices were right in saying that the by-law had no application to this case. The statute has provided for the cases of a person travelling without having paid his fare, or, having paid his fare for a part of the distance, proceeding beyond such distance without having paid his fare for the additional distance, and has made a fraudulent intention essential in either case. Now, if the company had made a by-law that if a person should innocently continue in the carriage beyond the distance for which he had paid his fare, he should be subject to a penalty, that would be beyond their power. The power given them is only to make by-laws to regulate and expedite their traffic arrangements. If we read the by-law, the first part provides that no one will be allowed to enter a carriage without having first paid his fare and taken a ticket; then, I apprehend, if a person does so, he may be turned out. All that is left of the by-law is applied to the use which the passenger is to make of his ticket after he has provided himself with one, that is to say, he is to produce it to the guard of the train, or some authorized servant of the company, when required so to do, and if he does not do so, he is to pay

the fare from the place whence the train originally started, and, in default, pay 40s. That is, I think, the reasonable construction of the by-law.

*Determination of Justices affirmed.*¹

[IN THE COURT OF QUEEN'S BENCH.]

Nov. 15, 1865.

THE QUEEN v. THE TOWNSHIP OF BOLTON-LE-SANDS.

35 L. J. M.C. 54; 13 L. T. 523; 14 W. R. 177; 12 Jur. N.S. 371.

Pauper—Union—Irremovability—24 & 25 Vict. c. 55. s. 1.—9 & 10 Vict. c. 66. s. 1.—27 & 28 Vict. c. 105. s. 1.

POOR LAW.—*The effect of the statute 27 & 28 Vict. c. 105. s. 1, in connexion with 9 & 10 Vict. c. 66. s. 1, and 24 & 25 Vict. c. 55. s. 1, is to render a pauper irremovable from his parish of residence within a union to his parish of settlement in the same union, although his term of three years' residence is computed by the time during which he lived in two or more parishes of the union, neither of which is his parish of settlement.*

The decision in the case of The Queen v. Great Salkeld (33 Law J. Rep. (N.S.) M.C. 185) is rendered of no effect by the 27 & 28 Vict. c. 105. s. 1.

On appeal to the Quarter Sessions for the county palatine of Lancaster against an order for the removal of Elizabeth Toulmin, widow, and her five children, out of the township of Poulton Bare and Torrisholme, in that county, into the township of Bolton-le-Sands, in the same county, the order was confirmed, subject to the following

CASE.

The township of Bolton-le-Sands and the township of Poulton Bare and Torrisholme are, with the parish of Heysham, members of the Caton (Gilbert's) Union. The place of settlement of the paupers was in the township of Bolton-le-Sands, and they were removable thereto unless they had acquired irremovability from the township of Poulton Bare and Torrisholme.

William Toulmin, the deceased husband of the pauper Elizabeth Toulmin, was settled in Bolton-le-Sands, and went with his wife (now the pauper widow), and their children, to reside in the parish of Heysham, in the spring of the year 1855; and they resided in Heysham without relief till the end of July, 1858, when they went to reside in the township of Poulton Bare and Torrisholme, where they continued to reside without relief until the 3rd of November, 1860. There was an unbroken and continued residence, without relief, for upwards of five years in the parish of Heysham and the township of Poulton Bare. On the 3rd of November, 1860, William Toulmin, being sick, was temporarily relieved by the township of Poulton Bare, and this relief was continued by the same township till about March, 1861, when his sickness became permanent. From March, 1861, until his death, in January, 1863, he was relieved, for himself and family, by the township of Bolton-le-Sands. No part of the five years' residence next previous to the relief had been in the township of Bolton-le-Sands; and since William Toulmin's death.

(1) See *Jennings v. the Great Northern Railway Company*, 35 Law J. Rep. (N.S.) Q.B. 15.

and up to the date of the said order of removal, the pauper Elizabeth and her children have been chargeable to and relieved by the township of Poulton Bare.

If the Court should be of opinion that, under the above facts, the paupers were irremovable, then the order of removal was to be quashed. But if the Court should be of opinion that they were removable, then the order was to be confirmed.

Maule, in support of the order.—It is submitted that the 27 & 28 Vict. c. 105. s. 1.¹ has no application to this case, and that that statute, though no doubt passed to reverse the decision of this Court in the case of *The Queen v. the Inhabitants of Great Salkeld* (33 Law J. Rep. (N.S.) M.C. 185), has not had that effect. Notwithstanding that act, a residence of three years, made up of the time spent in two parishes of the same union, neither of them being the parish of settlement, does not confer irremovability within the ambit of the same union. Such was the effect of the 24 & 25 Vict. c. 55. s. 1. and the case of *The Queen v. the Inhabitants of Great Salkeld* (33 Law J. Rep. (N.S.) M.C. 185), and that decision remains so far unimpaired.

F. M. White, for the appellants.—It is submitted that the case of *The Queen v. the Inhabitants of Great Salkeld* (33 Law J. Rep. (N.S.) M.C. 185) is of no authority since the statute of the 27 & 28 Vict. c. 105. The actual decision of the question stated for the Court in that case is expressly reversed by that act; therefore, unless the *ratio decidendi* of that case, as distinct from the immediate decision, is to prevail, this order must be quashed.

Cockburn, C.J.—I think our judgment should be for the appellants. We need not re-consider the judgment of the Court in *The Queen v. the Inhabitants of Great Salkeld* (33 Law J. Rep. (N.S.) M.C. 185) inasmuch as a recent act of parliament (The 28 & 29 Vict. c. 79) has virtually put an end to all these questions. The act of the 27 & 28 Vict. c. 105. was, no doubt, passed to obviate what the framer of that act believed to be the effect of that decision; and it is true that the question put to the Court in that case was whether the residence in the parish of settlement should count in the calculation of the three years' residence, under 24 & 25 Vict. c. 55, which in that case had to be made up of such residence in part, and in part of residence in another parish in the same union; but the Court decided on the much larger ground, that when the parish of settlement to which the removal was to take place and the parish of residence in which the irremovability was alleged to have been acquired were in the same union, the 24 & 25 Vict. c. 55. had no application, and my mind in that case was much impressed with the idea that the doctrine of irremovability proceeded upon the ground of a respect for local ties and attachments formed by residence, which I thought would not have been affected by removability to the parish of settlement within the ambit of the union of the parish in which the residence was, but would have been torn asunder by a removal altogether out of the union.

The legislature, when they passed the 27 & 28 Vict. c. 105, supposed that the decision was based on the ground that, for the purpose of calculating the time necessary to acquire irremovability, there was a distinction between the residence in the parish of settlement and that in the other parish in the union. The Court, however, did not proceed on that ground, but on the ground that irremovability from one union to another union was intended to be established, whilst it did not intend to affect removability amongst the different parishes in the same union. But the enactment in that statute, in meeting what the legislature erroneously supposed to be the effect of the above

(1) The terms of the 1st section of the act are, "that in case of any poor person heretofore chargeable or hereafter becoming chargeable in any parish comprised in a union, not being the parish of his settlement, the period of time during which he shall have resided in the parish of the settlement, if in the same union, shall not be excluded in the computation of the time of residence required to render him exempt from removal under the statutes above referred to."

decision, has virtually decided the present question, though the facts of the case do not bring it expressly within its terms; for it enacts that the period of residence in the parish of settlement, if in the same union, shall not be excluded in computing the time of residence; so that if we were to hold here that the residence in these two parishes in the union did not create irremovability, then we should have this anomaly, that the same period of residence divided between two parishes in the same union would create irremovability if either of those parishes were the parish of settlement, but would not have that effect if neither of them were so. We cannot, therefore, say that the combined residence in the two parishes, neither of them the parish of settlement, did not in this case confer the status of irremovability.

MELLOR, J., SHEE, J. and LUSH, J. concurred.

Order quashed.

[BAIL COURT.]

June 14, 1865.

THE QUEEN v. THE OVERSEERS OF CHORLTON-ON-MEDLOCK.

35 L. J. M.C. 56; 12 L. T. 581; 13 W. R. 925.

Parochial Assessments—Re-deposit of Valuation List—Assessment Committee—Overseers—Stat. 25 & 26 Vict. c. 103. s. 21.

POOR LAW. RATES AND RATING.—*It is the duty of the overseers of a parish, under section 21. of the Union Assessment Committee Act, 1862, to deposit the valuation list, after alteration by the Assessment Committee, in the place in which the rate-books are kept, and to give due notice thereof in the same manner as in the case of the original deposit of the valuation list, pursuant to section 17. of the act.*

This was a rule for a mandamus to the overseers of the township of Chorlton-on-Medlock to deposit the amended valuation list of the township in the place in which the rate-books were kept.

The valuation list had been duly made and deposited in the first instance, under section 17. of the Union Assessment Committee Act, 1862, (25 & 26 Vict. c. 103). Alterations were afterwards made in it by the Assessment Committee, which necessitated its being re-deposited for inspection, under section 21. of the same act.

Mellish, on behalf of the Assessment Committee, contended that section 21. of the statute imposed the duty of re-depositing the list on the overseers.

Bere, for the overseers, shewed cause in the first instance, and argued from the express words of sect. 21, that the committee "shall cause the valuation list, with such alteration or insertion, to be deposited for inspection," that the duty lay on the committee, who should perform it by their clerk.

CROMPTON, J.—By the 17th section of the act, the overseers are to deposit the valuation list in the place in which the rate-books are deposited, and to give notice thereof as in the case of the allowance of a poor-rate. By section 21, the Assessment Committee are to cause the valuation list, after it has been amended, to be deposited for inspection in the "manner hereinbefore provided concerning the valuation list." That is, in the same manner as in the case of a valuation list under section 17, which is by the overseers. The depositing the list, and giving the required notices, are essentially functions of an overseer. It would be inconvenient to have that duty thrown upon the clerk to the Assessment Committee, and I cannot suppose that such was the intention of the legislature. Section 21. impliedly, in my opinion, authorizes

the Assessment Committee to cause the overseers to perform these duties. No person but the overseers have any power of meddling with the depository in which the rate-books are kept. The overseers are the persons who under section 21, according to my view of the act, are to make the re-deposit of the altered valuation list, and give the requisite notices, as in the case of the original deposit of the valuation list under section 17.

Rule absolute.

[CROWN CASE RESERVED.]

Nov. 11, 1865.

THE QUEEN v. FISHER.*

35 L. J. M.C. 57; L. R. 1 C.C. 7; 13 L. T. 380; 14 W. R. 58; 10 Cox. C.C. 146.

Malicious Injury—Temporary Damage—24 & 25 Vict. c. 97. s. 15.

CRIMINAL LAW.—*The prisoner was indicted, under 24 & 25 Vict. c. 97. s. 15, for maliciously damaging a steam-engine. It was proved that the prisoner had maliciously screwed up parts of the engine so that they would not work, and had reversed the plug of the pump which supplied the engine with water, and that the steam-engine was thus rendered useless and liable to burst:—Held, that the prisoner was properly convicted.*

This was a case reserved for the judgment of the Court for Crown Cases Reserved by the Chairman of Quarter Sessions for the western division of the county of Suffolk.

At the General Quarter Sessions of the Peace for the county of Suffolk, held, by adjournment, at Bury St. Edmunds, on the 4th of July, 1865, William Fisher was arraigned upon an indictment framed on the 15th section of the statute 24 & 25 Vict. c. 97, which charged that he unlawfully, maliciously and feloniously damaged, with intent to destroy or render useless, a certain thrashing-machine, the property of Edward Kersey Green.

At the trial, it was shewn that the engine in question had been under the prisoner's care as engine-driver and servant to the prosecutor, and that on Saturday, the 6th of May, 1865, in consequence of a difference between him and the prosecutor, the prisoner left the prosecutor's service. On the Monday following the prisoner did not come to work; but in the course of the day prosecutor said that he had not a man who could drive the engine, and that he would be glad to take him back. When the prosecutor and his other men went to work the engine, they got up the steam and tried to start it, but found they could not get it to move. They then unscrewed the engine to ascertain the cause, when they discovered that the working parts of the engine had been so tightly screwed up that the steam-power of the engine was not sufficient to set them in motion, and it was proved that this must have been the result of design and not of accident. They also discovered that the plug of the pump which supplies the engine-boiler with cold water had been taken out and replaced, with the wrong side up, so that no water could pass from the pump into the boiler; and this, also, it was deposed, must have been done designedly and could not have been accidental. They further found that the pipe leading from the plug of the pump to the boiler had been stopped up by a piece of stick being thrust up it, so that, even supposing that water could have passed through the plug, it could not have got through the pipe into the boiler. The engine was thus rendered temporarily useless, and it took the

* *Coram*, Pollock, C.B., Willes, J., Pigott, B., Shee, J. and Smith, J.

prosecutor and his men two hours to get it to work; and it was moreover shewn that if the fire had been kept up the plunger of the pump would have forced the pump off the boiler, and also that the water in the boiler would have become exhausted, and the boiler would have burst, and serious consequences would have ensued. But it was admitted by the prosecutor that when the working parts of the engine had been loosened, the plug taken out and properly replaced, and the obstruction from the pipe had been removed, the engine was just as good as before. Various circumstances tended to shew that these acts had been done by the prisoner. Upon these facts, it was objected, by the counsel for the prisoner, that there had been no offence committed within the meaning of the statute, inasmuch as there had been no actual damage done to the engine. The Court left the case to the jury, and directed them that the preventing the machine from working was "doing damage," and the jury found the prisoner guilty.

Upon the application of counsel for the prisoner, the Court decided to reserve the question of law, for the consideration of the Court for Crown Cases Reserved, whether, upon the facts stated, the temporary injury to the engine was such a malicious damage as to bring the prisoner under the penalties of the statute, and whether the prisoner was properly convicted.

The prisoner was discharged upon recognizances of bail to appear and receive judgment when called upon.

H. Mills, for the prisoner.—The conviction cannot be upheld unless the Court is satisfied that some permanent damage was done to the steam-engine. The plug had only to be taken out and reversed and the engine was as good as ever. There was no evidence of any breaking or cutting. All the cases where persons have been convicted under this act have been cases where there has been some substantial damage requiring repair.

[*POLLOCK, C.B.*—But the case states that if the plug had not been again reversed the engine would have burst. The reversing the plug is repair.]

If the engine had burst it would have been different. There then would certainly have been damage. In *The Queen v. Gray* (26 Law J. Rep. (N.S.) M.C. 203; s. c. 1 Dears. & B. 303), which was a conviction under the 1 Vict. c. 85. s. 2, for causing bodily injury to an infant with intent that it should die, it was proved that the prisoner exposed her infant in a field on a cold wet day, with intent that it should die, but the Court held that the conviction could not be sustained, because there was no lesion of any part of the organs of the child. It is clear, therefore, that some injury to the machine ought to have been proved.

Orridge, in support of the conviction, was not called upon to argue.

POLLOCK, C.B.—We are all of opinion that the conviction was right. The question is, whether the injury which the statute contemplates must be of a permanent kind. We think it need not. In the case of a gun which has been spiked the injury would not be permanent, but the gun would be rendered useless for a time until something be done to it; it may be said to need repair. It is said here that the steam-engine was in no manner injured by what the prisoner did to it; but it needed repair, that is to say, the reversing the plug and loosening the screw, and this would of course take time and labour. It is therefore impossible to say that the machine was not damaged. Indeed, if it had been left in the state in which the prisoner placed it, the evidence is that it would certainly have burst. The several parts of this machine were so misplaced by the prisoner that if the machine had been left to itself it would have been damaged. That in my judgment is doing damage.

The other JUDGES concurred.

Conviction affirmed.

[CROWN CASE RESERVED.]

Nov. 11, 1865.

THE QUEEN v. CURGERWEN.*

35 L. J. M.C. 58; L. R. 1 C.C. 1; 13 L. T. 383; 14 W. R. 55; 10 Cox. C.C. 152;
11 Jur. N.S. 984.Distinguished, *R. v. Jones*, [1883] E. R. A.; 52 L. J. M.C. 96; L. T. 768;
31 W. R. 800.*Bigamy—Absence for Seven Years—Knowledge of Accused—Burthen of Proof.*

CRIMINAL LAW.—On an indictment for bigamy, it was proved that the prisoner and his wife had lived apart for seven years, and that the prisoner then married again. There was no evidence of the prisoner's knowledge of the existence of his first wife at the time he married again. The prisoner was convicted:—Held, that the burthen of proof that the prisoner did not know that his wife was alive at the time he contracted the second marriage was not on the prisoner, and that the conviction could not be sustained.

This case was reserved by Willes, J.

The accused was tried, before me, at the last Cornwall Assizes, for bigamy, when the question arose whether when a husband and wife had lived apart for seven years and he married again, there being no evidence to shew his knowledge of the existence of his first wife (so to speak), he is liable to be convicted of bigamy, unless he can prove that at the time of the second marriage he did not know of his first wife being alive; in other words, whether the burthen of proof of absence of such knowledge rests upon the prisoner: a question left undecided in *The Queen v. Briggs* (1 Dears. & B. 98; s. c. 26 Law J. Rep. (N.S.) M.C. 7).

The prisoner was a man-of-war's man. The first marriage was to one Charlotte Curgerwen, on the 1st of September, 1852, at Buryan, in Cornwall. After the marriage, the couple went to Ireland, where the prisoner was then in the Coastguard service, and they lived together until June, 1853, when, in consequence of some disagreement, she left him and returned to her father's house at Buryan. In January, 1854, the prisoner went to Portsmouth, to join a ship-of-war which was proceeding to the Baltic, and was afterwards engaged in the Russian War. Upon that occasion the first wife went to Portsmouth to see the prisoner off, and after doing so, she, in or about March, 1854, returned to her father's house, where she remained without seeing or corresponding with her husband, or, so far as the evidence went, knowing whether he was dead or alive, until shortly before the prosecution. There was no evidence that he had in the mean time ever been near where she lived, or had seen or heard of her or any member of her family, or known whether she was dead or alive. After the war, but at what precise time did not appear, the prisoner returned to England and was again employed in the Coastguard. On the 9th of July, 1862, the prisoner, being then at a Coastguard station at a small place upon the coast of Devon, contracted the second marriage with one Eliza Hardy, and they lived together as man and wife undisturbed until this prosecution. A short time before the prosecution the prisoner was promoted and sent to a station in Cornwall, about 20 miles from where his first wife was living. This led to the proceedings. It appeared, therefore, that the prisoner and his first wife had been living apart for more than eight years at the time of the second marriage, and under circumstances in which it was at the least equally probable that he did not know as that he did know of his first wife being alive,

* *Coram* Pollock, C.B., Willes, J., Pigott, B., Shee, J. and Smith, J.

if not, indeed, as I am inclined to think, more probable that he did not know. A statement by the prisoner before the Magistrates was put in, but, fairly construed, it amounted only to an admission of having been married twice, and of his then, that is, when before the Magistrates, knowing that his first wife was alive.

It was contended for the prisoner that there was no evidence upon which a conviction could properly take place, and that the burthen of proof in the absence of knowledge was not upon the prisoner. Knowing that the question of burthen of proof in these cases was unsettled, I determined in the event of a conviction to reserve these objections, and I directed the jury, in substance, that the fact of the second marriage whilst the first wife was alive made a *prima facie* case, and that the burthen was upon the prisoner to bring himself within the exception of the statute; and it being clear that the living apart for seven years was proved, they ought to acquit, if they were satisfied that he did not know of his wife being alive within the seven years, and convict if the evidence did not so satisfy them. The jury found the prisoner guilty, and I let him out on bail until the opinion of the Court for Crown Cases Reserved was taken upon the propriety of the conviction.

No counsel appeared on either side.

POLLOCK, C.B.—We are all of opinion that the conviction in this case cannot be sustained. The case, as stated by the learned Judge, is that the accused and his wife had lived apart for more than seven years and that the accused then married again, and that there was no evidence to shew his knowledge of his first wife's being alive at the time he married again, and that the facts shewed that it was equally probable that the accused did not know of his first wife's existence as that he did. The question has been several times raised whether the burthen of proof of the negative is on the accused, or whether the prosecution are bound to prove that the prisoner must have known of the existence of his wife or her husband, as the case may be. In the late edition of *Russell on Crimes* (1 Russ. on Crimes, 270), by Mr. Greaves, that learned author seems to think the burthen of proof is on the accused. The expression "burthen of proof" is certainly open to objection, and we do not agree in the view of Mr. Greaves. We think it better to follow the rule laid down by my late learned Brother Wightman in *The Queen v. Heaton* (3 Fost. & Fin. 819), and that by so doing we shall be acting more in conformity with the spirit of the English criminal law.

The other JUDGES concurred.

Conviction quashed.

[CROWN CASE RESERVED.]

Nov. 11, 1865.

THE QUEEN v. BEALE.*

35 L. J. M.C. 60; 13 L. T. 335; 14 W. R. 57; 12 Jur. N.S. 12; 10 Cox C.C. 157.

Attempt to carnally know a Girl under Ten Years of Age—Consent of Girl.

CRIMINAL LAW.—*The prisoner was indicted for unlawfully attempting to have carnal knowledge of a girl under the age of ten years. The evidence was, that the prisoner attempted to have carnal knowledge of the girl, but that she consented to the attempt:—Held, that the fact that the girl consented to the attempt was immaterial, and that the conviction of the prisoner was right.*

* *Coram*, Pollock, C.B., Willes, J., B., Shee, J. and Smith, J.

This was a CASE stated for the opinion of the Court, by the Deputy Assistant Judge of the Middlesex Sessions.

Frederick Beale was indicted and tried before me, at the Middlesex Sessions, on the 23rd of August, 1865, for unlawfully attempting to have carnal knowledge of Mary Jane Catherine Green, a child under the age of ten years. The indictment also contained a second count for assaulting the said Mary Jane Catherine Green, with intent to carnally know and abuse her, and a third count for an indecent assault.

Mary Jane Catherine Green proved that she was nearly ten years old; that she lived with her father and mother, and that the prisoner was a lodger in their house. On the day in question she went into his room, when he pulled her between his knees, raised her clothes, took down his trousers, and indecently assaulted her. He hurt her a little, on which she cried out "Oh!" but she did nothing to prevent him, and made no objection to the act. He told her not to tell her mother, and she did not in fact tell of it until some days after, when a discharge was discovered, which the medical man proved to be gonorrhœa. Upon this evidence it was contended by the counsel for the prisoner, that inasmuch as the child had consented to the act done to her, there was no assault in law; an assault implying an act done, with more or less of force used, against the will of the party, and that therefore the prisoner must be acquitted upon the second and third counts, both of which charged assaults. It was also contended, that although it was made a statutable offence to have carnal knowledge of a child under that age, without regard to her consent or non-consent, yet in this case the prisoner, being only indicted for the attempt, could not be convicted upon the first count, because the child could consent to the attempt, although not to the complete offence, and in fact did consent. He cited the recent case of *The Queen v. Johnson* (10 Cox's Crim. Cas. 114), and contended, also, that upon the authority of *The Queen v. Read* (1 Den. C.C. 377; s. c. 18 Law J. Rep. (N.S.) M.C. 88), *The Queen v. Cockburn* (3 Cox's Crim. Cas. 543), and *The Queen v. Mehegan* (7 Ibid. 145), tender years did not affect the rule.

I directed the jury that if they were satisfied that the girl actually consented to the act being done to her, they should acquit the prisoner; but that "consent" meant a willing mind on her part to allow the act to be done; and that if, from her tender years, not knowing what was being done, she merely submitted without the exercise of any will by her, it would be such an assault in law as would support the indictment.

The jury found the prisoner "Guilty, for that the child was too young to know what it was she was doing, and therefore consented to the act done by the prisoner."

On the application of the counsel for the prisoner I reserved the point, and the questions for the Court are: Whether, upon the facts proved and the finding of the jury that the child consented for the reason stated, the prisoner was rightly convicted of a misdemeanor in attempting to know and abuse a child under ten years of age, as charged in the first count of the indictment, notwithstanding the consent of the child; and also whether he was guilty of an indecent assault.

Prentice, for the prisoner.

F. H. Lewis, in support of the conviction.

POLLOCK, C.B.—We are all of opinion that the conviction was right. The fact that the girl was a consenting party is quite immaterial. The consent of the girl is immaterial in an indictment charging the commission of the felony of having carnal knowledge; and it must follow that consent is immaterial where the offence charged is the attempt only.

Conviction affirmed.

[CROWN CASE RESERVED.]

Nov. 11, 1865.

THE QUEEN v. NAYLOR.*

35 L. J. M.C. 61; L. R. C.C. 4; 13 L. T. 381; 14 W. R. 58; 11 Jur. N.S. 910;
10 Cox. C.C. 149.*False Pretences—Obtaining Goods—Intention to Pay—Intent to Defraud.*

CRIMINAL LAW.—On an indictment charging the prisoner with obtaining goods by certain false pretences, the jury found that the prisoner did obtain the goods by means of the false pretences, but that he intended to pay for them when it should be in his power to do so, and a verdict of guilty was entered:—Held, that the prisoner was properly convicted.

This was a CASE stated by the Deputy Recorder of the City of Chester.

This prisoner was tried before me at the Quarter Sessions for the city of Chester, on the 14th of July, 1865. There were three counts in the indictment, but the only one which became material was the second, which stated, "That the said Francis Naylor unlawfully, knowingly and designedly did, in a certain letter written by him, the said Francis Naylor, and sent by him to the said Mary Ingram, falsely pretend to the said Mary Ingram that the said Francis Naylor had seen a person named Moss (meaning one Elias Moss, of Roscoe Arcade, in the town of Liverpool, furniture-broker, the said Elias Moss then and long before being well known to the said Mary Ingram as a furniture-broker), and that the said Elias Moss was furnishing a house and wanted two Kidderminster carpets, two felt carpets, and twelve yards of stair carpet, and that the said Elias Moss wanted the said carpets to come by passenger train, by means of which said false pretences contained in the said letter the said Francis Naylor did then unlawfully obtain from the said Mary Ingram two Kidderminster carpets, two felt carpets, and twelve yards of stair carpet, with intent thereby then to defraud, whereas, in truth and in fact, the said Francis Naylor had not then seen the said Elias Moss, nor did the said Elias Moss then want the said carpets, nor did the said Elias Moss want the said carpets or any carpets to come by passenger train, nor had the said Elias Moss then ordered the said carpets, or any carpets whatsoever; to the great damage and deception of the said Mary Ingram, to the evil example," &c.

It was proved that the prosecutrix, Mary Ingram, at the time of the transaction in question, carried on the business of an upholsterer and furniture-dealer at Chester. That for some considerable time prior to the month of January, 1865, the prisoner had been employed by the prosecutrix to procure orders for goods to be supplied by her. That, during the six months prior to the transaction in question, goods to a considerable amount had been supplied by the prosecutrix in consequence of representations by the prisoner that he had received orders for them. That, in the month of January, 1865, the prisoner wrote a letter to the prosecutrix containing the statement set out in the second count, that is to say, that a person named Moss, a furniture-dealer at Liverpool, was in want of some carpets, of sizes and descriptions mentioned in the letter, and that such carpets were to be sent by passenger train to Moss's place of business. In consequence of this letter the prosecutrix forwarded by railway a package containing carpets of the size and description mentioned in the letter, such package being directed to Moss at his place of business at Liverpool, where it arrived in due course. The value of the carpets so sent was 12*l*. Prior to the arrival of the package, the prisoner, who had been previously acquainted with Moss, and also with persons in his employment, applied to one of such persons, stating that he expected a package of

* *Coram*, Pollock, C.B., Willes, J., Pigott, B., Shee, J. and Smith, J.

carpets from Chester to be sent to Moss's, and requested that it might be permitted to remain there. Permission was given, and after the arrival of the carpets at Moss's the prisoner applied there for them, and they were delivered to him. The statement in the letter that Moss was in want of the carpets was false. Neither Moss nor any person in his employment had had any communication with the prisoner about carpets prior to his writing the letter containing such statement. The prosecutrix, in cross-examination, stated that payments on account had been made to her by the prisoner both prior and subsequent to the transaction in question, and that such payments amounted to 465*l.*, but that the carpets in question had never been paid for. She further stated, on cross-examination, that prior to the transaction in question the prisoner had accepted bills of exchange for her accommodation. She also stated that she expected to receive the price of the carpets from the prisoner, but that she supplied them in consequence of his representation that Moss wanted them, as she knew that Moss was a respectable and solvent person. The jury found, in answer to questions put by me—That the prisoner's statement that Moss wanted the carpets was false to his knowledge; that he made it to induce the prosecutrix to part with the carpets; that the prosecutrix was induced to part with the carpets by reason of such false pretence; that the prisoner at the time he made the pretence and obtained the carpets intended to pay the prosecutrix the price of them when it should be in his power to do so.

Upon this finding the counsel for the prisoner contended that the jury had negatived the intention to defraud, and, consequently, that the prisoner was entitled to a verdict of not guilty. I entertained some doubt upon the question, and therefore reserved it for the consideration of the Court for Crown Cases Reserved. I directed a verdict of guilty to be entered, but postponed judgment, and the prisoner was discharged upon recognizance of bail to appear and receive judgment.

The question for the consideration of the Court was, whether upon the facts above stated and the finding of the jury, a verdict of guilty or a verdict of not guilty ought to have been entered.

No counsel appeared.

POLLOCK, C.B.—We are all of opinion that the prisoner was properly convicted.

Conviction affirmed

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Queen's Bench.)

May 15, 1865.

LEATHAM v. THE VISITOR AND GUARDIANS OF BOLTON-LE-SANDS, ETC.*

35 L. J. M.C. 62; 6 B. & S. 547; 13 W. R. 785.

Pauper Lunatic—Order of Maintenance—Gilbert Union.

POOR LAW.—*When a removable pauper lunatic is adjudged to be settled in a parish in a union formed under Gilbert's Act (22 Geo. 3. c. 83), the order of maintenance ought to be made on the guardians of the particular parish, not on the guardians of the union.*

* *Coram*, Erle, C.J., Pollock, C.B., Bramwell, B., Channell, B., Byles, J., Keating, J. and Smith, J.

E. R. A. [1866]—VOL. 2

56

Error was brought by the defendants to reverse the judgment of the Court of Queen's Bench, in favour of the plaintiff, on a demurrer.

These proceedings were taken to review the decision of that Court in the case of *The Queen v. Bramley* (1 B. & S. 732; s. c. 31 Law J. Rep. (N.S.) M.C. 11). Judgment below was given without argument in accordance with that decision. As the case turned on a broad principle of law, and not on any point of pleading, it will be sufficient to state that the plaintiff, the treasurer of the West Riding Lunatic Asylum, sued the defendants, under the name of the Visitor and Guardians of the Poor of the united parishes, townships and places of Bolton-le-Sands, Berwick, Caton, Tatham, &c., in the county of Lancaster, alleging them to be a body corporate formed under the provisions of the statute 22 Geo. 3. c. 83. (Gilbert's Act), to recover from them the cost of the board and maintenance of a removable lunatic pauper who had been sent from the township of Bramley, in the West Riding, to the lunatic asylum under a Justice's order, and who was still maintained in the asylum chargeable to Bramley, and whose place of settlement was adjudged to be in the township of Tatham (one of the defendant's townships) by a subsequent order of Justices, made under the statute 16 & 17 Vict. c. 97. s. 97, which directed the defendants, as the guardians of the poor of the Caton Union, to pay to the plaintiff certain weekly sums in respect of the future board and maintenance of the lunatic. The declaration alleged the defendants to be known by the name of the Guardians of the Caton Union.

The fifth plea alleged that the defendants were incorporated under Gilbert's Act.

West, for the plaintiffs in error, the defendants below.—This action cannot be maintained. The Justices had no power to make any order on the defendants under the statute 16 & 17 Vict. c. 97. s. 97. Their order ought to have been on the guardians of the township of Tatham, not on the guardians of the union, the union being a Gilbert union, and not a poor-law union. The decision in *The Queen v. Bramley* (1 B. & S. 732; s. c. 31 Law J. Rep. (N.S.) M.C. 11) is wrong. There is a material difference between the powers and functions of guardians in a poor-law union and of guardians in a union under Gilbert's Act, the 22 Geo. 3. c. 83. The guardian of a parish in a Gilbert union is not a union officer, but a parish officer—*The Queen v. the West Riding* (7 El. & B. 15; s. c. 26 Law J. Rep. (N.S.) M.C. 41). In a poor-law union he has no functions as a parish officer, but acts only as a member of the board of guardians. In a Gilbert union there are no guardians of the union; but the guardians are guardians of the parishes in the union. These meet in a board for certain specific purposes. This lunatic, being a removable pauper, ought to be maintained by the township of Tatham; but if this order is good, and the defendants' board has to pay the plaintiff, the board has the power of compelling the township of Tatham to repay the amount. Under the Gilbert Act, the board are to provide funds for the support of a workhouse and of the poor maintained in it. And this common charge is to be apportioned by the board on the parishes, but the guardian of each parish is to provide clothing and give out-relief to the poor of his own parish. The maintenance of a lunatic not in the house would be out-relief. The 97th section of the statute 16 & 17 Vict. c. 97. is carefully framed to meet the different cases. It directs that the order of maintenance is to be made, first, on "the guardians of the union to which the parish in which such lunatic is adjudged to be settled belongs": that applies to a poor-law union; secondly, on "the guardians of such parish in case the parish be in a union": that branch of this sentence meets the case of a Gilbert union. The third branch directs it to be made on the guardians of the parish when one parish is large enough to be a union by itself. The fourth case is where there are no guardians, and then the order is to be made on the overseers.—(He was stopped by the Court).

Temple, for the defendant in error, the plaintiff below.—The judgment below and the decision in *The Queen v. Bramley* (1 B. & S. 732; s. c. 31 Law

J. Rep. (N.S.) M.C. 11) were right. Section 97. of the statute 16 & 17 Vict. c. 97. directs the order to be made on the guardians of the union, when there is one. The interpretation clause, section 132, expressly states that the term "union" includes a Gilbert union as well as a poor-law union. It would be a very strong construction to give two different meanings to the word "union" in the same sentence. It may be that the statute empowers the Justices to make the order either on the guardians of the union or of the parish, if the parish be in a union. Under the older act, 8 & 9 Vict. c. 126, the Justices had an option of making the order on the treasurer of the union or on the overseers of the parish in the union—*The Queen v. Tyrwhitt* (12 Q.B. Rep. 292; s. c. 17 Law J. Rep. (N.S.) M.C. 141). The construction of section 97. of the statute 16 & 17 Vict. c. 97. cannot depend on the mode in which an order made under it is to be obeyed. That act does not refer to the funds for the maintenance of the poor in any way. These are provided under different acts. This statute merely adds another set of paupers to be provided for. There are provisions in the 33 Geo. 3. c. 35. s. 3. for forming a common fund for the maintenance of certain paupers. The Lunatic Act in effect makes lunatics chargeable to that common fund, as if they had been paupers sent to the workhouse. He cited also *The Queen v. Priest Hutton* (20 Law J. Rep. (N.S.) M.C. 226).

West was stopped in reply.

ERLE, C.J.—This is an action brought by the treasurer of a county lunatic asylum, against the visitor and guardians of a Gilbert union, for non-payment of the expenses of maintaining a pauper lunatic in a county asylum. It is brought to enforce payment under an order of Justices made under the statute 16 & 17 Vict. c. 97. s. 97, which orders the defendants, by the name of the Guardians of the Poor of the Caton Union, out of any monies which may come into their hands, as such guardians, to pay the expenses of maintaining the pauper lunatic. The plea which raises the point for adjudication is a plea that the defendants are a corporation under Gilbert's Act, and that the order is void unless it is authorized by the statute 16 & 17 Vict. c. 97. s. 97. As we read that section, it empowers the Justices to make an order upon four classes of persons who are to pay: first, on the guardians of the union to which the parish of settlement belongs; secondly, on the guardians of the parish in case such parish be in a union; thirdly, on the guardians of the parish if it be under a separate board of guardians; fourthly, upon the overseers of a parish not in a union, or under a board of guardians. There are three kinds of guardians referred to. If there are none of these, the order is to be on the overseers. Here, the order has been made on the defendants, as if they had been guardians of a union incorporated under the New Poor Law Act, 4 & 5 Will. 4. c. 76, and it is an order to pay out of the union funds. We are of opinion that the order ought to have been made on the guardians of the parish, it being a parish in a union under Gilbert's Act. The words in the second clause of the sentence, that the order is to be on the guardians of the parish in case such parish be in a union, means, in our opinion, in case such parish be in a Gilbert union. The section provides specifically for the case of guardians of a union and of guardians of a parish. I know no officer or guardian of a parish liable to have an order made upon him specifically, except a guardian under Gilbert's Act and a guardian of a parish where the parish is under a board of guardians, pursuant to the 4 & 5 Will. 4. c. 76, being too large a parish to require being united with another parish. I think we are bound to hold the order to be a void order. If the case had stood merely on the words of the statute, and there had been nothing substantial in the objection, I should have used all my powers to prevent the objection from prevailing. But having given the best attention that I can to this statute, 22 Geo. 3. c. 83, known as Gilbert's Act, it appears to me that it has created a guardian of a parish having duties to perform specifically in that parish, and has authorized him to meet with

other guardians of other parishes in monthly meetings. It has fixed and limited their specific duties while they are acting together. Neither of the specific sources of money, under Gilbert's Act, is applicable to the discharge of the cost of the future maintenance of this lunatic. The great object of the statute 22 Geo. 3. c. 83. was to ameliorate the condition of the poor, and to provide a union house in which they might be maintained. Section 24. points out the duties of the guardians and the funds out of which expenses are to be paid. By the earlier part of that section provision is made for the general expenses which are to be contributed to by each parish according to the average of the sums expended by each on account of their poor during the three preceding years. This rate is to be applicable to the permanent expenses. In respect of the current expenses of the house the parishes are to contribute in proportion to the number of paupers sent from each. The guardians have no power to order the parishes to contribute, except in accordance with these proportions, and the demand for payment is to specify ground upon which the demand is made. The schedules 15. and 16. point out how the two proportions of the expenses are to be adjusted. If an order were to be made under the Pauper Lunatic Act, it should be made upon the parish and be provided for by the parish. It would be an order which has no application to the general body of guardians, and could not properly be paid out of any fund, in the nature of a union fund, over which the general body of guardians have control. I have not heard during the argument where the defendants could get funds to pay the costs of this litigation, or the costs of the future maintenance of the pauper. The guardians cannot call for such money as part of the permanent expenses of the house, nor as for the maintenance of a pauper in the union house. We ought not to make them liable to a judgment which they have no means of satisfying except by taking the union house or the beds of the paupers. The statute 33 Geo. 3. c. 35, cited by Mr. Temple, appears to me very much to confirm the view which we have taken, inasmuch as it directs that there should be something in the nature of a union fund; for, by section 3, it directs that casual poor persons who have no settlements should be entitled to relief. It then specifically created, for the first time, a union fund, and orders their relief to be paid out of the expenditure for general purposes. It creates a new charge on the union. The statute 12 & 13 Vict. c. 103. s. 5. makes the cost of irremovable pauper lunatics a charge on the union fund; and refers, I take it, to the union fund created by the statute 33 Geo. 3. c. 35. s. 3. I am confirmed in this view by the provisions of section 102. of the statute 16 & 17 Vict. c. 97, which, repealing section 5. of the statute 12 & 13 Vict. c. 103, directs that the cost of irremovable pauper lunatics should be chargeable on the common fund of the union, where the parish from which the lunatic is sent is in a union. The word "union" there comprises poor-law union and Gilbert Union; and in that section the word "union" is used without any limitation. The cost of a pauper lunatic who is not irremovable falls on the parish to which he belongs; but the cost of maintaining an irremovable pauper lunatic, in the case of a Gilbert union, is, we think, to be paid out of the union fund created by the statute 33 Geo. 3. c. 35. The difference of the intention of the legislature in section 97. and section 102, with respect to the parties who are to pay, is appropriately expressed by the change of language in the two sections.

The other JUDGES concurred.

Judgment reversed.

[IN THE COURT OF QUEEN'S BENCH.]

Nov. 20, 1865.

THE GUARDIANS OF THE POOR OF THE HASTINGS POOR LAW UNION, *appellants*, v. THE GUARDIANS OF THE POOR OF THE PARISH OF ST. JAMES, CLERKENWELL, MIDDLESEX, *respondents*.

35 L. J. M.C. 65; 6 B. & S. 914; L. R. 1 Q.B. 38; 13 L. T. 362; 14 W. R. 175; 11 Jur. N.S. 977.

Referred to, *R. v. Norwich Incorporation*, 1874, 30 L. T. 704 (Q.B.).

Poor—Settlement—Renting a Tenement—6 Geo. 4. c. 57.

POOR LAW.—*A house was hired quarterly at a yearly rent of 25l., to be paid on the 29th of September, 25th of December, 25th of March, and 24th of June; a quarter's notice to be given by either party:—Held, that this was a renting of a tenement for a whole year within the meaning of the 6 Geo. 4. c. 57, and that a pauper having occupied the same and paid rent for a year, gained a settlement, upon the authority of The King v. Herstmonceux (7 B. & C. 551; s. c. 6 Law J. Rep. M.C. 35).*

This was a SPECIAL CASE stated by consent and by order of a Judge, under the 12 & 13 Vict. c. 45, after notice of appeal had been given to the Middlesex Quarter Sessions, against an order dated the 8th of February, 1865, and made under the hands and seals of two of Her Majesty's Justices of the Peace, in and for the county of Middlesex.

By this order, after reciting an order whereby the said lunatic, John Hazel, had been removed to the Middlesex County Lunatic Asylum, and had been maintained there from the date of the said removal until the 31st of January then last past, and that the said Justices had inquired into the last legal settlement of the said John Hazel, it was adjudged that the last legal settlement of the said John Hazel was in the parish of St. Clement, in the borough of Hastings, in the Hastings Poor Law Union, in the county of Sussex. And the said guardians of the Hastings Poor Law Union were by the said order ordered to pay to the guardians of the poor of the parish of St. James, Clerkenwell, certain sums therein specified for the costs of the removal of the said lunatic to the said asylum, and of his maintenance there.

The particulars of the settlement relied on were, that in or about the year 1856, the said John Hazel went to settle upon and inhabit a tenement, being a separate and distinct dwelling-house, in George Street, in the parish of St. Clement, in the said borough of Hastings, which he hired of one George Welland, at the rent of 25l. a year, and that he held, occupied, and resided therein under such yearly hiring thenceforward for six whole years, and paid rent for the same to the amount of 10l. in each year, and was assessed to and charged with and paid his share towards some one or more of the public taxes or levies of the said parish of St. Clement, in respect thereof, and resided therein forty days and upwards after the payment of some one or more of such taxes or levies in each year.

The grounds of appeal put in issue the sufficiency of the hiring or renting for the purpose of conferring a settlement. The facts are these: The said John Hazel, in July, 1856, applied to George Welland, as the agent of William Welland, to become the tenant of the house No. 62, George Street, in the said parish of St. Clement, Hastings, and an agreement was then signed, which was as follows:

“An agreement between William Welland and John Hazel.—William Welland agrees to let, and John Hazel agrees to hire, the house No. 62, George

Street, quarterly, at a yearly rent of 25*l.*, to be paid on the 29th September, 25th December, 25th March, and 24th June; taxes to be paid by tenant; to be left in tenantable repair; a quarter's notice to be given by either party.

“ John Hazel,

“ (For William Welland) George Welland.

“ Hastings, July 25th, 1856.”

It was admitted by the appellants that John Hazel occupied the said house under the said agreement for six years, and resided therein, and was assessed to, and paid rates and taxes in respect thereof, so as to gain a settlement in the said parish of St. Clement, if the said agreement constituted a yearly hiring, or renting, of the said house for the term of one whole year, within the meaning of the statute 6 Geo. 4. c. 57. s. 2. The rent for the house was always paid quarterly.

The question for the opinion of the Court was, whether the said agreement constituted such yearly hiring or renting of the said house for the term of one whole year? If the Court was of opinion that it did, the order of Justices was to be confirmed. If the Court was of the contrary opinion, then the order was to be quashed.

Poland, in support of the order (Nov. 8).—The question is, whether, upon the terms of the agreement under which the tenement was let and taken, as set out in the case, the pauper *bonâ fide* rented that tenement for the term of one whole year; the occupation had undoubtedly been sufficient. In *The Queen v. the Inhabitants of St. Giles without Cripplegate* (33 Law J. Rep. (N.S.) M.C. 3; s. c. 4 B. & S. 509), the hiring of the tenement was at a monthly rent, and terminable at a month's notice, to expire on either of the quarter days; and it was held to be a yearly hiring. The ground of that decision was, that the renting of a tenement for an indefinite period and an occupation for a year constituted yearly tenancy, and that it was an indefinite tenancy, because neither the stipulation as to notice to quit nor the reservation of monthly rent made it a monthly tenancy. For the same reason, the tenancy in this case is not quarterly, and therefore is yearly. (He was then stopped.)

Hurst, for the appellants.—In the case cited, and in all these cases that might be cited against the respondents, there is an absence of any words in the agreement for the tenancy to shew the character of the tenancy, and therefore it was held to be indefinite, and then the occupation for a year imparted to it the character of a yearly tenancy. Here the agreement describes it as an agreement to hire “ quarterly.” That expression fixes the character of the tenancy. The further words, “ at a yearly rent of 25*l.*,” is merely a mode of computing the rent. In *Doe d. King v. Grafton* (21 Law J. Rep. (N.S.) Q.B. 276), an agreement, by which a yearly rent was reserved, payable “ quarterly,” and for a six-months' notice in writing to quit at the expiration of such notice, was held to create a tenancy, not for a year, but until one of the parties should give to the other six months' notice. Yet that was more of a yearly hiring than this.

[BLACKBURN, J.—In *The King v. Herstmonceux* (7 B. & C. 551; s. c. 6 Law J. Rep. M.C. 35), where the pauper took a house at twenty guineas a year, the rent to be paid weekly, and either party to be at liberty to give three months' notice from any quarter-day, and at the expiration thereof to determine the tenancy, the Court held that that was a renting for one whole year; and Mr. Justice Bayley, delivering the judgment of the Court, says, “ A taking at an annual rent, though the rent is to be paid weekly, is *primâ facie* a yearly tenancy; if there be no proviso about quitting at three months' notice, there could have been no doubt on the subject, as it would then have been an ordinary yearly tenancy, with the rent to be paid weekly instead of quarterly or half-yearly. What, then, is the legal effect of a tenancy for a year with a proviso for determining it in the middle of the year? Such a proviso does not prevent it from being a yearly tenancy; when the party is in he is in of the whole estate for a year, liable to a defeasance on a particular event.” So that if there is here

a yearly hiring in other respects, defeasibility by a quarterly notice does not reduce it.]

It is submitted that here the hiring is expressly stated to be quarterly, which distinguishes it from other cases, and quarterly means from quarter to quarter, as yearly means from year to year. According to *The King v. Herstmonceux* (7 B. & C. 551; s. c. 6 Law J. Rep. M.C. 35), the tenant must have been in of an estate for a year; but here there was no such estate, and he was in only for a quarter.

[COCKBURN, C.J.—Certainly, the agreement in that case does not start with saying that the pauper took the house “weekly.” Nor do I recollect that in any of the cases of settlement by hiring and service, where the hiring was deemed to be yearly when the wages were made payable weekly, that the contract started with saying, “I engage you on a weekly hiring.”]

In *Wilson v. Abbott* (3 B. & C. 88) the Court would not infer a yearly hiring. *The King v. the Inhabitants of Warminster* (6 Ibid. 77) is in point to shew that the hiring of a servant at weekly wages, though for an indefinite period, is not a yearly hiring, and *The King v. Dodderhill* (3 M. & S. 243) shews that such a hiring is a weekly one. So, it is submitted, here the tenancy was a quarterly one.

Poland, in reply, referred to *The Queen v. the Churchwardens, &c. of Willesden* (3 B. & Sm. 593; s. c. 32 Law J. Rep. (N.S.) M.C. 109), where the agreement of tenancy was for three months at a yearly rent, with a three months’ notice to quit, and it was held to be a yearly tenancy after the expiration of the first three months, the tenant having held over after such three months.

Cur. adv. vult.

The judgment of the Court was delivered (Nov. 20) by—

SHEE, J.—In this case the question is, whether John Hazel, a pauper, had acquired a settlement in St. Clement’s, Hastings, by renting a tenement for the term of one whole year, within the meaning of the statute 6 Geo. 4. c. 57. The pauper actually occupied the premises for six years under an agreement in the following terms: “William Welland agrees to let, and John Hazel agrees to hire, the house No. 62, George Street, quarterly, at a yearly rent of 25*l.* to be paid on 29th September, 25th December, 25th March, and 24th June; taxes to be paid by tenant; to be left in tenantable repair; a quarter’s notice to be given by either party.” The language of the agreement, speaking as it does of a yearly rent, and mentioning the four quarter days, shews that the parties contemplated that the tenancy would probably continue for a year; but it was in the power of either party to put an end to the tenancy by a quarter’s notice, and we think that the use of the word “quarterly” shews that it was intended that the notice might terminate at the end of any quarter; so that it was at the option of either party, by giving a proper notice, to terminate the tenancy before the end of the year. If we were now for the first time construing the statute 6 Geo. 4. c. 57, we should not be disposed to hold that this was a hiring for a whole year, as there is great force in the argument that the true construction of the statute is that the tenancy must be such as must endure for a whole year; but in *The King v. Herstmonceux* (7 B. & C. 551; s. c. 6 Law J. Rep. M.C. 35), though it was forcibly contended in the argument that such was the true construction, the Court, consisting of three most eminent Judges, Bayley, Holroyd and Littledale, decided, after taking time to consider, that “a taking at twenty guineas a year, the rent to be paid weekly, and either party to be at liberty to give three months’ notice from any quarter-day, and at the expiration thereof to determine the tenancy, was a taking for a year, unless within the year notice should be given; and that, notice not having been given, the occupation was under a letting for a whole year within the meaning of statute 6 Geo. 4. c. 57. This case was followed by this Court in *The Queen v. the Churchwardens, &c. of Willesden* (3 B. & Sm. 593; s. c. 32 Law J. Rep. (N.S.) M.C. 109). In that

case there was an obscurely worded agreement. Mr. Justice Wightman, in his judgment, states its effect to be "a demise for three months certain from the 25th of December, 1859; but that, if the parties should go on as landlord and tenant after that time, it should be a yearly tenancy at the rate of 18*l.* a year, payable monthly and determinable by giving three months' notice;" which Mr. Justice Wightman thought "might be given at any time, and need not be a notice expiring at any particular time." "Then," said he, "the pauper, having occupied for more than a year, has rented a tenement for the term of one whole year within the meaning of statute 6 Geo. 4. c. 57." Mr. Justice Crompton seems to have inclined to think that the construction of the agreement was that the notice to quit must expire at the end of the year (on which reading of the agreement the present question would not arise); but he expressed no dissent from the view of Mr. Justice Wightman, and no disapprobation of *The King v. Herstmonceux* (7 B. & C. 551; s. c. 6 Law J. Rep. M.C. 35). In *The Queen v. St. Giles, Cripplegate* (33 Law J. Rep. (N.S.) M.C. 3; s. c. 4 B. & S. 509), the case of *The King v. Herstmonceux* (7 B. & C. 551; s. c. 6 Law J. Rep. M.C. 35) was again followed. There the letting was of a house "from 25th March, 1858, at the monthly rent of 1*l.* 11*s.* 8*d.*" . . . "One month's notice, to expire either on the 25th March, 25th June, 25th September, or 25th December, shall be a good and sufficient notice on either side" for the tenant to deliver up possession. Though the rent was expressed to be monthly, it was clear from the agreement, and the notice to quit, that the tenancy was intended to be more than a monthly one. The Court say, "To what other conclusion can we come than that it was a hiring of the tenement indefinite as to duration, but terminable at a month's notice on either side on any of the specified quarterly days? and the house having been actually occupied under that hiring for upwards of two years, it appears to us to have been an occupation under a hiring for a whole year." No case was cited, nor are we aware of any, in which the authority of *The King v. Herstmonceux* (7 B. & C. 551; s. c. 6 Law J. Rep. M.C. 35) has been questioned; and on this state of the authorities we feel ourselves bound to hold that though a tenancy is terminable by a notice to quit within a year, yet if the terms of the hiring are such that the parties contemplated that the tenancy would, unless the notice was given, endure for a year or more, and it does endure for a year, it will be sufficient to confer a settlement.

We do not intend to decide that a weekly tenant at a weekly rent who by payment of rent becomes a tenant from week to week, so long as both landlord and tenant please, gains a settlement at the end of fifty-two weeks, as having held under a letting for a whole year. We think that the decisions only apply to cases where it appears from the terms of the letting that the parties contemplated originally that the holding would endure for a year, though it might be put an end to before the expiration of the year. In the present case, indeed, the parties say that the house is to be let "quarterly"; and if the agreement stopped there, the inference would be, that they did not contemplate that the holding would continue for a year; but they proceed to say that it shall be at a yearly rent, payable on the usual four quarter-days. This seems to us to shew, quite as strongly as anything in the agreements in *The King v. Herstmonceux* (7 B. & C. 551; s. c. 6 Law J. Rep. M.C. 35), *The Queen v. the Churchwardens of Willesden* (3 B. & Sm. 593; s. c. 32 Law J. Rep. (N.S.) M.C. 109) and *The Queen v. St. Giles, Cripplegate* (33 Law J. Rep. (N.S.) M.C. 3; s. c. 4 B. & S. 509), that it was contemplated by the parties that the holding would continue for a year or more, though it might be put an end to before the expiration of a year. And the word "quarterly" will, we think have sufficient effect given to it by using it to shew that it was intended that the quarter's notice might terminate at the end of any quarter without giving it the effect of nullifying these expressions. Had the word "quarterly" been omitted, and the words "ending on any quarter-day" been inserted at the end of the agreement, the effect of the agreement would have been precisely the same, both as to the continuance of the holding and the mode in which it was to be

determined. The case would have then been identical with *The King v. Hertsmenceux* (7 B. & C. 551; s. c. 6 Law J. Rep. M.C. 35); and we think that we ought not to make nice distinctions between the effects of agreements, according to their words, when the intention of the parties, as expressed by the words used, and the legal effect of the agreements, are identical. It is important that points arising on settlement law, when once determined, should not be again disturbed except on the most urgent grounds, and we should therefore not feel justified in overruling the three cases already decided on this subject, although we may doubt the correctness of the original decision. The order should, therefore, be affirmed.

Order affirmed.

[IN THE COURT OF QUEEN'S BENCH.]

Nov. 11, 1865.

THE WAKEFIELD LOCAL BOARD OF HEALTH, *appellants*, *v.* THE WEST RIDING AND GRIMSBY RAILWAY COMPANY, *respondents*.

35 L. J. M.C. 69; 6 B. & S. 794; L. R. 1 Q.B. 84; 13 L. T. 590; 14 W. R. 100; 12 Jur. N.S. 160.

Distinguished, *Muir v. Hore*, [1878] E. R. A.; 47 L. J. M.C. 17; 37 L. T. 315 (C.P. D.).

Jurisdiction—Interested Justice—Railways Clauses Act (8 & 9 Vict. c. 20.) ss. 3, 145.—*Conviction.*

MAGISTERIAL LAW.—*By a provision in the Railways Clauses Act, a Justice of the Peace, who has summary jurisdiction given to him in certain matters under that act, is not to be interested in such matter:—Held, that the insertion of the clause to disqualify an interested Justice from acting was intended to have no greater effect than would have been supplied by the common law without it; and therefore it was competent for the parties at the hearing of an information before an interested Justice to waive the objection, and so render an order made by such Justice valid and binding upon them.*

This was a SPECIAL CASE stated, under the 20 & 21 Vict. c. 43, by two Justices of the West Riding of Yorkshire, for the opinion of this Court upon the validity of an order made by them at petty sessions, upon an information laid by the appellants against the railway company (the respondents), under the Railways Clauses Act (8 & 9 Vict. c. 20. s. 58), for not obeying an order of Justices directing the repair of certain roads which had been damaged by the respondents in the course of making their railway, under the West Riding and Grimsby Railway Act, 1862. The information and complaint against the company for disobeying the order to repair was laid on the 7th of November, and heard on the 17th of November, 1864, when the above Justices dismissed the summons.

With respect to the original order to repair, it appeared that on the 13th of January, 1864, the appellants laid an information before John Baiff, Esq., a Justice of the Peace of the West Riding, against the respondents, under the above 58th section of the 8 & 9 Vict. c. 20, charging the respondents with having, in the course of making their railway, used and interfered with and thereby damaged certain roads, and a summons was thereupon issued by that Justice to the respondents, and both parties appeared on the 1st of February, 1864, at Wakefield, before Colonel Smyth and H. W. Stansfeld, Esq., two Justices of the Peace for the West Riding; and those Justices made an order, by which they

ordered the respondents to repair some of the roads mentioned in the information. Upon the hearing of the information on the 1st of February, 1864, it was objected to the proceedings, amongst other things, that Colonel Smyth, one of the Justices, was interested in the matter of the above information, because he was a proprietor in the Aire and Calder Navigation Company, and, as such, was a ratepayer within the district of the appellants; and, further, that the company were not liable to repair the roads in question, because they had not themselves made the railroad, but had let the making of it to contractors, who by their sub-contractors or servants had executed all the works. This last objection only was, however, then relied upon, and the Justices made the order, subject to a case thereon to be stated for this Court, which, after argument upon that point, ordered the judgment of the Justices to be affirmed. (See this case reported on this point *sub nom. The West Riding and Grimsby Railway Company, appellants, v. the Wakefield Local Board of Health, respondents* 33 Law J. Rep. (N.S.) M.C. 174.) The respondents refused, however, to obey this order, and on the 12th of August, 1864, a complaint was made before the Mayor of Wakefield against the respondents for disobedience of the order of the 1st of February, and a summons was issued thereon, which came on to be heard on the 22nd of August, 1864. The respondents did not appear, and Col. Smyth and H. W. Stansfeld, Esq., who were again the Justices present, convicted and sentenced them to a penalty of 5*l.* a day. The respondents appealed against that conviction, to the West Riding Quarter Sessions, held in the October following, when it was contended by them that the order and conviction were invalid by reason of Col. Smyth, one of the Justices making the order, and joining in the conviction, being an interested person within the meaning of the Railways Clauses Consolidation Act, 1845, and by reason of the summonses of the 13th of January, 1864, and the 13th of August following, being both signed by Justices who were ratepayers of the borough of Wakefield, and therefore without jurisdiction. The Quarter Sessions quashed the order, subject to a case for the Court of Queen's Bench. No case had, however, been taken upon that order. The information and proceedings, the subject of the present case, were then taken by the appellants.

Upon the hearing of such information before the petty sessions the respondents, amongst other things, objected that the original order was void for want of jurisdiction in the convicting Justices, and the Justices determined to dismiss the information, being of opinion that the original information and summons on which the order was founded were respectively void for want of jurisdiction in the Justice acting in the matter, the said Justice being at the time a ratepayer within the district of the said local board of health, and interested within the provisions of the Railways Consolidation Act, 1845, and that the order of the 1st of February, 1864, was not a lawful order, because Col. Smyth, one of the Justices making the same, was interested within the meaning of the Railways Clauses Consolidation Act, 1845, and therefore had not jurisdiction to make it, and because the question of jurisdiction in the same Justice was not raised by the case previously stated for the opinion of the Court of Queen's Bench, wherefore the validity of the said order in this respect cannot be said to have been confirmed by the decision of that Court.

The first question asked was, whether the said order of the 1st of February, 1864, was under the circumstances a valid order? or whether the Justices had power to decide upon its validity or invalidity as respects the parties making it?

(The argument with reference to the effect of the former judgment of the Court on the case submitted to them upon the power of the respondents to proceed is omitted, inasmuch as the judgment of the Court now proceeded entirely upon the other point.)

Cleasby (Maule with him), for the appellants.—The question is, whether the order of the 1st of February is valid or invalid, on the ground that one of the Justices who made it was interested in the matter, and therefore the order was made without jurisdiction. The Railways Clauses Act (8 Vict. c. 20. s. 145.) provides, that "Every penalty or forfeiture imposed by this or the

special act, . . . the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two Justices; and on complaint being made to any Justice he shall issue a summons requiring the party complained against to appear before two Justices at a time and place to be named in such summons, and every such summons shall be served on the party offending either in person or by leaving the same with some inmate at his usual place of abode; and upon the appearance of the party complained against, or in his absence, after proof of the due service of such summons, it shall be lawful for any two Justices to proceed to the hearing of the complaint, and that although no information in writing or in print shall have been exhibited before them; and upon proof of the offence, either by the confession of the party complained against, or upon the oath of one credible witness or more, it shall be lawful for such Justices to convict the offender," &c. By section 3. (the interpretation clause), "The word 'Justice' shall mean Justice of the Peace acting for the county, city, borough, liberty, cinque port, or place where the matter requiring the cognizance of any such Justice shall arise, and who shall not be interested in the matter; and where such matter shall arise in respect of lands being the property of one and the same party, situate not wholly in any one county, city, borough, liberty, cinque port, or place, shall mean a Justice acting for the county, city, borough, liberty, cinque port or place where any part of such lands shall be situate, and who shall not be interested in such matter," &c. Then, if made without jurisdiction, on that ground it is nevertheless such an objection as might be waived, and was waived by the respect at the hearing on the 1st of February.

Temple (H. Lloyd with him), for the respondents.—The order of the 1st of February was a nullity; for being made by an interested Justice, it was as if made by a person who was not a Justice at all. This is an objection which cannot be cured by agreement between the parties. It is admitted that, at common law, if the parties do not object to the acting Justice being interested, knowing of his interest, they are precluded afterwards; but it is submitted that the effect of the above enactment is to make the want of interest a condition precedent to the validity of any act of a Justice, and so not merely declaratory of the common law.

COCKBURN, C.J.—I think there should be judgment for the appellants. That portion of the interpretation clause which requires that the Justice should be a person who was not interested in the matter would have been intended by the known principles of law, and would, therefore, appear to have been inserted out of abundant caution, unless, perhaps, the legislature thought that if they had stopped short after the earlier part of the definition it might have been contended that *expressio unius* was *exclusio alterius*, and that it was not intended to make interest a disqualification. But if they had intended to have prevented the Justices from acting, although the parties expressly waived the objection, they would have expressly said so. To read this enactment in the way it is now contended for, would produce the absurdity that a Justice if he became interested in the matter would cease to be a Justice. It, therefore, appears to me that the parties might submit themselves to Col. Smyth's jurisdiction, and although they might have objected, in the first instance, to his jurisdiction on the ground of interest, yet they cannot be allowed to take their chance of a decision in their favour then, and now, when they find it against them, seek to avert it by the present objection.

LUSH, J. concurred.

Judgment for the appellants.

[IN THE COURT OF QUEEN'S BENCH.]

Nov. 11, 1865.

SANDERS, *appellant*, v. BALDY, *respondent*.35 L. J. M.C. 71; 6 B. & S. 791; L. R. 1 Q.B. 87; 13 L. T. 822; 14 W. R. 177;
12 Jur. N.S. 334.*Game*—1 & 2 Will. 4. c. 32. ss. 3-23—*Cumulative Penalties*—*Using Engine to take Game out of season*.

GAME.—The 1 & 2 Will. 4. c. 32. s. 23. imposes a penalty on a person who uses an instrument for the purpose of taking game not being authorized so to do for want of a game certificate:—Held, that an uncertificated person who set a trap for the purpose of taking partridges or pheasants in the month of March, was liable to be convicted under that section, notwithstanding the 3rd section of the same act.

The penalties imposed by the 23rd section of 1 & 2 Will. 4. c. 32. are cumulative upon those imposed by the 3rd section of that act.

CASE stated by Justices under the 20 & 21 Vict. c. 48.

At a Petty Sessions holden at Hailsham, in Sussex, on the 5th of April, 1865, before two Justices, an information was preferred by the appellant against the respondent, under 1 & 2 Will. 4. c. 32. s. 23,¹ charging the respondent that he on the 13th of March, 1865, did unlawfully use a trap for the purpose of taking game, he, the respondent, not being authorized so to do for want of a game certificate, contrary to the said statute, whereby he had forfeited a sum not exceeding 5*l*. The Justices heard and dismissed the information.

The respondent was servant at a farm adjoining to a plantation situated in a parish within the jurisdiction of the Sessions, and the appellant was game-keeper to Sir C. W. Blunt, to whom the plantation belonged. The respondent was seen on Monday, the 13th of March, 1865, to set a trap in the plantation, which (as the Justices found) was for the purpose of catching partridges or

(1) 1 & 2 Will. 4. c. 32. s. 3. And be it enacted, that if any person whatsoever shall kill or take any game, or use any dog, gun, net, or other engine or instrument for the purpose of killing or taking any game on a Sunday or Christmas-day, such person shall, on conviction thereof before two Justices of the Peace, forfeit and pay for every such offence such sum of money, not exceeding 5*l*., as to the said Justices shall seem meet, together with the costs of the conviction; and if any person whatever shall kill or take any partridge between the 1st of February and the 1st of September in any year, or any pheasant between the 1st of February and the 1st of October, in any year, or any black game (except in the county of Somerset or Devon, or in the New Forest in the county of Southampton), between the 10th of December in any year, and the 20th of August in the succeeding year, or in the county of Somerset or Devon, or in the New Forest aforesaid, between the 10th of December in any year and the 1st of September in the succeeding year, or any grouse, commonly called red game, between the 10th of December in any year and the 12th of August in the succeeding year, or any bustard between the 1st of March and the 1st of September in any year, every such person shall, on conviction of any such offence before two Justices of the Peace, forfeit and pay for every head of game so killed or taken such sum of money, not exceeding 1*l*. as to the said Justices shall seem meet, together with the costs of the conviction; and if any person with intent to destroy or injure any game shall at any time put or cause to be put any poison or poisonous ingredients on any ground, whether open or inclosed, where the game usually resort, or in any highway, every such person shall, on conviction thereof before two Justices of the Peace, forfeit and pay such sum of money, not exceeding 10*l*., as to the said Justices shall seem meet, together with the costs of the conviction.

Section 23. And be it enacted, that if any person shall kill or take any game, or use any dog, gun, or net, or other engine or instrument for the purpose of searching for, or killing or taking game, such person not being authorized so to do for want of a game certificate, he shall, on conviction thereof before two Justices of the Peace, forfeit and pay for every such offence such sum of money, not exceeding 5*l*., as to the said Justices shall seem meet, together with the costs of the conviction: Provided always, that no person so convicted shall by reason thereof be exempted from any penalty or liability under any statute or statutes relating to game certificates, but that the penalty imposed by this act shall be deemed to be a cumulative penalty.

pheasants. The Justices, however, dismissed the information on the ground that the case did not come within the 23rd section, inasmuch as the respondent could not be said to have used the trap for the purpose of taking game not being authorized so to do for want of a game certificate, as that enactment could only apply to a case where a person might have been authorized if he had had a certificate; but here no certificate could have authorized the taking of partridges or pheasants at the time of the year of this occurrence, therefore the prisoner could not be said to be unauthorized by reason of the want of such certificate. They also thought that the 3rd section of the 1 & 2 Will. 4. c. 32. was the enactment intended to meet the case of taking game out of season.

The point of law raised for the consideration of the Court was, whether upon the facts stated the information was rightly laid and the respondent liable to the penalty imposed by the 23rd section of the 1 & 2 Will. 4. c. 32. for using an instrument for the purpose of taking game without a certificate, and should have been convicted.

Hannen, for the appellant.—There ought to have been a conviction. The first part of the 3rd section of the 1 & 2 Will. 4. c. 32. relates to taking, or using an instrument with intent to take game on a Sunday or Christmas Day, and the second part relates only to the actual taking or killing within the prohibited seasons, and is intended for the protection of game. The 23rd section is intended for the protection of the revenue, and applies irrespective of the time of year. The penalty imposed is intended to be cumulative. The game certificate is a personal licence to kill game, which expires on the 5th of April in every year, and is irrespective of any time of year. The statute prescribes the prohibited seasons. A person is liable to a conviction under the 23rd section notwithstanding he may also be liable under the 3rd section.

Counsel did not appear for the respondent.

COCKBURN, C.J.—I think the penalties imposed by the 3rd and 23rd sections of the act are cumulative. They are two substantial and distinct offences. One is for killing game out of season, and the other is for the protection of the revenue. The respondent is liable to the penalty.

LUSH, J., concurred.

Judgment for the appellant.

Case remitted.

[IN THE COURT OF QUEEN'S BENCH.]

Nov. 15, 1865.

THE QUEEN v. THE CHURCHWARDENS AND OVERSEERS OF THE
TOWNSHIP OF BILSTON.

85 L. J. M.C. 79; 6 B. & S. 908; L. R. 1 Q.B. 18; 13 L. T. 327; 14 W. R. 88;
12 Jur. N.S. 139.

Poor-Rate—Parochial Assessment Act (6 & 7 Will. 4. c. 96. s. 1.)—Net Annual Value—Deductions—Water-Rent.

RATES AND RATING.—A voluntary payment, by a landlord, to water-works of water-rent for the supply of water to a hereditament occupied by his tenant, and rateable to the poor, is not a tenant's rate, or an expense necessary to maintain the premises in a state to command their probable annual rent, within the meaning of the Parochial Assessment Act (6 & 7 Will. 4. c. 96. s. 1), and ought not to be deducted from the gross estimated rental of the premises, in order to ascertain their net annual value under that act.

This was a SPECIAL CASE, granted by the Staffordshire Quarter Sessions on the hearing of an appeal against an order of Justices made in Special Sessions, confirming a poor-rate, under the 6 & 7 Will. 4. c. 96. s. 6, which rate was assessed on a gross estimated rental of a house at 11*l.*, and a rateable value of 9*l.*

The appeal was heard at the Staffordshire Epiphany Quarter Sessions, 1865, when the Court found that the gross estimated rental of the house in respect of which the rate was made was 9*l.* 2*s.*, and that in order to arrive at the net rateable value the appellant was entitled to a deduction of several sums as outgoings, which the overseers ought to have allowed, under the 6 & 7 Will. 4. c. 96. s. 1. and, amongst them, the sum of 11*s.* 4*d.* for "water-rent," which deductions would reduce the net rateable value to 4*l.* 9*s.* 1*d.*; and in accordance with such finding, the Court of Quarter Sessions reduced the gross estimated rental to 9*l.* 2*s.*, and the net rateable value to 4*l.* 9*s.* 1*d.*; subject, as to the latter sum, to the opinion of the Court of Queen's Bench, as to whether the sum of 11*s.* 4*d.* for "water-rent" was properly included in such deduction.

The township of Bilston is supplied with water partly from pumps and partly from works constructed by a company, incorporated as the Dudley Waterworks Company, under an act of 4 & 5 Will. 4. c. xlii., and it was in the option of owners or occupiers of the houses in the township to accept or refuse the water supplied under that act.

By the Bilston Improvement Act, 1850 (13 & 14 Vict. c. xcvi.), it was part of the duty of the Bilston Improvement Commissioners to supply water for domestic purposes to such owners, occupiers, &c. of any house in a street where water-pipes were laid as should require the same, at certain rates. The scale of charges for the quarterly supply of water by the Improvement Commissioners was published by order of the Commissioners, in November, 1863.

The water was supplied by pipes from the mains to the houses. About one-half of the inhabited houses were supplied with water from these waterworks, and paid rent for the same to the Commissioners; and as to these, it was a matter of arrangement between the landlord and the tenant to which of the two the water was supplied, and by which of the two the water-rent was paid. The inhabitants of these houses to which there was no supply from the waterworks procured their water from their own wells or other sources. In the present instance the water was supplied from the waterworks. The landlord paid the sum of 11*s.* 4*d.* per annum as the water-rent, and the occupier had nothing to do with it.

The appellants contended that this payment for water was a deduction from the rental to which they are entitled under the Parochial Assessment Act. as being an expense necessary to maintain the premises in a state to command such a rent.

The respondents contended that inasmuch as it was optional with the owner and occupier of the house whether they would take their supply of water from the Commissioners or obtain it from other sources, it was not a necessary expense or outgoing, which they ought to allow as a deduction from the rateable value. And the question was left, so that if the Court should be of opinion that the deduction ought to be allowed, the rate was to stand as reduced, viz. at 4*l.* 9*s.* 1*d.*; if on the contrary, an addition of 11*s.* 4*d.* was to be made to the sum to which the rateable value was reduced by the Quarter Sessions.

M'Mahon (*D. D. Keane* with him), for the respondents.—It is submitted that the sum proposed to be deducted for "water-rent" comes within either the denomination of a "usual tenant's rate and tax," or an "expense necessary," under the circumstances of the house and township in question, to "maintain the premises in a state to command such rent," within the 6 & 7 Will 4. c. 96. s. 1. That section enacts, that "no rate for the relief of the poor in England and Wales shall be allowed by any Justices or be of any force which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to be let from year to year, free of all the usual tenant's rates and taxes and tithe commutation rentcharge, if any, and

deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent." The "water-rent," if not a tenant's rate or tax, is an expense necessary to maintain the rent.

[MELLOR, J.—The payment of the water-rent is not compulsory on the tenant. COCKBURN, C.J.—You might as well say that the cost of gas in a man's house or of candles is necessary to maintain the rent.]

The rent would be lower if it were not for this payment. He referred to *The Queen v. Halldare* (34 Law J. Rep. (N.S.) M.C. 17).

A. S. Hill, for the appellants, was not heard.

COCKBURN, C.J.—I think our judgment should be for the appellants. The question we have to decide is, whether the water-rent is to be deducted from the gross estimated rental. We think it ought not to be so deducted. It is neither a tenant's rate or tax, nor an expense necessary to keep the house in a state to command its present rent. The cost of food or light is an expense as necessary as this of water for that purpose; but no one would think of claiming such deductions as those.

MELLOR, J., SHEE, J. and LUSH, J. concurred.

Judgment for the appellants.

Rate amended accordingly.

[IN THE COURT OF QUEEN'S BENCH.]

Nov. 15, 1865.

THE QUEEN v. SPURRELL AND ANOTHER.

35 L. J. M.C. 74; L. R. 1 Q.B. 72; 13 L. T. 364; 14 W. R. 81;
12 Jur. N.S. 208.

Poor—Appointment of Overseers—43 Eliz. c. 2. s. 1.—Householder.

POOR LAW.—*A householder in a parish to be liable to serve the office of overseer must occupy as tenant of the premises. A servant who occupies a tenement of his master, in part payment of his services and as subservient to and necessary for the performance thereof, and not merely as a matter of convenience, is not a householder within the 43 Eliz. c. 2. s. 1; and an appointment of two overseers for a parish, of whom he is one, is a bad appointment.*

This SPECIAL CASE for the opinion of this Court was stated by the Court of Quarter Sessions of Norfolk, upon the hearing of an appeal against an appointment of overseers made by the Justices in the petty sessions holden for the hundred of Garrow, in the county of Norfolk, and dated the 28th of March, 1864, whereby the said Justices appointed John Spurrell and William Walker to be overseers of the poor of the parish of Pudding Norton in that hundred, for the ensuing year, under the 43 Eliz. c. 2. s. 1¹.

(1) 43 Eliz. c. 2. s. 1: "The churchwardens of every parish, and four, three or two substantial householders there, as shall be thought meet (having respect to the proportion and greatness of the same parish and parishes, to be nominated yearly [on the 25th of March, or within fourteen days next after (54 Geo. 3. c. 91.)] under the hands and seals of two or more Justices of the Peace of the same county, whereof one to be of the quorum, dwelling in or near the same parish or division where the same parish doth lie, shall be called overseers of the same parish."

The order appealed against was as follows:

"Norfolk, to wit.—We, whose hands and seals are hereunto set and affixed, being two of Her Majesty's Justices of the Peace in and for the county aforesaid (one whereof is of the quorum, as the statute in that case directs), do hereby nominate and appoint John Spurrell and William Walker, substantial householders within the parish of Pudding Norton, in the county aforesaid, to be overseers of the poor of the said parish, together with the churchwardens thereof, until the 25th day of March next ensuing the date hereof and fourteen days afterwards, unless other overseers shall be previously appointed in their stead. Given under our hands and seals this 28th day of March, in the year of our Lord 1864.

"D. L. Astley (L.S.)

"Richard Phayre (L.S.)"

The appellant John Spurrell is tenant under William Boycott and other trustees under the will of John Morse, deceased, of a farm of 812 acres, together with a farm-house and premises and a cottage adjoining, and forming part of the said premises, but 50 yards or more from the farm-house, at one entire rent, such cottage being a separate and distinct tenement. The farm is co-extensive with the parish of Pudding Norton, and the said John Spurrell resides with his family and servants in the farm-house which, excepting the cottage above mentioned, is the only human habitation in the parish. The appellant William Walker is farming bailiff to the said John Spurrell, and looks after the men. He is a weekly servant, and receives 14s. a week wages, and occupies the above-mentioned cottage (which is furnished with his own furniture) rent free, in part payment for his services; and but for the cottage his wages would be higher. No poor-rates are paid for the parish of Pudding Norton, but the said John Spurrell pays to the treasurer of the Walsingham Union, which comprises the said parish, the county rate in respect of the said farm, premises and cottage.

On behalf of the appellants it was contended that William Walker was not "a substantial householder" within the meaning of the 43 Eliz. c. 2. s. 1. The Court of Quarter Sessions gave the following judgment: "We find that under the circumstances of this case both appellants were substantial householders within the meaning of the 43 Eliz. c. 2. s. 1, and we confirm the order, subject to a case for the opinion of the Court of Queen's Bench."

If this Court should be of opinion that William Walker is a substantial householder within the meaning of the 43 Eliz. c. 2. s. 1, then the order appealed against, and the order of Quarter Sessions confirming the same, were to stand, otherwise they were to be quashed.

The parish of Pudding Norton was united with other parishes to form, and formed, the Walsingham Union under the 4 & 5 Will. 4. c. 76. s. 26, and was made a contributory to the common fund of that union, under section 28. of the same act.

By the General Consolidated Orders of the Poor Law Commissioners, art. 82,² the guardians of a union are to make orders on the overseers of every parish in the union for such sums as they may require for the relief of the poor and contribution to the common fund, and other expenses chargeable by the guardians on the parish.

The 24 & 25 Vict. c. 55. s. 9.³ came into operation on the 25th of March,

(2) By the General Consolidated Order of the Poor Law Commissioners, art. 89, "The guardians shall make orders on the overseers or other proper authorities of every parish of the union from time to time for the payment to the guardians of all such sums as may be required by them for the relief of the poor of the parish, and for the contribution of the parish to the common fund of the union, and for any other expenses chargeable by the guardians of the parish: and in such orders the contributions shall be directed to be paid in one sum or by instalments on days specified, as to the guardians may seem fit."

(3) 24 & 25 Vict. c. 55. s. 9. recites, "That it is also expedient to alter the mode in which the contributions of parishes to the common fund of the union in which they are comprised are now calculated": and enacts, "that after the 25th of March next the several parishes comprised

1862, and its effect was materially to increase the sum chargeable to the parish of Pudding Norton as its contribution to the common fund of the Walsingham union; and on the 30th of March, 1864, an order of contribution to the common fund of that union for the sum of 11l. was made on the overseers of Pudding Norton by the guardians. The above-mentioned appointment of overseers for the parish of Pudding Norton was then appealed against to the Quarter Sessions.

Denman (A. S. Hill with him), on behalf of the respondent Walker.—The respondent Walker is a substantial householder within the meaning of the 43 Eliz. c. 2. s. 1. It is admitted that if he be not, the appointment of him and Spurrell to be overseers is a bad appointment. For it was held in *The Queen v. Cousins* (33 Law J. Rep. (N.S.) M.C. 87) that the statute of Elizabeth, which mentions four, three or two substantial householders, cannot be construed to include one, when the least number mentioned is two; and that as in order to work out the acts relating to the poor there must be two overseers, the appointment of one (it appearing that there is no other appointment of another) is bad; and the Court quashed such appointment, although it appeared that there was in the parish but one inhabitant householder, who had been appointed. But Walker was a weekly servant and lived in the cottage, and the case uses the expression "rent free." He had his own furniture in the cottage, and although he did not pay rent *eo nomine*, he paid it indirectly through the deduction in his wages. It was a separate tenement, and his master had no right without his permission in the house. When this case was before the Court on a former occasion in a different form, Crompton, J. was inclined to think that Walker was a householder—*In re Overseers of Pudding Norton* (33 Law J. Rep. (N.S.) M.C. 136). *The Queen v. Stubbs* (2 Term Rep. 395) shews that Walker was a substantial person so as to satisfy the terms "substantial" in the statute. He is a householder whether he occupies as weekly tenant or yearly tenant. The consequences of determining that either of these persons, who are the only householders in the parish, is not liable to serve the office of overseer of the poor, will be to exempt this parish from contributing to the support of the poor of the union.

Mellish (*Bulwer* with him), for the appellant, against the order.—The occupation of Walker was the occupation of a servant and not of a tenant, and an occupation *quà* servant does not make him a householder. It is the ordinary usage for gamekeepers and gardeners to occupy a cottage on the master's premises, and their wages are regulated accordingly. It cannot be contended that such an occupation would at the end of twenty years, without any payment of rent or acknowledgment of title, confer in effect a title in fee simple under the Statute of Limitations as against the master, yet such a result would follow if their occupation is that of tenant and not servant. The occupation is compulsory for the purposes of service.

[COCKBURN, C.J.—Is it not rather for the convenience of both parties?]

In *Bertie v. Beaumont* (16 East, 33) the occupation of a farm labourer, a weekly servant, in a cottage of his master without paying rent, but having less wages on that account, was held to be the occupation of a servant; and

in any union already formed or hereafter to be formed under the provisions of the 4 & 5 Will. 4. c. 76, shall contribute to the common fund thereof, in proportion to the annual rateable value of the lands, tenements and hereditaments in such parishes respectively assessable by the laws in force for the time being to the relief of the poor, and in no other manner, whether the lands, tenements, and hereditaments shall be actually rated or not, and whether the rate levied shall be collected in full or upon any composition: provided always, that nothing herein contained shall alter or affect the liability of any parish comprised in any such union in regard to any charge lawfully created in the said union, and secured upon the poor-rates of all or any of the parishes comprised therein, which shall have been created at any previous time to the said 25th of March; but the same shall continue to be charged and payable in like manner as it would by law have been charged and payable if this act had not been passed; provided also, that nothing herein contained shall apply to any contribution which shall be in arrear from any parish in such union on the said 25th of March, but the same shall be recoverable and shall be applicable in the same manner as if this act had not been passed."

therefore in law the occupation of the master though the latter allowed the man less wages on account of the convenience to him of the occupation. In *The Queen v. Kelstern* (5 M. & S. 136) the occupation of a house and garden by a farm labourer for certain wages per annum and the house and garden and other advantages, was held to be the occupation of a servant, and not an independent occupation so as to confer a settlement, although the house was a hundred yards from where the master lived, because the occupation was necessarily connected with the service. In *The Queen v. Minster* (3 Ibid. 276) the distinction taken is, that if the occupation is connected with the service and necessary for the performance of it, it is the master's occupation, and not the servant's; but if it be not connected with the service, it is the servant's occupation and will confer a settlement. *The Queen v. Stubbs* (2 Term Rep. 395) turned upon the meaning of the word "substantial," and not "householder." In *The Queen v. Cheshunt* (1 B. & Ad. 473) the Sessions found that the pauper occupied the cottage at a weekly rent; yet it was held, that he did not gain a settlement, inasmuch as his occupation was referable to his character of servant and not of tenant; and Lord Ellenborough there said, "If the Court should hold in this and similar cases that the legal relation of landlord and tenant subsisted, it would become necessary to turn such persons out of possession by the regular proceedings in ejectment, and every gentleman having twenty or thirty cottages in which his labourers resided, would be compelled on any change of their service to have recourse to such means." In *Clarke v. the Overseers of St. Mary, Bury St. Edmund's* (26 Law J. Rep. (N.S.) C.P. 12), a hall-keeper of the Guildhall of the borough, who exclusively occupied a house and paid rates and taxes, but no rent, and whose occupation was in part payment for his services, was held to occupy as servant and not as tenant. It would be sufficient in an indictment for burglary to lay the property of Walker's house in the name of Spurrell—*Brown's case* (2 East, P.C. 501). Mr. Justice Crompton in *In re Pudding Norton* (33 Law J. Rep. (N.S.) M.C. 87) simply decided that this objection to the appointment could not be taken by *certiorari*.

Dénman, in reply.—The Sessions have found substantially that Walker was a householder in spite of the agreement with Spurrell.

[COCKBURN, C.J.—He is a householder if he occupies as tenant, but not if his occupation is that of his master.]

In *Hughes v. the Overseers of Chatham* (1 Lutw. 51; s. c. 5 Man. & G. 54) the question was, whether Burton occupied a house as tenant within the 2 Will. 4. c. 45. s. 27. His house was situated in the dockyard at Chatham. He was a master ropemaker, and as such had the house as his residence. He paid no rent in money for it, but had it as part remuneration for his services. No part of it was used for public purposes, the office in which he performed his public services being away from it. If he had not been allowed the house, he would have had an allowance for a house in addition to his salary. He was held to occupy as tenant. Lord Chief Justice Tindal says, "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring upon him an interest in real property, either in fee or for years, at will, or for any other estate or interest; and if he do so, the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration. But it may be that a servant may occupy a tenement of his master's not by way of payment for his services, but for the purpose of performing them. It may be that he is not *permitted* to occupy as a reward in the performance of his master's contract to pay him, but *required* to occupy in the performance of his contract to serve his master."

[COCKBURN, C.J.—That is the distinction that presses upon me; but the Sessions have not found distinctly whether the occupation of this cottage was subsidiary to and a part of the service, or whether this agreement was merely subordinate to it.]

The Sessions say the occupation was "in part payment for the service," and that means he paid his rent in service instead of money, as Lord Ellenborough puts it in *Bertie v. Beaumont* (2 Term Rep. 395). Lastly, a man may be a householder without being a tenant.

COCKBURN, C.J.—With reference to the last point, I think a man cannot be a householder within the true construction of that statute who has not an independent occupation. But I do not think that where a man occupies as servant he can be said to be a householder at all, inasmuch as his occupation is the occupation of the master. But when we come to the question, whether in this case there was the relation of landlord and tenant between the parties, or whether the occupation was simply that of servant, the facts do not seem to me sufficiently found by the Sessions, for one essential element in the consideration of that question is omitted, namely, whether this occupation was an occupation for the purpose of and necessary to the service or not. If the occupation were necessary to the service, then, I think, it is the occupation of the master, although it is said that the remuneration which the servant receives is the less on account of his having the advantage of the premises of the master for the purpose of his habitation. On the other hand, if the occupation be not necessary to the service, then the fact that the occupation is part of the remuneration for the service will not render that occupation less an occupation *quâ* tenant than it would have been if the man had paid rent. It may be that it happens to be convenient both to the master and to the servant; that the servant requiring some place of habitation, he shall by agreement with the master, instead of receiving so much for his wages, out of which wages he would have to find himself a separate habitation, inhabit some premises of the master as part of the remuneration for his service. That is only an equivalent for the wages. He would be receiving in the one instance the whole amount of his wages, and out of those wages he would have to find himself a habitation, for which he would have to pay rent; but in the other he inhabits premises of his master, and instead of paying his master the rent, the master deducts it from the wages. It does not, therefore, follow that because the relation of master and servant happens to exist between the parties, and by a subordinate arrangement the servant occupies premises of the master rent free as part of the wages which he would otherwise receive if he paid the rent, the occupation may not be an occupation *quâ* tenant independent of the master. The question is, whether the occupation is simply in part remuneration for his services, or whether it is subservient and necessary to the services. That is a question of fact, which it is essential that the Sessions should inquire into and ascertain, and the case must go back to them for that purpose. After this expression of our opinion the Sessions will probably have no difficulty in coming to a decision.

MELLOR, J., SHEE, J. and LUSH, J. concurred.

Case remitted to the Sessions.

[IN THE COURT OF QUEEN'S BENCH.]

Nov. 28, 1865.

THE QUEEN v. STRUGNELL.

35 L. J. M.C. 78; 7 B. & S. 124; L. R. 1 Q.B. 93; 13 L. T. 433; 14 W. R. 193;
12 Jur. N.S. 269.

Referred to, *R. v. Haywood*, 1866, 14 L. T. 600 (Bail Court).

Theatre—Stage-Play—Hiring of Public Room—6 & 7 Vict. c. 68. ss. 2, 7, 11, 16.

THEATRE.—The appellants hired from the owners, for six consecutive

nights, a public room, which was not duly licensed as a theatre. They published playbills, announcing that plays would be performed on these nights in the room. One of them took money at the door from those who witnessed the performances:—Held, that the appellants could not be convicted under 6 & 7 Vict. c. 68. s. 2, for “having and keeping” an unlicensed theatre; but that they could only be convicted under s. 11, for acting or allowing parts to be acted in an unlicensed theatre.

Upon appeal to the Quarter Sessions for the borough of Grantham, against an order of two Justices of the Peace, convicting the appellants under the 6 & 7 Vict. c. 68. s. 2, the Sessions quashed the conviction, subject to the following

CASE.

At a Court of Quarter Sessions for the borough of Grantham, held on Tuesday, the 11th of April, 1865, before the Recorder, Edmund Rosenthal and Marian Taylor appealed against an order of two Justices of the Peace for the borough, on the 6th of February, 1865, which order is as follows :

Borough of Grantham. } Be it remembered that, on the 6th day of February, in the year of our Lord, 1865, at Grantham, in the said borough, Edmund Rosenthal and Marian Taylor are convicted before the undersigned, two of Her Majesty's Justices of the Peace for the said borough, for that, on the 31st day of January last past, the said Edmund Rosenthal and Marian Taylor did have and keep a certain public room in the Exchange Hall, situate in the borough aforesaid, for the public performance of stage-plays, without authority by virtue of letters patent, or licence from four Justices of the Peace for the said borough, and for that on the 1st day of February instant, the said Edmund Rosenthal and Marian Taylor did have and keep the same room for the same purpose without such authority as aforesaid, and for that on the 2nd day of February instant the said Edmund Rosenthal and Marian Taylor did have and keep the same room for the same purpose without such authority as aforesaid, and for that on the 3rd day of February instant the said Edmund Rosenthal and Marian Taylor did have and keep the same room for the same purpose; and we adjudge the said Edmund Rosenthal and Marian Taylor for their said offence on the 31st day of January last past to pay the sum of 2s. 6d., for their said offence on the 1st day of February instant to pay the sum of 2s. 6d., for their said offence on the 2nd of February instant to pay the sum of 2s. 6d., and for their said offence on the 3rd day of February instant to pay the sum of 2s. 6d., which said several sums of 2s. 6d., 2s. 6d., 2s. 6d., and 2s. 6d. are to be paid and applied according to law; and we also adjudge the said Edmund Rosenthal and Marian Taylor to pay the sum of 9s. 6d. for their costs in this behalf; and if the said several sums be not paid forthwith, we order that the same be levied by distress and sale of the goods and chattels of the said Edmund Rosenthal and Marian Taylor; and in default of sufficient distress, we adjudge each of them the said Edmund Rosenthal and Marian Taylor to be imprisoned in the castle or gaol at Lincoln, in the county of Lincoln, there to be kept to hard labour for the space of three calendar months, unless the said several sums and all costs and charges of the said distress and of the commitment and conveying of the said Edmund Rosenthal and Marian Taylor shall be sooner paid. Given, &c.

It was proved in evidence :

1. That Edmund Rosenthal and Marian Taylor, in the month of January, 1865, hired a large public room within the borough of Grantham, known as the Exchange Hall, for the public performance therein of stage-plays.

2. That Edmund Rosenthal and Marian Taylor paid to the secretary of the Exchange Hall the sum of 7l. for the use of such public room, for six consecutive nights, commencing on the 30th of January last.

3. That such public room was not duly licensed for the performance of stage-plays by virtue of letters patent, or licence from four Justices of the Peace of the borough, or otherwise.

4. That Edmund Rosenthal and Marian Taylor caused to be issued and published playbills, announcing that on the several nights mentioned in the order certain stage-plays would be performed, that is to say: on the 31st day of January, 1865, "The Bohemian Girl" and "Prince Amabel"; on the 1st day of February, 1865, "Il Trovatore" and "Ixion"; on the 2nd day of February, 1865, "Lurline" and "Ixion"; on the 3rd day of February, 1865, "Lucia di Lammermoor" and "Ixion"; and such stage-plays were accordingly publicly performed by Edmund Rosenthal, Marian Taylor and other persons on the several days mentioned in such order.

5. That the said Marian Taylor received at the door of the entrance of the said public room money from the public who attended to witness the stage-plays publicly performed.

No witness was called on behalf of the appellants. On the part of the respondents it is argued that, under the circumstances before stated, the appellants had or kept a house or other place of public resort for the public performance of stage-plays, without authority by virtue of letters patent, or without licence within the intent and meaning of the 2nd section of the act 6 & 7 Vict. c. 68, but no case or authority is quoted in support of such argument.

On the part of the appellants it is argued that they did not have or keep a house or other place of public resort for the public performance of stage-plays, without authority or licence as aforesaid, within the intent and meaning of the 2nd section of the said act, but that the owners of the Exchange Hall were the persons who so had or kept the same; and in support of such argument the case of *Davys v. Douglas* (4 Hurl. & N. 180; s. c. 28 Law J. Rep. (N.S.) M.C. 193) is cited, and the 7th and 11th sections of the said act are relied on.

J. W. Mellor, for the appellants.—The appellants did not "have or keep" the hall for the public performance of stage-plays, within the meaning of the act. The words "have" and "keep" refer to a permanent interest, such as that of an owner or occupier. Here the secretary is the person liable, as he is the actual and responsible manager of the premises. If it were otherwise, he could profit by a contravention of the statute without being liable to any penalty. The appellants could only have been convicted under section 11, which imposes a specific penalty on every person who for hire shall act or present, or cause, permit, or suffer to be acted or presented, any part in any stage-play in any place not being a patent theatre, or duly licensed as a theatre. This liability is made plainer by section 16; in every case in which money or other reward shall be taken or charged, directly or indirectly, or in which the purchase of any article is made a condition for the admission of any person into any theatre to see any stage-play, every actor shall be deemed to be acting for hire.

[*LUSH, J.*—The licence seems to be granted to the house, and not to the individual.]

Mellish and Cave, for the prosecutors.—The persons liable under section 2. of the act are those who cause the play to be performed, and who hire premises for that purpose. It was the object of the legislature that the licensee should be the director of the performance. Therefore, by section 7, the licence is to be granted to the manager or responsible person for the time being. The possessor of a licence is ordinarily called the "manager." In *The Queen v. Stannard* (1 Leigh & Cave, 349; s. c. 33 Law J. Rep. (N.S.) M.C. 61) an indictment under the statute 25 Geo. 2. c. 36. s. 8, for keeping a disorderly house, proof that the prisoner was the owner of the house, and let the rooms to weekly tenants, with the knowledge that they would be applied to the purposes of prostitution, though he occupied no part of the house, nor kept the key,

or reserved to himself any right of entry, was held insufficient to support a conviction.

[MELLOR, J.—There the landlord, if he had wished, could not have got in.]

It is submitted that the owner of the hall was in the same position as the prisoner in the case cited. They referred to *Rich v. Basterfield* (2 Ld. Raym. 1197) and *Shutt v. Lewis* (5 Esp. 128).

MELLOR, J.—We are both of opinion that the Recorder was right, and that the conviction by the Justices was erroneous. I should certainly have thought it unfortunate if the act of parliament had contained no section enabling Justices to exercise control over persons in the situation of the appellants, and to restrain them from acting with impropriety or contrary to good manners. But it appears to me that this control is provided for by the 11th section. This section applies to persons who have no permanent interest in the places where they perform. Now, if the appellants had chosen to invite a stranger to bring out any play in these rooms, the secretary, I apprehend, would have interfered and said, "No, we did not allow you to use these rooms that you might let them out to others." This shews, I think, the true relation subsisting between the parties. They were only performing by the permission of the secretary, and do not come within the 2nd section, which refers to one who has a permanent interest in a theatre, or who is the responsible manager of it. I have therefore come to the conclusion that the Magistrates were wrong.

LUSH, J.—I am of the same opinion. The object of the act seems to be to maintain a proper control over places for the performance of stage-plays. It imposes a penalty on the owners or occupiers of an unlicensed theatre, and upon those who cause a play to be acted in any such place. Now, the persons convicted were neither owners nor occupiers of the hall. They had no interest in it; all they did was to pay for the use of it for six nights for the purposes of their entertainment. This seems to me a case regulated by the 11th section. The appellants caused stage-plays to be presented in an unlicensed theatre. When I find that there is a separate section distinctly alluding to persons of the description of the appellants, I think that it would be straining the language of the 2nd section to say that a person who has the use of a public room for an evening entertainment "has and keeps" it, within the meaning of the 2nd section. The licence, according to the provisions of another section (section 7), is to be granted to the actual and responsible manager of the theatre for the time being. When the responsible manager has procured a licence, he may allow other persons to perform within the building. But any such person who has the use of this building for a few entertainments by night is not required by the statute to take out a licence. The order of Sessions must be confirmed.

Order of Sessions confirmed.

[IN THE COURT OF QUEEN'S BENCH.]

Nov. 8, 1865.

THE LOCAL BOARD OF HEALTH OF CHATHAM EXTRA, *appellants*, v.
THE ROCHESTER PAVEMENT AND ROAD COMMISSIONERS,
respondents.

35 L. J. M.C. 81; L. R. 1 Q.B. 24; 13 L. T. 273; 14 W. R. 51; 12 Jur. N.S. 47.

Commissioners of Turnpike Trust—Local Act, 9 Geo. 3. c. xxxii.—Paying

off old Charge on Rates and Tolls—"Hereafter Borrow"—Sinking Fund—12 & 13 Vict. c. 87. s. 3.—13 & 14 Vict. c. 79, s. 4.

HIGHWAYS.—*Certain Commissioners of a turnpike-road and for other purposes, under a local act of parliament, were empowered to borrow sums of money for the purposes of the act, on the credit of certain rates, assessments and tolls, and did so borrow at interest at the rate of 5l. per cent. per annum. Afterwards, by the 12 & 13 Vict. c. 87. s. 3, where such Commissioners should "hereafter borrow, charge or secure any sum or sums of money on the credit of the tolls arising on such road," they should, "out of the tolls of such road and in priority to all other payments thereout, except the interest of such monies as aforesaid, . . . set apart a sum of 5l. per cent. per annum on the amount of money so borrowed, charged or secured."* The Commissioners, with a view to get the money at a cheaper rate, by reason of the inducement of this sinking fund, called in the old securities and obtained the money at 4l. per cent.—Held, that they were not entitled to set apart the sinking fund under the 12 & 13 Vict. c. 87. s. 3, as the money raised to pay off the old charges was not "hereafter borrowed" within the meaning of that act.

Semble—that the power to create a sinking fund under 12 & 13 Vict. c. 87. s. 3. was confined to cases where the money was borrowed on the credit of the tolls alone of a turnpike-road, and could not be extended to a case like the present, where the security consisted of rates, assessments and tolls—Blackburn, J. dubitante.

This CASE was stated pursuant to the statute of the 20 & 21 Vict. c. 43, by Justices of the Peace for the county of Kent.

At a Special Sessions for the highways, holden for the north or Rochester division of the lathe of Aylesford, in the county of Kent, the Commissioners of the Turnpike Trust, under the statute 9 Geo. 3. c. xxxii, intituled, 'An Act for paving, cleansing, lighting and watching the high streets and lanes in the parish of St. Nicholas, within the city of Rochester and parish of Strood, in the county of Kent, and for making a road through Star Lane across certain fields adjoining thereto to Chatham Hill, in the said county,' (hereinafter called the respondents) exhibited an information pursuant to the 4 & 5 Vict. c. 59, (which has since been periodically re-enacted,) alleging that the funds of the said turnpike trust were insufficient for the repair of the said turnpike-road lying within the district called Chatham Extra, in the parish of Chatham, in the said division and county; and thereupon the Sessions made an order that the sum of 100l., part of the rate or assessment levied or to be levied for the repair of the highways in and for the district of Chatham Extra in the said parish of Chatham, should on the 1st of August, 1865, by the said local board of the said district (the appellants), be paid to the said respondents, to be wholly laid out in the actual repair of such part of the said turnpike-road as lies within the said parish of Chatham and district of Chatham Extra.

The Commissioners were empowered under 9 Geo. 3. c. xxxii, to cause the streets of St. Nicholas, Rochester and Strood, to be paved, cleansed, lighted and watched, and to open, make and keep in repair a road from Star Lane, in the city of Rochester, across Chatham Hill, to the old road from London; and they were empowered to make every year a rate upon all occupiers of houses or tenements within the parishes of St. Nicholas and Strood respectively, and to erect a turnpike-gate at the end of the new road next Chatham Hill, and another gate at or near the Angel Inn, in Strood, and no other gate upon any of the said streets or roads, and to take at such gates the tolls specified by the said act.

The Commissioners were also empowered at any meeting, to borrow and take up at interest any sum or sums of money upon the credit of the rates, assessments and tolls payable by virtue of the said local act, and to assign over the same, or any part or parts thereof, by any writing or writings under

their hands and seals, to any person or persons that should advance or lend their monies thereon, as a security or securities for the several sums that should be borrowed and the interest thereof as aforesaid. Provided, that after the first meeting no money should be borrowed upon the credit of that act unless fourteen days' notice should be given in manner therein directed, and no preference was to be given to any creditor in respect of priority of advancing such sums, but all to be creditors in equal degree one to another. And it was enacted, that all monies raised or collected by virtue of the said local act should be vested in the said Commissioners, and should be applied for the purposes of the same act and to no other purpose, without declaring that any one of such purposes should have priority or preference over another or others of such purposes, except that the expenses of passing the act should be paid out of the first money so raised.

The new road was made and has been maintained to the present time by the respondents, and the turnpike-gates set up and maintained as directed by the said local act, and tolls continue to be taken thereat, and rates are annually made and collected in St. Nicholas and Strood, and the streets and lanes of the two parishes are kept paved, lighted and cleansed pursuant to the said local act. The whole of such income is treated as a common fund, and has been applied to all the payments to which the trust is liable.

The Commissioners from time to time borrowed money for the purposes of the said act, amounting to upwards of 10,000*l.*, which has been reduced, by occasional payments of principal, to its present amount of 8,000*l.*

The great bulk of this loan was borrowed in 1769 and 1770 (except 200*l.* borrowed in 1823), at 5*l.* per cent. per annum interest, and sums were paid off from time to time, so that in 1853 the principal, secured by the assignment of tolls, &c., was 9,800*l.*, and the Commissioners believing that the money could be had at a lower rate, accordingly advertised for a loan of that amount at 4*l.* per cent. interest, to be secured on the tolls and rates of the trust. Among the holders of the original assignments of 1770, creditors to the amount of 2,200*l.* offered to continue such at the reduced rate of interest, and new capitalists came forward, whose tenders were accepted for 7,500*l.* more, making together 9,700*l.* The remaining 100*l.* was paid off absolutely from funds in hand. All the original assignments were in April 1853 delivered up and cancelled, as well as those of creditors who lowered the rate of their interest and continued otherwise creditors as before as those of the creditors who received their principal money and relinquished all claim. And new assignments to the amount of 9,700*l.* were executed to all the creditors, whether new or continuing, without distinction. Since 1853 assignments to the amount of 1,700*l.* have been paid off without any preference, reducing the total secured debt to the present sum of 8,000*l.*, at interest of 4*l.* per cent., and 6,800*l.* of this present debt is due to creditors who had no claim on trust till April, 1853; the remainder, 1,200*l.*, is due to those who then exchanged old assignments for new ones.

Each assignment was by deed to secure 100*l.*, and witnessed that the Commissioners named or empowered by the said act, by those presents assigned and transferred the rates, assessments and tolls payable by virtue of the said act, to the assignee, his executors, administrators and assigns; to have, hold, receive and take the same, and the money to be collected and received thereby, until the said sum of 100*l.*, with interest for the same, should be fully paid and satisfied.

There are in the two parishes of St. Nicholas and Strood highways not under the Commissioners of this trust, and in respect of the repair of such highways rates are made by the ordinary surveyors of highways.

The new road had for several years been falling into an inferior condition in consequence of the inability of the funds of the trust to meet the expense of repairing, and it was estimated by the surveyor to the respondents to require

about 120*l.* in the current year to keep in a proper state of repair that portion which lies within the district of Chatham Extra.

The estimated revenue and expenditure for the year 1865, founded principally on the actual receipts of tolls and rates at the maximum rate in St. Nicholas and Strood, and payments of 1864 in respect of interest on the sinking fund of 5*l.* per cent. on the 8,000*l.* and repairs, shewed a deficit of 378*l.* for repairs, &c. of the turnpike-road in the four parishes.

It was contended, by the appellants, that the respondent Commissioners could not lawfully set aside 5*l.* per cent. per annum on the 8,000*l.* principal remaining unpaid on the assignments until after payment out of the revenues of the trust of not only the interest on that principal and other liabilities and annual expenses of the trust, but also the necessary expenses of the repairs of such road, inasmuch as the debt, if any, being an old debt, created before the passing of the 12 & 13 Vict. c. 87. (Aug. 1, 1849,) the powers of that act were not available, and the Commissioners were left to apply those of the 13 & 14 Vict. c. 79. They would then find sufficient funds from their tolls and rates to pay the interest and all other liabilities, and also to repair the roads, their sole deficit being then in the sinking fund, for which (being postponed to all other payments) there would remain to be set apart only about 25*l.* instead of 400*l.*, and that such a deficiency in means for raising a sinking fund could not be made good by contributions from highway rates; and further, the appellants say, that unless the debt of 8,000*l.* is an old debt created before 1849, the existing assignments are void as being for money raised for other purposes than those of the local act of 1769. So that in either case the 5*l.* per cent. on capital cannot be set apart for a sinking fund until after providing for repair of road out of the income of rates and tolls.

The respondents contended that they, as Commissioners of this turnpike trust, were authorized under the acts 12 & 13 Vict. c. 87. and 13 & 14 Vict. c. 79, to set apart 5*l.* per cent. of the principal of their secured debt after payment of interest only, and that thereupon, if the income of the trust should be insufficient to defray the cost of repairs of the road, the deficiency was to be provided for by contributions from the monies applicable to the repairs of the highways of parishes through which the turnpike-road passes. They alleged that the present debt both in form and substance was a new debt created since the 1st of August, 1849. After the old assignments, to the amount of 7,600*l.*, have been actually paid off in cash, and the remaining twenty-two securities (2,200*l.*) satisfied by being exchanged for new assignments (made the same as to the new lenders) in April, 1853, that the new loan was for the purposes of the act and highly beneficial to the trust in reducing the amount annually required for interest.

The questions for the opinion of the Court were, whether the estimated deficiency of the respondents' revenues, as shewn in this case arises lawfully under the provisions of the 12 & 13 Vict. c. 87, so as to authorize an order for contributions from parochial or district highway funds towards the maintenance and keeping in repair of the road within this turnpike trust, or whether the respondents are bound to provide for the maintenance and repair of such road and other payments prior to setting apart the sinking fund of 5*l.* per cent. per annum on the principal debt, and prior to defraying the charge of lighting the parishes of Strood and St. Nicholas, Rochester.

Mellish (*F. Smith* with him), for the respondents, in support of the order.—The material questions are whether, in taking the accounts, the Commissioners who managed the road were entitled to take credit for a sum of money which they had set apart for a sinking fund to pay off the debt of the road, and that depends upon the question whether the money borrowed on the security of the tolls was borrowed before or after August, 1849. If before that period of time, the statute 13 & 14 Vict. c. 71. applies, and the repairs must be paid for before a sinking fund is set apart, and the order would be wrong; but if since, the statute 12 & 13 Vict. c. 87. s. 3. applies, and the sum to be set

apart for a sinking fund takes precedence of the repairs, and the order would be right. Another question arises out of the transaction in April, 1853. When the old assignments of such of the old creditors as continued creditors on the new footing were exchanged for fresh assignments, and new assignments were executed to the new creditors—namely, whether the debt of each of those parties stands on a different footing one from the other. But if the whole of the debt is deemed to have been created before August, 1849, that question cannot arise, as the order is bad for the whole amount for which it is made.

[BLACKBURN, J.—If the transaction in April, 1853, can be made to be in law merely a transfer of the old debt and interest for the purpose of reducing the interest, that would imply that the purpose was the same purpose as before.]

The material act is the 12 & 13 Vict. c. 87. s. 3.¹ It is submitted, then, that any one of those persons who lent their money in 1853 would have a right to complain if the sinking fund is not set apart, because they lent it at a lower rate of interest upon the faith of that provision. The 13 & 14 Vict. c. 79, s. 4,² will be relied on by the other side. But that act does not touch a case

(1) 12 & 13 Vict. c. 87. s. 3. enacts, "That in every case in which the trustees or commissioners of any turnpike-road shall hereafter borrow, charge, or secure any sum or sums of money on the credit of the tolls arising on such road, such trustees or commissioners shall, out of the tolls of such road, and in priority to all other payments thereout, except the interest on any such monies as aforesaid, and on any other monies remaining owing on the security of the said tolls, set apart a sum of 5*l.* per centum per annum on the amount of money so borrowed, charged, or secured; and when and so often as the sums so set apart as aforesaid shall amount to the sum of 200*l.*, the trustees or commissioners of the road out of the tolls of which such sum has arisen shall, at any general annual or other meeting of such trustees or commissioners, apply such sum in the payment of a proportionate part of the monies borrowed, charged, or secured as aforesaid, and then remaining unpaid, to the creditors of the tolls of such road, and shall, twenty-eight days, at least before such general annual or other meeting, cause notice to be given of such meeting, and of the purposes thereof, so far as the same relate to the application of the said sum, in some newspaper usually circulated in the county or counties in which such road is situate; and at such meeting such trustees or commissioners shall apply such sum, or a portion thereof (as the case may require), in or towards the discharge of monies owing on the security of the tolls of such road, to the creditor who shall, by proposal in writing transmitted to the clerk of such trustees or Commissioners before such meeting, have offered to accept the lowest composition in respect of such monies, and shall apply the surplus (if any) of such sum, after payment to such creditor as aforesaid, or a portion of such sum (as the case may require), in or towards the discharge of monies owing on the security of the said tolls, to the creditor who by proposal as aforesaid shall have offered to accept the next lowest composition in respect of such monies, and so in like manner until the sum shall be exhausted; and if two or more creditors by proposal as aforesaid shall have offered to accept an equal rate of composition, it shall be lawful for such trustees or commissioners to determine by lot the preference between or amongst such creditors, or to pay such composition rateably between or amongst such creditors, as such trustees or commissioners think fit; and if there be no such proposal as aforesaid, or there be any surplus of the sum after applying the same, so far as may be necessary, in or towards the discharge of the monies to which such proposals as aforesaid relate, such trustees or commissioners may apply the said sum rateably amongst the creditors, or may pay the same to such of them as may be determined by lot, as such trustees or commissioners think fit."

(2) 13 & 14 Vict. c. 79. s. 4. enacts, "That where the trustees or commissioners of any turnpike road had before the passing of the said act borrowed, charged, or secured any sum or sums of money on the credit of the tolls arising on such road, and any such money shall remain unpaid and unsatisfied at the time of the passing of this act, such trustees or commissioners shall, out of the tolls of such road, after payment thereof of the interest on any monies owing on the security of the said tolls, and such sums as may be required to be set apart under the said recited enactment, and all other annual liabilities (if any) of their trust, and the necessary expenses of the repairs of such road, and of the salaries of their officers, and all other necessary expenses of their trust, set apart a sum of 5*l.* per centum per annum on the amount of principal money so borrowed, charged, or secured before the passing of the said act, and remaining unpaid and unsatisfied as aforesaid, or such lesser sum as may from time to time remain after such payment as aforesaid; and when and so often as the sums so set apart shall amount to the sum of 200*l.*, the trustees or commissioners of the road out of the tolls of which such sum has arisen shall apply such sum in or towards payment of the monies so borrowed, charged, or secured as aforesaid, and then remaining unpaid, in manner provided by the said act with respect to the application of money arising from the sums set apart as therein mentioned, in or towards the discharge of monies borrowed, charged, or secured after the passing of such act: Provided always, that it shall be lawful for one of Her Majesty's principal Secretaries of State, if upon

like the present, which is within the 12 & 13 Vict. c. 87. That statute must be read as if the other had never passed.

[COCKBURN, C.J.—The question comes to be this, whether the borrowing anew at a reduced rate of interest to pay off the old debt, if it can be considered to create a new debt, is a borrowing within the 12th section of the 9 Geo. 3. c. xxxii., by which the power to borrow from time to time for the purposes of that act as being within the scope of the powers given by that act. But that section must have been intended by the legislature to apply to the borrowing of further sums, and not to the mere substitution of one debt for another. It could not have been intended to give this power to create a sinking fund in a case like the present, where the funds are sufficient to pay the interest and repair the road; but when the sum is set apart from the sinking fund, it becomes impossible to satisfy one or other of those exigencies.]

They get the money cheaper.

[BLACKBURN, J.—They borrow at a cheaper rate, but at the same time throw a burthen upon another body. It might be equitable if you are about for the first time to raise a sum of money for the improvement of a road to make the parish liable; but surely it would not be so where there is a debt already contracted and the form of the debt merely is changed.]

The new creditors lent their money on the faith of the advertisement and the sinking fund, and its being a new loan.

[BLACKBURN, J.—Is it not the duty of a person going to lend his money to a body of trustees to inquire whether it is a fresh loan, or the transfer of an old loan?—for if in form it is not a transfer, it is in substance. It is not a borrowing for fresh works. Your argument appears to me to put the lender in the position of a person who has taken a bill of exchange for value, and to say that as he has advanced his money and got a formal assignment of the tolls, he has a right to assume that the trustees had the power to create this new debt, and so entitled himself to this sinking fund.]

There are cases which shew that where there are certain forms which are conditions precedent. Commissioners and such bodies are bound by their seal, which is conclusive evidence against them that they are acting under proper resolutions and matters of that sort.

[BLACKBURN, J.—With reference to those matters that is so. The Commissioners here had power to raise the 9,800*l.* for the purpose of lowering the interest on the old debt. Then, if the lenders were fixed with knowledge of such power, the hardship that they expected to lend their money on the credit of the tolls would go. Was it not their duty to inquire before they lent their money, what you were borrowing it for?]

Bovill (*Prentice* with him).—The 13 & 14 Vict. c. 79. s. 4. applies to this debt; and, further, this second borrowing was not for the purposes of the first act. The purposes for which the power to borrow was given were to make a new road, repair the road, and light and pave the streets. There was no obligation to pay off the old debt.

COCKBURN, C.J.—If the Commissioners had money in their hands to pay off the debt, then paying it off would be one of the purposes of the act.]

If this second borrowing were also to be within the act of 12 & 13 Vict. c. 87. then there would be a power of giving priority to such as should lend at that time over any portion of the old lenders who might not be paid off, which would be contrary to the provisions of the original act. Further, the 12 & 13 Vict. c. 87. s. 3. was only intended to apply where there were trustees

the application of the trustees or commissioners of any turnpike-road he see fit so to do, by order in writing under his hand, to authorize such trustees or commissioners not to set apart any sum as hereinbefore required, or to set apart a less sum per centum per annum than the sum hereinbefore mentioned; and it shall be lawful for such Secretary of State from time to time to vary or revoke any such authority, and such order shall be binding on such trustees or commissioners: Provided also, that where provision is made under any local act for forming a fund for the discharge of the monies borrowed, charged, or secured on the tolls of any turnpike-road, this enactment shall not extend to the trustees or commissioners of such road."

of the trust *simpliciter*, and not where they had other powers as well, and they are only entitled to set apart this sinking fund out of the tolls, and no mention is anywhere made of a fund composed of tolls, rates and assessments; therefore it cannot have been intended that the sinking fund should have been set apart out of this common fund. This is, without doubt, a turnpike-road, and is none the less so because the tolls may be applied to other purposes than the repair of the road, and they form part of a common fund derived from other sources—*The Trustees of Sunk Island Turnpike Road v. the Surveyors of Highways of the Parish of Patrington* (1 Best & S. 747; s. c. 31 Law J. Rep. (N.S.) M.C. 18). The borrowing was a borrowing before the year 1849, and therefore within the 13 & 14 Vict. c. 79; and if it was a new borrowing it would not be within the powers of the Commissioners.

Mellish, in reply.—With reference to the non-applicability of the 12 & 13 Vict. c. 87, where the trust is not a turnpike trust *simpliciter*, and the tolls are to go to a common fund, there seems no difficulty in setting apart a sum from the tolls for the sinking fund before paying them over to the common fund.

COCKBURN, C.J.—I am of opinion that the appellants are right, and that this order must be quashed. The first question is, whether the 12 & 13 Vict. c. 87. applies to the present case. If it does, it would be the duty of the Commissioners, out of the fund which comes to their hands, to assign 5l. per cent. of the amount for the formation of the sinking fund before they proceed to pay the interest of the money borrowed, or to expend the necessary amount for the repairs of the road; but I think that act does not apply.

The trustees, under an act of parliament, were empowered to borrow money upon the credit of the rates and tolls levied under the powers of that act, and they did borrow a sum of money at interest of 5l. per cent. They were ultimately advised that they could obtain the amount which they required, or some portion of the money, at a lower rate of interest, namely, 4l. per cent., and they advertised for persons to advance the money on the same security, on the assignment of the tolls and rates under the Act of Parliament of 1849, and they obtained the money. The 12 & 13 Vict. c. 87. enacts, that "In every case in which the trustees or commissioners of any turnpike-road shall hereafter borrow, charge, or secure any sum or sums of money on the credit of the tolls arising on such road, such trustees or commissioners shall, out of the tolls of such road, and in priority to all other payments thereout, except the interest on any such monies as aforesaid, and on any other monies remaining owing on the security of the said tolls, set apart a sum of 5l. per cent. per annum on the amount of money so borrowed, charged, or secured." Those words, taken in their literal signification, would apply to the present case, because this was money borrowed after the passing of that act; but inasmuch as it was a sum of money borrowed not for any fresh purpose, not by way of making fresh roads, or being expended in any improvement that might come within the scope of the act of parliament, but as it was merely a sum borrowed to pay off the previously existing debt, it appears to me, that it was merely a substitution of a new debt for an old debt, and the legislature never could have contemplated such a case, or intended that that should come within that enactment of this statute. It might be that the funds arising from the tolls here, combined with the rates, might be adequate to pay the interest of the money borrowed, and to maintain the repairs of the road, and yet sufficient might not be left after those two most essential objects had been complied with to constitute a sinking fund. I imagine that the legislature did not intend to alter the existing state of things with reference to a case like the present, where the money had been borrowed previously to the passing of that act, and where no new charge had been created, but simply a new one substituted for the old one, but to provide that where any monies should be borrowed after the passing of that act to carry

out the objects of the trust, a sinking fund should be established for the purpose of paying the debt. It cannot be contended here that the Commissioners are bound under that act to set aside a sum of 5*l.* per cent. on the amount due, which comes to 400*l.* a year, and to do that before they pay the interest of the money due and the expenses of the repairs of the road. If they are not bound to do that, then it is admitted on both sides that there is a sufficient fund for the repairs of the road after the payment of the interest, without calling upon the appellant's parish to contribute. I own, besides taking that view of the first question, that I cannot see my way to the conclusion that the act of parliament in question can be applicable to the present case.

It is not absolutely necessary to express an opinion on the second question; but I cannot help thinking that where an act of parliament speaks of money borrowed upon the security of the tolls of a turnpike trust, and then goes on to say that where money is borrowed upon the security of such tolls, a sum shall be set apart out of such tolls by way of creating a sinking fund to pay off that money, that cannot be applied to a case where money has been borrowed, not on the credit of the tolls, but on the tolls *plus* rates. The creditor, in the two cases, is in a very different position. The tolls are precarious, and the income arising from them may fail; but the rates in a populous parish of the town are certainly a good security, and the creditor who has such a security as that is in a different position from the creditor who has only security on the tolls. But whether that be so or not, inasmuch as, according to the local act of parliament, no distinction is made between rates and tolls, and the money is authorized to be borrowed, and has been, upon the assignment of the rates as well as the tolls, it seems to me that the act of parliament which relates to tolls simply, and provides for a sinking fund to be created out of those tolls, without anything more, is not applicable to such a case. I think, therefore, that in deciding on the first point, it is not necessary to decide the second; but I entertain a strong opinion on the second point that that act of parliament cannot apply. For these reasons, I am of opinion that the order of the Justices was wrong, and that the appeal must be allowed.

BLACKBURN, J.—I have come to the same conclusion on the first point on which our judgment is based, namely, that I think, under the circumstances, the debts do not come within the meaning of the act of 1849, so as to make a sinking fund have priority to the repairs of the road. If that be so, then the present case is one in which the order should not have been made. Upon that point, and on that point only, I base my opinion that the order ought to be quashed. The act of 1849 enacts, that in every case in which the trustees and commissioners shall hereafter borrow or secure any sum or sums of money on the credit of the tolls, they shall set apart a sinking fund out of the tolls before they discharge any other charges upon them. The act of 1850 extends that enactment to a case in which money has been borrowed before the act of 1849, and causes a sinking fund to be set aside out of the tolls after the repairs of the roads and other charges have been met. The difference of those two cases can only become of practical importance when the turnpike trust, as far as the turnpike-road is concerned, is in a state of insolvency. For so long as the turnpike-roads trustees have a sufficient amount to keep the roads in repair, and set aside the sinking fund, it is utterly immaterial whether they set it aside before or after. What was the state of the law at the time the act was passed? Now, turnpike-roads are all public highways, and as such, if the turnpike trustees are able to keep them in repair, they are bound to do so, and if they are not, the parish is to contribute: and the consequence of causing a sinking fund to be taken out of the tolls before the payment of the expenses of repairing the roads would be to accelerate the time when the parish will become liable. But the question really comes to this practically—shall the increase of the sinking fund be delayed, or, shall it be set apart at the expense of the parishes? In that view of the matter, it would be right and proper for

the legislature to say, whenever there is any fresh thing to be done for the turnpike-road, and money to be borrowed for fresh purposes for the benefit of the parish, that the parish will have to give a first security for the sinking fund, because that will be a new matter. But where the debts have been already incurred without the parish being liable, it is not right and proper to make the parish give security for the sinking fund for parishes, or to meddle with the bygone debts, but leave them as they were before, and only deal with future borrowings. Now comes the question of what is the meaning of a hereafter borrowing of any sum or sums of money? I think this can only mean a new charge, and I think where money is already borrowed and charged, and there is merely a transfer to fresh creditors for the purpose of diminishing the quantity of interest, I do not think that that is a charging the tolls with any fresh charge; it is merely continuing an old charge; consequently, I think that in such a case as I have mentioned that it is merely an old charge continued to a new person, and it does not come within the act of 1849, though I think it is within the act of 1850. Now, in the present case, the form was gone through of the old creditors being paid off and a new assignment made of the debt: and was that new assignment such as to make it a new borrowing? It is quite plain, as the case is stated, that it is the old charge continued on, although in the hands of new persons, to reduce the rate of interest. A good deal was said in the argument that that was beyond their power. I cannot think there is any doubt that if parties are to continue borrowing a sum of money, and they, having borrowed, find that they can get it at a reduced rate of interest, I do not think that they do go beyond their power in getting it, if there is no hardship and they do it fairly. In substance, it is merely a continuation of the old debt; therefore I think it does not come within the act of 1849, but, subject to the other point, it would come within the act of 1850. Now, as to the other point to which my Lord has adverted. This is money borrowed, not on the security of the tolls, but on the tolls and the rates. The Commissioners of the turnpike-roads are not only Commissioners of the roads, but they are Commissioners for paving and lighting. Upon that point I do not think it necessary to express any opinion: if it were, I should take time to consider; but my inclination of opinion, at present, is contrary to my Lord's. My inclination of opinion is, that these words are within the act of parliament, although the borrowing is not only upon the tolls, but upon other matters. But that is merely intimation of opinion, and, if it were necessary, I should take more time to consider it. If that ever becomes a material question, it will be raised on mandamus, when it could be taken to Error to be decided. As it is, the present case will be decided without an appeal.

MELLOR, J.—I agree with my Lord and my Brother Blackburn as to the first point. Admitting the literal construction of the words of the statute to be what Mr. Mellish says, yet, when one comes to look at the whole context of the two statutes, I think we have an interpretation that is reasonable and satisfactory. It is this: that money which had been borrowed before the act of 1849 and secured upon the tolls, though it may be reasonable, owing to a change of circumstances, that a sinking fund should be provided, yet still as that would have an effect upon the interest of the parish at large, it is not, as it appears to me, to have in that case any priority to money borrowed after, because there the money is borrowed on the credit of the thing as it stood, and the money has not therefore to be raised, and there is no necessity to hold out special inducements to obtain the money. I think, as this was simply money raised for the purpose of paying off the old charge (and that is the real key to the construction of this act of parliament), the Commissioners are not to increase the charge or the incumbrance of the tolls except upon the terms of the act of 1849. If there be no increase of the charge, or enlargement of the obligation, but a simple substitution of money borrowed at 4*l.* per cent. to pay off money borrowed at 5*l.* per cent., I can see no reason in justice why the construction contended for by Mr. Mellish should prevail. Without saying

more on that point, I entirely concur in the conclusion which has been come to by my Lord and my Brother Blackburn. But, with regard to the second point, I confess I agree with my Lord, and I cannot help thinking that the case does not apply to this act of parliament. The great object of the act of parliament is lighting, watching, cleansing, improving, and incidentally making a new road, and for that purpose rates are to be levied on certain parishes and tolls taken at particular gates, and, according to the whole form of the statute, they become one common fund, and are applicable to the various purposes of the act, not merely to the repair of the road alone, but lighting and watching, and various other things, which are the principal objects, as it appears to me to be, contemplated by the act of parliament, the road itself being comparatively a subordinate matter. At all events, it is not put forward as the important object of the act itself. That being so, when we come to look at the terms of the 12 & 13 Vict., we find they are, in every case in which the trustees or commissioners of any turnpike road shall hereafter borrow, charge or secure any sum or sums of money on the credit of the tolls; that is to say, in the case in which the charge and the security is upon the credit of the tolls, then priority is assigned. But then it says, "and on monies remaining owing on the security of the said tolls, set apart a sum of 5l. per cent. per annum on the amount of money so borrowed, charged or secured." Then, again, when we come lower down, we find a section which says what is to be the application of the monies. It says they shall pay such sums, "and the payment of a proportionate part of the monies borrowed, charged or secured, as aforesaid, and then remaining unpaid to the creditors on the tolls of such road." Now here, these persons are not creditors of the tolls "of such road" alone, but the first security they have is according to the words of the statute which empowers the commissioners to make the road, which says, "they may borrow and take up at interest any sum or sums of money upon the credit of the rates, assessments and tolls." Therefore, it appears to me, these persons are not creditors of the tolls only, but creditors of the rates, assessments and tolls, and it appears to me that the working out of the sinking fund would be attended with great hardship, and would alter very much and very materially the position of the parish. As it appears to me, it is not intended really to apply to a case where the main security, or where the security may, or a considerable portion of it may, consist of a right to charge and assess lands and tenements of a permanent character, and which are not precarious like tolls. I think, for these reasons, that the act of parliament does not apply, and that it is not necessary to go further. I agree with my Lord and my Brother Blackburn on the first point upon which I have based my judgment; but I have thought it right to express an opinion in accordance with what my Lord has given, thinking that that is the fair construction to be put upon the act of parliament.

SHEE, J.—I agree that the 12 & 13 Vict. c. 87. has reference only to a new charge made after the passing of the act, or to further charges made after the passing of that act, and I also entirely agree with what has fallen from my Lord and my Brother Mellor on the second ground.

Order quashed.

[CROWN CASE RESERVED.]

Nov. 11, 1865.

THE QUEEN v. REDMAN.*

35 L. J. M.C. 89; L. R. 1 C.C. 12; 13 L. T. 303; 14 W. R. 56; 10 Cox C.C. 159;
11 Jur. N.S. 960.

Threat to accuse to procure Sale of a Mare.

CRIMINAL LAW.—*The prisoner was convicted under 24 & 25 Vict. c. 96. of threatening to accuse of an abominable crime, thereby to extort money. It was proved that the prisoner went to the prosecutor and threatened to accuse his son of an unnatural offence with a mare, unless the prosecutor would buy the mare for 3l. 10s.:—Held, that the conviction was right.*

CASE stated by Willes, J.

Henry Redman was tried before me at the last Wilts Assizes (under the 24 & 25 Vict. c. 96. s. 47), for threatening a boy's father to accuse the boy of an abominable offence upon a mare, with intent to extort money from the father. The prisoner charged the boy with an abominable offence upon a mare in the prisoner's possession. Before giving information against the boy (which he afterwards did, when the charge was dismissed as groundless), the prisoner went to the boy's father and stated to him that the offence had been committed, and that if the father did not buy the mare of him and pay him 3l. 10s. for her, he would accuse the boy. The father refused, saying that the prisoner was a liar and wanted to get rid of the mare.

The prisoner pursued the same course to the boy's master, who treated his attempt in the same way.

No evidence was given as to the value of the mare, but there was the above evidence of the prisoner's desire to get rid of her.

The boy was called, and denied the charge, which was a most improbable one.

I told the jury to find the prisoner guilty, if he threatened the father to make the charge for the purpose of putting off the mare and forcing the father under terror of the threatened charge to buy and pay for her at the prosecutor's price.

The jury found the prisoner guilty, and I directed that he should remain in custody until the opinion of the Court for Crown Cases Reserved was obtained upon the question whether the case was within the statute.

No counsel appeared for the prisoner.

Bowen, in support of the conviction, was not heard.

POLLOCK, C.B.—We are all of opinion that the conviction was right.

WILLES, J.—I reserved the point, not because I entertained any doubt, but because the point was new and the prisoner was not defended by counsel.

Conviction affirmed.

* *Coram*, Pollock, C.B., Willes, J., Pigott, B., Shee, J. and Montague Smith, J.

[IN THE COURT OF QUEEN'S BENCH.]

Nov. 20, 22, 1865.

THE QUEEN v. THE JUSTICES OF THE PARTS OF LINDSEY.

35 L. J. M.C. 90; 6 B. & S. 892; L. R. 1 Q.B. 68; 13 L. T. 524;
14 W. R. 179; 12 Jur. N.S. 814.

Highway District Acts—Notice fixing Time for First Meeting of Highway Board—5 & 6 Will. 4. c. 50. s. 6.—25 & 26 Vict. c. 61. s. 10.—27 & 28 Vict. c. 101. s. 10.

HIGHWAYS.—By the 54 Geo. 3. c. 91. s. 1. overseers of the poor are to be appointed on the 25th of March, or within fourteen days after, and by the 5 & 6 Will. 4. c. 50. s. 6. the same date is fixed for the appointment of surveyors of highways. By the 25 & 26 Vict. c. 61. s. 10. waywardens are to be elected at the time when surveyors would have been chosen before the act. By the 27 & 28 Vict. c. 101. s. 10. the first meeting of the highway board is to be appointed for a time not more than seven days after the time fixed by law for the election of waywardens:—Held, that after a provisional order directing the election of waywardens, a final order, fixing the first meeting of the highway board for the district for the first Thursday after the 25th of March was good, and did not unduly curtail the time for the election of waywardens.

By a provisional order of the Quarter Sessions at Kirton for the Parts of Lindsey, in the county of Lincoln, on the 20th of October, 1864, certain parishes, townships and places were constituted a highway district, under the 25 & 26 Vict. c. 61, to be called the Isle of Axholme Highway District, and it was ordered that waywardens should be elected for each of these parishes, townships and places.

This order was confirmed by a final order of the same Sessions, on the 7th of April, 1865, directing the first meeting of the highway board to be elected for the Isle of Axholme Highway District to be held at the police-station at Epworth, in the district, on the first Thursday after the 25th of March, 1866, at eleven o'clock in the forenoon.

Keane obtained a rule, in Trinity Term, 1865, calling upon Justices in and for the Parts of Lindsey to shew cause why a *certiorari* should not issue to remove the final order, on the ground that the time fixed by it for the meeting of the highway board was fixed contrary to law and in violation of the statutes 25 & 26 Vict. c. 61. s. 10, 5 & 6 Will. 4. c. 50. s. 6. and 54 Geo. 3. c. 91. s. 1. (Two other grounds on which the rule was obtained were abandoned.) The affidavits in support of the rule stated the facts as above; and it appeared, from an affidavit of the assistant clerk to the Magistrates, that the parishes, townships and places in question were within the petty sessional division of the hundred of Manley; and that during the last eight years it had been the general custom for parishes and townships within the division, and appointing surveyors of highways, to elect the surveyor on the 25th of March in each year; and if an election took place after that day, it was almost invariably on the 26th or 27th of March. Only six instances of elections after these last dates could be discovered by the clerk, and these were on the 28th, 29th and 31st of March.

Hayes, Serj. and J. W. Mellor shewed cause (Nov. 20).—The order is valid. By the 25 & 26 Vict. c. 61. s. 6. reg. 5. the provisional order may, and the final order shall, state the time for the first meeting of the highway board, not being more than seven days after the first election of waywardens. This is repealed by the 27 & 28 Vict. c. 101. s. 10, which provides that the time appointed must be not more than seven days after the time limited by law for the election of waywardens. By 25 & 26 Vict. c. 61. s. 10. the waywardens are to be elected at the same time as surveyors would have been before the act; that is, according to the 5 & 6 Will. 4. c. 50. s. 6, on the

25th of March, or if that day should fall on Good Friday or on Sunday, then on the next day following, or within fourteen days next after the 25th of March. But there is nothing to shew that provision ought in all cases to be made for delay in the election of waywardens. Ample time, according to the usual practice, has been secured for their election.

[MELLOR, J.—It might happen that waywardens would be unable to attend the first meeting, because the election did not take place till after it.]

The first meeting could always be adjourned if it came on before the time for the election. This could be done under the 25 & 26 Vict. c. 61. s. 40.

Keane and Cave, in support of the rule.—The order is bad. The time which it fixes for the first meeting of the waywardens is inconvenient, as it unduly abridges the time within which they may be elected. The 26th of March would not be more open to objection than the day actually named; but if the former day had been fixed for the meeting, the waywardens could hardly have been elected so as to attend it. Moreover, the time for nominating the overseers of the poor will be limited, as the nomination must take place at the time appointed by the order for the meeting of the waywardens.

Cur. adv. vult.

MELLOR, J. (Nov. 22) delivered the judgment of the Court.¹—In this case a rule *nisi* was obtained by Mr. Keane for a *certiorari* to remove a final order made at the Quarter Sessions holden at Kirton, for the parts of Lindsey, in the county of Lincoln, on the 7th of April last, whereby it was ordered that a certain provisional order of the 20th of October, 1864, the confirmation of which had been duly respite to these sessions, should be finally ordered to be confirmed, and the same was confirmed. By which final order it was also ordered that the first meeting of the highway board to be elected for the Isle of Axholme highway district should be held at the police-station at Epworth, in the said district, on the first Thursday after the 25th of March, 1866, at eleven o'clock in the forenoon.

Two objections which had been made to the order were abandoned by Mr. Keane during the argument, and the only point remaining for consideration was the appointment of the day for holding the first meeting of the highway board, which, it was alleged, was fixed contrary to law, and in violation of the 25 & 26 Vict. c. 61. s. 10, the 5 & 6 Will. 4. c. 50. s. 6. and the 54 Geo. 3. c. 91. s. 1.

By the 54 Geo. 3. c. 91. s. 1, overseers of the poor are to be appointed on the 25th of March, or within fourteen days next after it. By the 5 & 6 Will. 4. c. 50. s. 6. it was enacted, that the inhabitants of any parish maintaining its own highways should, at their first meeting for the election of overseers of the poor, proceed to the election of one or more persons to serve the office of surveyor in the said parish for the year next ensuing; and that in any parish in which there is no meeting for the nomination of overseers of the poor, the inhabitants contributing to the highway-rate shall meet at the usual place of public meeting on the 25th of March, and if that day should fall on Good Friday or on Sunday, *then on the day next following*, or within fourteen days next after the said 25th of March in every year. Such were the provisions for the election of surveyors of highways at the time of the passing of the 25 & 26 Vict. c. 61, which gave large powers to Justices in Quarter Sessions to form highway districts for the more convenient management of highways. The first thing to be done was to make a provisional order constituting the highway district, which was, in order to its validity, to be confirmed at some subsequent Court of General or Quarter Sessions to be held within a period of not more than six months. By section 6. of that act, various regulations were enacted as to the making, confirmation, and approval of the orders for forming a highway district; and by regulation 5. it was provided, "that the provisional order

(1) Mellor, J. and Shee, J.

might, and that the final order should, state the time, not being more than seven days after the first election of waywardens, and the place at which the first meeting of the board was to be held." This regulation was repealed by the 27 & 28 Vict. c. 101. s. 10, and in lieu thereof it was enacted, that "the first meeting of the highway board, after the formation of a district, shall be held at such time as may be appointed by the provisional or final order of the Justices, *so that the time appointed be not more than seven days after the expiration of the time limited by law for the election of waywardens*; or in case of a special day being appointed for such election as thereafter mentioned, be not more than twenty-one days after that day." Provision for the election of waywardens is made by section 10. of the 25 & 26 Vict. c. 61, in the same manner as surveyors of the highways would have been chosen or appointed if the act had not passed; and section 7. of the 27 & 28 Vict. c. 101. makes provision for places, in which, previously to the passing of the provisional order forming a highway district, no surveyor had been elected, and no provision made by the previous Highway Act of 1862.

In the highway district for the Isle of Axholme the election of waywardens will have to be made at the time and in the manner in which surveyors of highways were formerly elected for the various parishes forming part of that district, viz., on the 25th of March, or in case that fall on Good Friday or Sunday, then on the day next following, or within fourteen days next after the 25th of March. The final order constituting this district orders that the first meeting of the highway board for the Isle of Axholme highway district shall be held at the police-station at Epworth, in the said district, on the first Thursday after the 25th of March, 1866, at eleven o'clock in the forenoon. Under these circumstances, Mr. Keane contended that the order is bad, inasmuch as it unduly circumscribes the time allowed by law for the election of waywardens for the several parishes within the district, and indirectly limits the time for the nomination of overseers of the poor in parishes in which the surveyors of highways were formerly elected at the same meeting at which overseers of the poor were elected. On the other hand, it was contended, by Serj. Hayes, that the order was clearly within the power of the Justices at Sessions to make, inasmuch as the time appointed for the meeting was not more than seven days after the expiration of the time limited by law for the election of waywardens, and that there was nothing to compel the parties to postpone such meeting for fourteen days after the 25th of March, and to fix it on one of the seven days thereafter.

We have come to the conclusion that, although it would have been better to have postponed the day of meeting to one of the seven days after the expiration of the time limited by law for the election of waywardens, yet, inasmuch as the day actually appointed allows a reasonable and sufficient time for the various elections of waywardens to take place, according to the practice which has prevailed in the district for the last eight years in the election of surveyors of highways, we see no reason for quashing this order. It seems that no real inconvenience will result from our supporting it, and although, as we have already said, it would have been more prudent for the Sessions to have appointed a later day, we cannot fail to observe that the 5 & 6 Will 4. c. 50. s. 6. directs the inhabitants to meet for the election of surveyors of the highways on the 25th of March, and if that day should fall on Good Friday or Sunday, then on the day next following, or within fourteen days next after the said 25th of March. In order to entitle the applicants to have this order quashed, they ought to shew that the Court of Quarter Sessions were bound to appoint a day after the expiration of the time limited by law for the election of waywardens. This they have failed to do, and we are therefore of opinion that the rule should be discharged, with costs.

Rule discharged.

[CROWN CASE RESERVED.]

Jan. 20, 1865.

THE QUEEN v. SHERLOCK.

35 L. J. M.C. 92; L. R. 1 C.C. 20; 13 L. T. 643; 14 W. R. 288;
12 Jur. N.S. 126; 10 Cox. C.C. 170.

Refusal to Assist a Constable in the Execution of his Duty—Indictment—Sufficiency of.

CRIMINAL LAW. POLICE.—*An indictment against a person for refusing to aid and assist a constable in the execution of his duty, and prevent an assault made upon him by prisoners in his custody on a charge of felony, with intent to resist their lawful apprehension is sufficient without stating how the apprehension became lawful; and if it state a refusal to assist, without the further allegation that he did not, in fact, aid and assist.*

The prisoner was tried at the Quarter Sessions for the county of Sussex, held at Lewes on the 2nd of July, 1865, and convicted; whereupon the following CASE was reserved for the opinion of this Court. The following is a copy of the indictment which was preferred and found against him:

Sussex, to wit.—The jurors for our Lady the Queen, upon their oath present that heretofore, and before the committing of the offence hereinafter mentioned, to wit, on the 25th day of May, in the year of our Lord, 1865, Isaac Brown and James Brown were in the custody of James Newnham and George Parsons, constables of the East Sussex constabulary, and James Baldwin, a peace officer, in the parish of Rotherfield, in the said county of Sussex, upon a charge of felony, and the said Isaac Brown and James Brown committed an assault upon the said constables and breach of the peace, with intent to resist their lawful apprehension. And the jurors further present, that the said constables, there being a reasonable necessity for them to do so, called upon Caleb Sherlock, the defendant, for assistance in order to prevent the said assault and a breach of the peace. And the jurors aforesaid further present that the defendant Caleb Sherlock did unlawfully, wilfully and knowingly refuse to aid and assist the said constables in the execution of their duty, or to prevent an assault and breach of the peace, against the peace of our said Lady the Queen, her Crown and dignity.

The defendant's counsel submitted that the indictment was bad upon the following points: 1. The record did not shew lawful apprehension of the two Browns. 2. That there could not have been an assault to prevent apprehension, the Browns being already apprehended. 3. That the record does not state that the refusal to assist was on the same day and year as the assault, nor that it was the same assault; and that the merely stating a refusal is not sufficient without an allegation that he did not aid and assist.

The Chairman did not withdraw the case from the jury, and the defendant was convicted, and ordered to pay a fine to Her Majesty of 5*l.*, which amount the defendant deposited with the deputy clerk of the peace pending the decision of the Court for Crown Cases Reserved.

The opinion of the Court was requested whether the defendant was lawfully convicted upon the above indictment.

No counsel appeared.

Per Curiam.—We have considered this case, and think that the conviction should be affirmed.

Conviction affirmed.

[CROWN CASE RESERVED.]

Jan. 20, 1865.

THE QUEEN v. RICE AND WILTON.

35 L. J. M.C. 93; L. R. 1 C.C. 21; 13 L. T. 382; 14 W. R. 56;
12 Jur. N.S. 126; 10 Cox. C.C. 155.*Disorderly House—Disorderly Conduct inside but not outside of the House.*

DISORDERLY HOUSE.—A conviction on an indictment for keeping a disorderly house will be supported, although there is no evidence of any indecency or disorderly conduct being perceptible from the exterior of the house.

The following CASE was stated by the Deputy Recorder of the city of Chester.

The defendants were tried at the Quarter Sessions for the city of Chester, on the 14th of July, 1865, upon an indictment which stated that they "unlawfully did keep and maintain a certain common, ill-governed and disorderly house, and in the said house, for the lucre and gain of them, the said Peter Rice and Mary Wilton, certain persons, as well men as women, of evil name and fame, and of dishonest conversation, then and there unlawfully and wilfully did cause and procure to frequent and come together, and the said men and women, in the house of them, the said Peter Rice and Mary Wilton, at unlawful times, as well in the night as in the day, then and there to be and remain, drinking, tippling, whoring and misbehaving themselves, unlawfully and wilfully did permit, and yet do permit, to the great damage and common nuisance of all the liege subjects of our said Lady the Queen, there inhabiting, being, residing and passing, to the evil example of all others offending, against the peace, &c.

It was proved that the prisoners acted as master and mistress of a house at Chester; that the house was frequented by prostitutes, who were constantly in the habit of bringing men there for the purposes of prostitution, and that this was done with the knowledge and assent of the prisoners. It was further proved that when a prostitute brought a man to the house for such purpose, such prostitute and man were allowed by the prisoners to have the use of a bedroom in the house either for a whole night or for a shorter period; that when such prostitute and man occupied the room for a whole night the sum of 5s. was charged by the defendants, and paid by the prostitute or man to the defendants for the use of the room. When occupied for a shorter period the sum of 2s. 6d. was charged by and paid to them. There was no evidence that any indecency or disorderly conduct was perceptible from the exterior of the house.

It was contended by the counsel for the defendants that there was no proof that the house was so conducted as to be a common nuisance, and consequently that the indictment was not proved. He declined to address the jury, stating that he could not contest the truth of the facts above stated. I directed the jury to find a verdict of guilty, which was entered, but judgment was postponed until the opinion of the Court for Crown Cases Reserved could be obtained; and the defendants were discharged on recognizance of bail to appear and receive judgment.

The question for the consideration of the Court is—Whether upon the facts so proved the defendants were guilty of an indictable offence as charged in the indictment.

No counsel appeared.

Per Curiam.—We have considered this case, and think that the conviction should be affirmed.

Conviction affirmed.

[CROWN CASE RESERVED.]

Jan. 20, 1866.

THE QUEEN v. FANNY SCHMIDT.*

35 L. J. M.C. 94; L. R. 1 C.C. 15; 13 L. T. 679; 14 W. R. 286;
12 Jur. N.S. 149; 10 Cox. C.C. 172.

Approved, *R. v. Villensky*, [1892] E. R. A.; 61 L. J. M.C. 218; [1892] 41 W. R. 160 (C.C.R.).

Receiving Stolen Goods—24 & 25 Vict. c. 96. s. 91.—*Stolen Goods ceasing to be Stolen at the Time of Receipt.*

CRIMINAL LAW.—*The prisoner was convicted of feloniously receiving stolen goods under the following circumstances: The goods were stolen, and sent by the thief in a parcel by railway, addressed to the prisoner. A policeman belonging to the railway company, from information he had received, examined the parcel at the railway station at the place of its destination, and stopped it. It was called for by one of the thieves on the day of its arrival, and refused to him. A porter of the company, the next day, by the direction of the policeman, took it to a house which the thief who had called for it designated, and it was there received by the prisoner:—Held, by Martin, B., Keating, J. and Lush, J., that the conviction was wrong, as the goods had ceased to be stolen goods, within the statute, at the time of the receipt by the prisoner—Erle, C.J. and Mellor, J. dissentientibus.*

The prisoner had been indicted and convicted with four men, named respectively Daniels, Scott, Townsend, and White, at the Court of Quarter Sessions held at Chichester, for the Western division of the county of Sussex, on the 20th of October, 1865.

The four men were indicted for having stolen a carpet-bag and divers other articles, the property of the London, Brighton and South-Coast Railway Company, and the prisoner, Fanny Schmidt, for having feloniously received a portion of the same articles, well knowing the same to have been stolen. With respect to the conviction of the female prisoner, the Deputy-Chairman, before whom the trial was had, stated the following CASE for the consideration of the Court for Crown Cases Reserved:

The evidence adduced, so far as it related to the question submitted, was, in substance, as follows:

On the 28th of July last two passengers by the prosecutors' line of railway left a quantity of luggage at the Arundel station, which luggage was afterwards stolen therefrom. On the 29th of July a bundle, containing a portion of the stolen property, was taken to the "Augmering station," on the same line of railway, by the prisoner Townsend, and forwarded by him to the female prisoner, addressed "Mr. (sic) F. Schmidt, Waterloo Street, Hove, Brighton." The bundle was transmitted to Brighton in the usual course on Sunday morning, the 30th. Meanwhile, the theft had been discovered, and shortly after the bundle had reached the Brighton station a policeman (Carpenter) attached to the railway company opened it, and having satisfied himself that it contained a portion of the property stolen from the Arundel station, tied it up again, and directed a porter (Dunstall), in whose charge it was, not to part with it without further orders.

About 8 p.m. of the same day (Sunday, 30th) the prisoner, John Scott, went to the station at Brighton and asked the porter (Dunstall) if he had got a parcel from the Augmering station in the name of Schmidt, Waterloo Street. Dunstall replied "No." Scott then said, "It is wrapped up in a silk handkerchief, and is directed wrong. It ought to have been directed to 22, Cross Street,

* *Coram*, Erle, C.J., Martin, B., Keating, J., Mellor, J. and Lush, J.

Waterloo Street." Dunstall, in his evidence, added, "I knew the parcel was at the station, but I did not say so, because I had received particular orders about it."

The four men were apprehended the same evening in Brighton, on the charge for which they were tried and convicted.

On Monday morning, the 31st of July, the porter Dunstall, by the direction of the policeman (Carpenter) took the bundle to the house, No. 22, Cross Street, Waterloo Street, occupied as a lodging-house and beer-house by the female prisoner and her husband (who was not at home, and did not appear), and asked if her name was Schmidt; on ascertaining which he left the bundle with her and went away. Carpenter and another policeman then went to the house, found the bundle unopened, and took the prisoner to the Town-hall. All the prisoners were found guilty. As to the female prisoner, the question was reserved for the opinion of this Court, whether the goods alleged to have been received by her had not, under the circumstances stated, lost their character of stolen property, so that she ought not to have been convicted of receiving them with a guilty knowledge within the statute.

Pearce, for the prisoner.—When the goods reached Schmidt's hands, they were not stolen goods within the meaning of the statute. In consequence of the conduct of the company, the goods had lost that character. Carpenter not only opened the bundle, but delivered it to Dunstall with special directions. In consequence of the railway company having re-exercised acts of dominion over it, the property had re-vested in them, and the subsequent delivery to Schmidt was voluntary. In the indictment, the property is only laid in the railway company; there is no count laying it in the consignor or consignee. The case is not distinguishable from *The Queen v. Dolan* (1 Dears. C.C. 436; s. c. 24 Law J. Rep. (N.S.) M.C. 59). In that case the goods were found by the owner in the pocket of the thief. The owner sent for a policeman, who took the goods, but subsequently returned them to the thief, who was sent by the owner to sell them where he had sold others. The thief went to the shop of the prisoner and sold the goods, and gave the money to the owner. The prisoner was convicted of receiving the stolen goods: but the Court held the conviction to be wrong. That case overruled the previous decision of *The Queen v. Lyons* (Car. & Mar. 217).

Hurst, for the prosecution.—This case is distinguishable from *The Queen v. Dolan* (1 Dears. C.C. 436; s. c. 24 Law J. Rep. (N.S.) M.C. 59). The real owner of the goods here was the passenger. As against the owner, the railway company had no title.

[MELLOR, J.—They merely open it to see what it is, and then transmit it to its address.]

Yes; therefore that is no resumption of the possession by the owner. When the goods were in the hands of the policeman they were *in custodia legis*. When he let them go, parties were *in statu quo* they were before he interfered; and the prisoner received the goods from the railway company, as she would have done if he had not intervened.

[MARTIN, B.—Is that so? Goods are in the possession of a policeman, and he, wishing to get a person to commit a crime, gives them to the prisoner. The receipt is from the policeman?]

In a certain sense it may be so.

[MARTIN, B.—In every sense it is so. The goods had been lawfully intercepted. ERLE, C.J.—I think it is the ordinary case of a detective watching. MARTIN, B.—Dunstall went for the purpose of getting Schmidt to commit a crime. ERLE, C.J.—Suppose a thief sends a stolen basket by a messenger to a person who intends to receive it guiltily, and a policeman stops the messenger and looks at it on the way, and says to him "Go on," surely that would not prevent the subsequent receipt from the messenger being a guilty one. MARTIN, B.—Here the policeman clearly took possession by virtue of his right as police constable.]

The prisoner really received the goods from the company, and not from the policeman.

[MELLOR, J.—The address to which they were sent was the address to which the thieves wished them to be sent. MARTIN, B.—No, Dunstall was not the agent of the thieves, but of the policeman, if he was the agent of anybody. KEATING, J.—I observe, however, that the address was changed at the request of Scott.]

That shews that Dunstall was the agent of the thieves.

[ERLE, C.J.—Burglars often have been convicted of stealing property in the custody of a lodging-house keeper. MELLOR, J.—The question asked of us is, whether they had not lost their character of stolen property, and I certainly do not see how they had. LUSH, J.—If the true owner had brought an action for non-delivery, would the fact that they were stolen be any defence?]

No, certainly not; therefore the property remained in the passenger and was not diverted. The argument for the prisoner really comes to this, that if a policeman finds stolen property in the hands of an innocent agent, and does not take possession of it, or prevent the agent from delivering it, yet the discovery alone divests the property of the character of stolen goods.

Pearce, in reply.—The railway company took possession of the goods. The interference was first on Sunday. The thieves were taken into custody on that day, but the goods were not delivered till the Monday.

ERLE, C.J.—I think the conviction is right. The question on which we differ is, as to whether the goods had lost the character of stolen goods. I think that in this case the company were acting as the bailees of the thieves, and as innocent agents.

MARTIN, B.—There was no receipt here by the prisoner adverse to the true owner. I think the conviction wrong upon that ground, but it is wrong also upon the formal ground, that here the property is laid in the London, Brighton and South Coast Railway Company; and assuming that to be true the receipt also was from them.

KEATING, J.—I agree with my Brother Martin, that the conviction is wrong. It seems to be admitted that if the goods had got back for any time into the custody of the true owner the conviction would be wrong. I think then that there is no distinction in principle between the ownership of the railway company and of any other owner. We can know of no owner except those mentioned in the indictment. I can see no distinction between this and *Dolan's case* (1 Dears. C.C. 436; s. c. 24 Law J. Rep. (N.S.) M.C. 59). The felonious *transitus* was at an end.

MELLOR, J.—I agree with the Lord Chief Justice. The indictment truly alleges the property to be in the company at the time it was stolen; but there was a new bailment from the thieves. I think, further, that the policeman only inspected the goods and did not take possession. I agree with the decision in *Dolan's case* (1 Dears. C.C. 436; s. c. 24 Law J. Rep. (N.S.) M.C. 59); but in the present one I think the goods did not get back to the possession of the true owner.

LUSH, J.—I agree with my Brothers Martin and Keating, on the ground that the goods were delivered to the true owner. If the railway company had acted throughout as innocent agents, the felonious transit would have continued; but in fact they discovered the theft and no longer intended to forward them as agents for the thieves. The goods having got back into their possession with that knowledge, they could have had no defence against the true owner.

MARTIN, B.—I wish to add, that I think the policeman was wrong in acting as he did.

Conviction quashed.

[IN THE COURT OF QUEEN'S BENCH.]

Nov. 8, 1865.

THE QUEEN, *on the prosecution of* DODD AND SOUTHAN, *appellants,*
v. THE OVERSEERS OF BILSTON, respondents.

35 L. J. M.C. 97; L. R. 1 Q.B. 16.

Distinguished, *Smith v. Birmingham Corporation*, [1883] E. R. A.; 52
 L. J. M.C. 81; 11 Q.B. D. 195; 49 L. T. 25; 31 W. R. 788 (Q.B.D. Div.).

Poor-Rate—Parochial Assessment Act (6 & 7 Will. 4. c. 96. s. 1.)—Local Act (10 & 11 Vict. c. xxx.)—Small Tenements—Usual Deductions—Composition.

RATES AND RATING.—*The net annual value of hereditaments rated to the poor-rate is, by the Parochial Assessment Act, to be ascertained by the rent at which the same would let from year to year, "free of all the usual tenant's rates and taxes," &c. By a local act, the owners of small tenements were empowered to compound for the poor-rate in respect of such tenements by the payment of one-half of such rate only:—Held, that the deduction for usual tenant's rates and taxes must be made at the full sum allowed for other similar property not in composition, and not according to the sum actually paid by way of composition.*

This was a SPECIAL CASE stated by the Staffordshire Quarter Sessions, upon the hearing of an appeal before them, brought by Messrs. Dodd and Southan against a poor-rate duly made and allowed on the 24th of May, 1864, and confirmed by Justices in Special Sessions on the 12th of August, 1864. Mr. Dodd was rated as owner of a small tenement in Bilston upon a gross estimated rental of 7l. 16s. 3d. and a rateable value of 6l. 5s. Mr. Southan was rated as owner of another small tenement in the same place upon a gross estimated rental of 6l. 11s. 3d. and a rateable value of 5l. 5s.

The Sessions found that the gross estimated rental of each of the houses was 6l. 10s., and their rateable value 4l. 13s. 7d. each, and reduced the rate accordingly, subject, as to a further reduction, to the following

CASE.

Messrs. Dodd and Southan are the owners of the houses which are the subject of the above assessment, and which are let at 2s. 6d. per week, giving an annual rental of 6l. 10s.; and one-fifth of that sum, or 1l. 6s., is to be taken as the sum ordinarily deductible for rates and taxes, and 1l. 3s. 5d. for repairs and other deductions allowed by the Parochial Assessment Act.

By the 10 & 11 Vict. c. xxx., entitled "An act for better assessing the poor-rates, highway rates, county and police rates, and other parochial and local rates, on small tenements in the several townships of Wolverhampton, Bilston, Willenhall and Wednesfield, in the county of Stafford," it is enacted, "That the owner of every tenement within the several townships of Wolverhampton, Bilston, Willenhall, and Wednesfield, being the union of Wolverhampton, in the parish of Wolverhampton, in the county of Stafford, which may be assessed to the poor-rate and other rates mentioned in the act at any annual sum under 6l. 10s. rateable value, which said annual sum of 6l. 10s. shall be ascertained according to the provisions of an act, 6 & 7 Will. 4. c. 96, entitled 'An Act to regulate Parochial Assessments,' shall hereafter be rated and pay such several poor-rate, highway rate, county and police rate, and the local rates aforesaid in respect of such tenements, instead of the actual occupiers thereof." And it is further enacted, "That in all cases where any owner shall have been or shall be liable to be rated in pursuance of this act in respect of any such tenement

as aforesaid, it shall be lawful for such owner to give notice to the officer authorized to make or collect any such rate of his intention to compound for the same by payment of a reduced rate, whether such tenement be occupied or not; and that in every such case every such owner shall thenceforth, until he shall give like notice for determining such composition, be liable to pay one-half of such rate only; and all such compositions shall be entered into the rate-book of such officers, and such owners shall be thenceforth rated accordingly."

The houses which were the subject of this appeal were within the provisions of that act, and were in composition, the owner paying the rates, but compounding for and paying in respect of them only one-half of the sum which would be payable in respect of the said houses if they were out of composition. The appellants contended, that although these houses were in composition, they were entitled to the same deduction for rates and taxes as was allowed in respect of other property which was not in composition, and that the gross rental of 6*l.* 10*s.* ought to be reduced by one-fifth for rates and taxes and by the amount necessary for repairs, namely, 1*l.* 3*s.* 5*d.*, which would leave the rateable value at 4*l.* 0*s.* 7*d.* The respondents contended that, inasmuch as houses in composition only pay half rates and taxes, the owners of such houses are only entitled to one-half of the deduction, one-half of the rate being the sum actually paid by them, and that the proper deduction in respect of such houses, therefore, is only one-tenth of the gross rental, instead of one-fifth; and this deduction, together with that for repairs, of 1*l.* 3*s.* 5*d.*, would leave the rateable value at 4*l.* 13*s.* 7*d.*, as found by the Court of Quarter Sessions.

The question for the opinion of the Court was, whether the owners of the houses the subject of this appeal were entitled to the same amount of deduction for rates and taxes in respect of such houses as was allowed to the occupiers of houses not in composition.

If the Court should be of opinion that they were not so entitled, the rateable value of each of the houses was to stand as reduced by the Court of Quarter Sessions, viz., at 4*l.* 13*s.* 7*d.* If the Court should be of opinion that they were entitled to the same amount of deduction for rates and taxes in respect of such property as was allowed to the occupiers of property which was not in composition, then the rateable value of each of the houses was to be reduced by a further reduction of 13*s.*

A. Staveley Hill, in support of the order of Sessions.—By the Parochial Assessments Act (6 & 7 Will. c. 96. s. 1.) all usual tenant's rates and taxes are to be deducted; and by that is meant such rates as are usually paid by the particular tenant; and it is submitted that here the *quantum* of the composition is the rate usually paid by the tenant of the house now in question. He referred to the Wolverhampton Water Rates Act, 1847. The 13 & 14 Vict. c. 99. s. 4. contains a similar provision.

Keane (*M'Mahon* with him), for the appellants, was not called upon.

COCKBURN, C.J.—The Parochial Assessment Act is anterior to the local acts, which appear to me to be immaterial to the present question. The Parochial Assessment Act provides that in fixing the amount of net annual value of hereditaments rated to any rate a deduction should be made of the usual tenant's rates and taxes from the rent. The composition is for the mutual convenience of parties, and a landlord puts himself in the place of the tenant; but that does not affect the question under the Parochial Assessment Act. Independently of the local act, the landlord, to claim the benefit, must be considered to stand in the place of tenant, and the deduction to be made must be in respect of what the tenant would have to pay, and not in respect of the amount of composition.

BLACKBURN, J.—The Parochial Assessment Act says, that to ascertain the net annual value of hereditaments to be rated, there shall be taken "the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes," &c. Then, the Wolverhampton

Poor-Rates Bill, 1847, says, in section 5, that, in all cases where any owner shall be liable to be rated in pursuance of that act in respect of any small tenement, it shall be lawful for such owner to give notice to the officer authorized to make or collect any such rate of his intention to compound for the same by payment of a reduced rate, whether such tenement be occupied or not, and that in every such case every such owner shall thenceforth, until he shall give like notice for determining such composition, be liable to pay one-half of such rate only. But that does not make the composition an element in ascertaining the rateable value. It is not to be a different rate because the landlord has claimed to pay a composition.

MELLOR, J. and SHEE, J. concurred.

Judgment for the appellants.

Rate to be amended.

[IN THE COURT OF QUEEN'S BENCH.]

Nov. 16, 1865.

THE MINERVA LODGE v. GLADSTONE AND OTHERS, JUSTICES OF LIVERPOOL.

Ex parte O'DONNELL.

35 L. J. M.C. 99; L. R. 1 Q.B. 274; 14 W. R. 83.

The Friendly Societies Act, 1854 (18 & 19 Vict. c. 63), was repealed by the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60).

Friendly Societies—18 & 19 Vict. c. 63. ss. 23, 24.—Money in Hands of an Officer of Society who executes an Assignment—Assignee—Complaint.

FRIENDLY SOCIETY.—*The Friendly Societies Act (18 & 19 Vict. c. 63. s. 24.) gives summary power to Justices to order an officer, a member of a friendly society, or his assignee, who by false representation or imposition may obtain possession of any monies, &c. of such society, or having the same in his possession, may withhold or misapply the same, or may wilfully apply any part of the same to purposes other than those expressed in the rules of such society, to deliver up such monies, &c. or repay the money applied improperly:—Held, that this section does not give the Justices power to make an order on an assignee for the benefit of the creditors of an officer of such society, for repayment out of his effects of a sum equal in amount to the balance of the society's monies in the hands of such officer at the time he made the assignment, such balance not consisting of specific monies, and the amount having come into the possession of the assignee solely in his representative character.*

This was a motion for a rule calling upon certain Magistrates of Liverpool to shew cause why they should not hear an information laid by the Minerva Lodge Friendly Society, through their treasurer, against Isaac Storey, under the 18 & 19 Vict. c. 63. s. 24.

From the affidavits used, it appeared that Isaac Storey was the surviving assignee of the estate and effects of John Jones, an insolvent, under a deed of assignment, dated the 13th of January, 1865. John Jones had been for eighteen years previous to the 20th of December, 1864, the treasurer of a duly-certified friendly society, called the Minerva Lodge, No. 1661, of the Liverpool district, and of the Manchester Unity of Independent Order of Odd-Fellows. On that day Jones resigned his office as treasurer, and then

had 73*l.* 5*s.* 3*d.*, the monies of the above friendly society, in his hands, and still had the same at the time of the execution of the assignment to Storey and the co-assignee, *for the benefit of the creditors of John Jones*. John Jones was a full member of the society till the day of his death, and died without paying over the money. Hugh O'Donnell was appointed treasurer of the friendly society to succeed Jones, and on the 23rd of February, 1865, he gave Storey and the co-assignee notice, under the 23rd section¹ of the 18 & 19 Vict. c. 63, demanding of them the above sum of 73*l.* 5*s.* 3*d.* Storey's co-assignee died on the 12th of March, 1865; but he had not, nor had Storey since, paid over the sum of 73*l.* 5*s.* 3*d.*, although he had received sufficient sums out of the estate to enable him to do so.

A summons was obtained against Storey by O'Donnell, on behalf of the society, which came on to be heard on the 24th of May, 1865, before the then sitting Magistrates for Liverpool, Robert Gladstone, John Johnson Still and Christopher James Corball, Esqs., who refused to hear the information then preferred by O'Donnell against Storey, for that having such monies in his possession he withheld the same contrary to the 18 & 19 Vict. c. 63. s. 24, on the ground that they had no jurisdiction, because the treasurer of the society could not identify the monies.

(1) By 18 & 19 Vict. c. 63. s. 23, "If any person already appointed or employed, or hereafter to be appointed or employed, to or in any office in any friendly society established under this act or under any of the acts hereby repealed, whether such appointment or employment was before or after the legal establishment of such society, and having in his hands or possession, by virtue of his office, any monies or property whatsoever of such society, or any deeds or securities belonging to such society, shall die, or become bankrupt or insolvent, or have any execution or attachment or other process issued against him or any part of his property, or shall have any action or diligence raised against his lands, goods, chattels, or effects, or property or other estate, heritable or movable, or shall make any assignment, disposition, assignation, or other conveyance for the benefit of his creditors, the heirs, executors, administrators, or assignees of every such officer, and every other person having or claiming right to the property of such officer, and the sheriff or other person executing such process, and the party using such action or diligence respectively, shall, upon demand in writing made by the treasurer or by the trustee or any two of the trustees of such society, or any person appointed at some meeting of the society to make such demand, deliver and pay over all such monies, property, deeds, and securities belonging to such society to such person as such treasurer or trustees shall appoint, and shall pay, out of the estate, assets, or effects, heritable or movable, of such officer, all sums of money due which such officer shall have received, before any other of his debts are paid, and before any other claims upon him shall be satisfied, and before the money directed to be levied by such process as aforesaid, or which may be recovered or recoverable under such diligence, is paid over to the party issuing such process or using such diligence; and all such assets, lands, goods, chattels, property, estates and effects shall be bound to the payment, discharge and satisfaction of such claims."

Sect. 24. "If any officer, member, or other person, being or representing himself to be a member of such society, or the nominee, executor, administrator, or assignee of a member thereof, or any person whatsoever, by false representation or imposition, shall obtain possession of any monies, securities, books, papers, or other effects of such society, or having the same in his possession, shall withhold or misapply the same, or shall wilfully apply any part of the same to purposes other than those expressed or directed in the rules of such society, or any part thereof, it shall be lawful in England for any Justice of the Peace acting in the county or borough in which the place of business of such society shall be situated, upon complaint made by any person on behalf of such society, to summon the person against whom such complaint is made to appear at a time and place to be named in such summons; and any two Justices present at the time and place mentioned in such summons shall proceed to hear and determine the said complaint, in manner directed by the act 11 & 12 Vict. c. 43; and in Scotland every such offence may be prosecuted by summary complaint at the instance of the Procurator Fiscal of the county, or of the society, with his concurrence, before the sheriff; and if the said Justices or sheriffs respectively shall determine the said complaint to be proved against such person, they shall adjudge and order him to deliver up all such monies, securities, books, papers, or other effects to the society, or to repay the amount of money applied improperly, and to pay, if they think fit, a further sum of money not exceeding 20*l.*, together with costs not exceeding 20*s.*; and, in default of such delivery of effects, or repayment of such amount of money, or payment of such penalty and costs as aforesaid, the said Justices or sheriffs may order the said person so convicted to be imprisoned in the common gaol or house of correction, with or without hard labour, for any time not exceeding three months: provided, that nothing herein contained shall prevent the said society, or in Scotland Her Majesty's Advocate, from proceeding by indictment against the said party; provided also, that no person shall be proceeded against by indictment if a conviction shall have been previously obtained for the same offence under the provisions of this act."

Holker, in support of the motion.—The Justices have power, under the 24th section of the 18 & 19 Vict. c. 63, to order Storey, as assignee of Jones, a member and treasurer of the society, to repay the 73*l.* 5*s.* 3*d.* as money withheld or applied improperly by him as such assignee. Storey here has monies of the society in his possession, and has withheld the same, and is therefore within the 24th section.

[MELLOR, J.—The 24th section points to the case of a person obtaining or keeping wrongful possession of monies belonging to the society, by misapplying or wilfully applying the same contrary to the rules. The 23rd section points to a case like the present, where the monies have come to the assignee's hands in a legitimate manner. LUSH, J.—What words are there in the 24th section to give the Justices power to order the assignee to give priority to the payment to the society?]

They may order him to repay the amount.

[LUSH, J.—But that is only where the money has been applied improperly.]

The money would have been applied improperly if the assignee had paid debts before the society's claims.

MELLOR, J.²—I think this rule must be refused. The 24th section of the 18 & 19 Vict. c. 63. seems to me to apply to cases where the monies have been obtained or are withheld improperly by the officer himself, or by some personal act of his assignee. That section cannot apply to a person who has come into possession of the money merely in his representative character and not through any wrongful act of his own.

SHEE, J.—I am of the same opinion. I also think that the 24th section only applies to the specific monies, books, papers and effects belonging to the society, and means that after an order made under that section for their re-delivery and default in obedience to that order, then the assignee, &c. shall be liable to be punished under that section.

LUSH, J.—I am of the same opinion. I also think that the 24th section applies to a case where the specific money is in the hands of an assignee, executor, &c., who neglects to deliver them up after order made.

Rule refused

[IN THE COURT OF COMMON PLEAS.]

Jan. 24, 1866.

ABLERT, *appellant*, v. PRITCHARD, *respondent*.

35 L. J. M.C. 101; 1 H. & R. 274; L. R. 1 C.P. 210; 14 L. T. 16;
14 W. R. 331; 12 Jur. N.S. 211.

Turnpike—Liability of Threshing Machines to Toll—Conflict of General and Local Acts.

HIGHWAYS.—A local turnpike act (26 Vict. c. lix.) imposed certain tolls on "waggons and carts," and by the interpretation clause included in these words *threshing-machines*. By the 3 Geo. 4. c. 126. s. 4. all the enactments, provisions, matters and things contained in the act are to extend to existing and future turnpike acts, unless expressly referred to and varied, altered or repealed; and by s. 32, implements of husbandry are exempted from toll. By the 9 Geo. 4. c. 77. s. 19, the powers, &c. in the former act are to extend to every local turnpike act as if repeated in it. By the 14 & 15 Vict. c. 38.

(2) Cockburn, C.J. was absent through ill health.

s. 4. and the 16 & 17 Vict. c. 135. s. 6, implements of husbandry in the 3 Geo. 4. c. 126. are to include threshing-machines:—Held, that within the area of the local act, the provisions of the general acts as to threshing-machines were superseded, and that such machines within such area were liable to pay toll.

This was a SPECIAL CASE, stated under the 20 & 21 Vict. c. 43, for the opinion of the Court, and the following are the material facts.

An information was laid before a Justice of the Peace for the county of Monmouth, by the respondent, against the appellant, under the 3 Geo. 4. c. 126. s. 32, charging the appellant with having, on the 16th of June, 1865, as collector of tolls at the Cross Buchan Gate, on the Abergavenny turnpike-road, demanded from the respondent toll for a steam-engine and threshing-machine although exempt from toll as being agricultural implements.

It appeared that the respondent was in charge of a threshing-machine, drawn by three horses, and a steam-engine, also drawn by three horses, which he was taking along the said road to a certain farm, to be there used for hire for threshing corn, and that the appellant had demanded and taken toll for the same, though the respondent had claimed exemption. The turnpike-road and gate were within the turnpike district comprehended in 26 Vict. c. lix., 'An act to continue the Abergavenny Turnpike Trust excepting certain roads, and for other purposes.' By section 2. of that act it was enacted, that 'the word "cart" and the word "waggon" respectively should mean and include all carts, waggons, &c. . . . and threshing-machines' By section 17, the following tolls were authorized: "For every horse or other beast drawing any waggon or cart (except waggons or carts going for or returning laden with lime only), 6d."; "for every horse or other beast drawing any waggon or cart going for or returning laden with lime only," 4d. or 6d., according to the breadth of the wheels; "for every horse or other beast drawing any waggon or cart laden with timber," 1s. or 9d., according to the breadth of the wheels. And the only other places in the act where either of these words were used were section 21, which provided that the tolls for all horses or other animals drawing any stage-coach or other stage-waggon, van, caravan, cart or other stage-carriage, carrying or employed for the purpose of carrying passengers or goods for hire, should be paid every time of passing; section 22, which provided that all horses and animals drawing any stage-coach, omnibus, waggon, van, caravan or other stage-carriage, carrying or employed for the purpose of carrying passengers or goods for hire, in respect whereof the tolls should have been paid at any toll-gate, should, upon a ticket denoting such payment being produced, be permitted to pass once toll free on the same day through any other toll-gate which such ticket would free in the case of horses or animals drawing any other carriage; and section 24, which provided that the tolls should be demanded, taken and be payable before the carriage, cart, waggon, beast or cattle should be permitted to pass through any of the toll-gates.

It was contended, on behalf of the appellant, that by virtue of this act she was entitled to demand the toll; and on behalf of the respondent, that he was exempt by virtue of the 3 Geo. 4. c. 126. s. 32, which provides, "that no toll shall be demanded or taken by virtue of this or any other act or acts of parliament on any turnpike-road, . . . for any horse, beast or other cattle or carriage employed in carrying or conveying, having been employed only in carrying or conveying on the same day, . . . any ploughs, harrows, or implements of husbandry, . . ."; and of 14 & 15 Vict. c. 38. s. 4, and the 16 & 17 Vict. c. 135. s. 6, which provide that "implements of husbandry," in the said section, shall include "threshing-machines," because, by the 3 Geo. 4. c. 126. s. 4, it is enacted, that "from and after the 1st of January, 1823, all the enactments, provisions, matters and things in this act contained shall extend and be deemed, construed and taken to extend to all acts of parliament now in force, and to all acts which shall hereafter be passed for

making, widening, turning, amending, repairing or maintaining any turnpike-road or roads in that part of Great Britain called England, save and except where any other commencement is particularly directed by this act, and as to such enactments, provisions, matters and things as shall be expressly referred to, and varied, altered or repealed by any such act or acts as shall be hereafter passed."

The said Justice was of opinion that the 3 Geo. 4. c. 126. s. 32. should have been expressly referred to in the local act in order to make horses drawing a threshing-machine liable to toll, and that as, in his opinion, this had not been done, the appellant ought to be convicted, and he convicted her accordingly.

The question now was, whether this determination was correct.

Gray, for the appellants.—The question turns on the 3 Geo. 4. c. 126. s. 4, and is simply whether by virtue of that section the exemption contained in section 32. of that act is in force on the Abergavenny Turnpike Roads, notwithstanding the provision of the local act. It is submitted that it is not; for, first, it must be borne in mind, that the exemption as to threshing-machines is not contained in the 3 Geo. 4. c. 126, but in a subsequent act, which extends the meaning of "implements of husbandry"; and that at the time when the 3 Geo. 4. c. 126. was passed, the carriage of a threshing-machine along a turnpike-road was unknown, such an event only occurring in quite recent times, in consequence of the invention of steam threshing-machines to be carried as a commercial speculation from one farm to another, and be used instead of the farmers' own implements of husbandry, properly so called. Now in construing acts of parliament, the question always is, what is the "intention of the legislature"?—*Williams v. Pritchard* (4 Term Rep. 2), *Lyn v. Wyn* (Bridgman's Judgments, 122); and the above considerations shew that in passing the 3 Geo. 4. c. 126. the legislature had no intention of exempting threshing-machines, and that section 4. does not apply to threshing-machines for the first time mentioned in the 14 & 15 Vict. c. 38. But, secondly, if it does, the local act "expressly refers to" the 3 Geo. 4 c. 126. s. 32; as, if a threshing-machine be an implement of husbandry within that section, there could hardly be a more express reference to the section than by specially naming this particular machine, and imposing a toll on it. And the later and local act is the one which ought to prevail. For although the machinery here adopted is somewhat different to that now used for incorporating the Lands Clauses and similar general acts with local and personal acts, the one applying the general act to the local one by a clause in the former, the other by a clause in the latter, the principle is the same, and it is always held in the latter case that the special provisions of the special act are to prevail. And, thirdly, even if the 3 Geo. 4. c. 126. s. 4. applies to threshing-machines, and the local act does not expressly refer to section 32, yet it is incompetent for the legislature to say that no later act shall affect the provisions of the act they are passing, unless such later act is worded in a particular way. A parliament may make regulations for their guidance in conducting business, as, for instance, that a bill shall not be brought in a second time in the same session; but, notwithstanding, if they disregarded this rule, this would not vitiate the statute passed in contravention of it. The same would be the case if the legislature, for instance, passed an act to say all future acts should be in Latin; a subsequent one in English would, notwithstanding, be of full force. So here, it was utterly incompetent for the legislature, in the time of George the Fourth, to say that no future parliament should be able to affect the act then passing, however clearly the intention might appear from the future act, unless such act used certain express terms and references. And the question, therefore, is, what was the intention of the legislature in passing the 26 Vict. c. lix.? and that is quite clear, for there are express words. It is true that it has said that acts *pari materia* are to be read together as one act, and as if passed at one time; but we still cannot lose sight of the fact, that the acts were passed at different

times, by different bodies of men, and therefore we must look to the intention of the later body in interpreting the meaning of the words used by them. And even if it be said that the legislature is to be considered to have had the previous act in its mind, that still is in favour of the present contention, because this shews that they intended, notwithstanding, to overrule the former enactment.

H. James, for the respondent.—First, a threshing-machine is an implement of husbandry, and the 14 & 15 Vict. c. 38. is merely declaratory, and therefore the 3 Geo. 4. c. 126. s. 4. does apply to threshing-machines. Secondly, the local act does not expressly vary and repeal the 3 Geo. 4. c. 126. s. 32. By the 9 Geo. 4. c. 77, which has not been referred to, this provision is repeated in the local act exactly as if it were part of it. This being so, what is the effect of having this general provision for exemption, and this special provision for imposing toll in the same act? Which is to prevail? Now the intention of the general act as shewn by the recital in section 4, was uniformity, and Lord Denman, C.J., in *The King v. the Trustees of the Northleach and Witney Roads* (5 B. & Ad. 978), says, that its effect "is to incorporate the statute with all particular acts, . . . and if they are inconsistent . . . the latter must be considered not continued; otherwise the very evil would ensue which that act was intended to prevent, viz. the want of uniformity in the laws regulating turnpike-roads throughout the kingdom." Again, the words of the local act are not directory, but only permissive. And, further, where there is a clause imposing toll on the public, and another giving an exemption, we ought to construe the act in favour of the exemption, especially if it be one in favour of husbandry—*Hickinbotham v. Perkins* (3 Moore, 185). Thirdly, it is quite competent for the legislature to make such a provision as is contained in the 3 Geo. 4. c. 126. s. 4. It is quite true that one parliament cannot fetter another in one sense, because the latter can repeal the acts of the former; but if they do not, such acts are in force; and if a former act says this act shall apply in a particular way, and unless certain things be done, and the legislature does not repeal it, the legislature must be taken to approve of it. And this prospective legislation is now in general use, and has been fully recognized, as in the case of the Lands Clauses Act, and various other acts of general application, and where by some oversight a conflict arises, then, as was said in *Middleton v. Croft* (Cases temp. Lord Hardwicke, 826), "subsequent acts of parliament in the affirmative only are never taken to be a repeal of former acts, unless there be negative words, or a plain contrariety between the two acts, so that there is a plain indication in the latter of an intention to repeal the former."

Gray, in reply.—Unless the appellant's construction be adopted, words must be struck out of the local act, for there is no section, but the section as to tolls, to which the interpretation clause can apply; and full effect is always to be given to all words. The words of the general act, are no doubt, incorporated; but where a conflict arises, the words of the particular act must prevail; this has always been held to be the case where the Companies' Clauses and similar acts conflict with local and personal acts. And if a contrary intention is not plainly discoverable, the words of a later act are to prevail over those of an earlier one—*The Queen v. St. Edmund's, Salisbury* (2 Q.B. Rep. 84; s. c. 10 Law J. Rep. (N.S.) M.C. 138) and *The Dean of Ely v. Bliss* (5 Beav. 582; s. c. 11 Law J. Rep. (N.S.) Chanc. 351).

ERLE, C.J.—I am of opinion that our judgment should be for the appellant. Upon first reading the case, I was strongly of opinion that the Justice was right; but on consideration of the statutes and the rules of construction, I have been compelled to alter my opinion. The question is, whether a threshing-machine is liable to toll under 26 Vict. c. lix. By section 17. of that act, tolls may be demanded for horses and other beasts drawing "waggons and carts," and by section 2, these words are to include

"threshing machines." If there were nothing else, there would be an express enactment, that a toll may be demanded for a threshing-machine; and I am unable to give effect to these words, if I hold that a threshing-machine is exempt from toll. A difficulty has been raised from the words of previous statutes, exempting implements of husbandry. By 3 Geo. 4. c. 126. s. 23, "no toll shall be taken by virtue of this or any other act or acts of parliament on any turnpike-road . . . for any horse, beast or other cattle or carriage employed in carrying or conveying . . . implements of husbandry." And in furtherance of an intention to obtain uniformity, by section 4. of the same act, it is provided that "all the enactments, provisions, matters and things in this act contained shall extend . . . to all acts of parliament now in force, and to . . . be passed hereafter, for making, &c. . . turnpike-roads, . . . save and except, . . . as to such enactments, &c., . . . as shall be expressly referred to, and varied, altered or repealed by any such acts as shall be hereafter passed;" and by 9 Geo. 4. c. 77. s. 19, it is provided "that all the powers, authorities, claims, penalties, forfeitures, matters and things contained" in the former act "shall extend . . . to every local turnpike act, . . . as if the same were repeated and re-enacted in the body of such local turnpike act, and were made part thereof." And therefore, coupling these statutes with 14 & 15 Vict. c. 38. s. 4. and 16 & 17 Vict. c. 135, s. 6, which provide that the words, "implements of husbandry," in 3 Geo. 4. c. 126, shall include threshing-machines, we have a universal act for all England which as directly exempts threshing-machines from toll as the local act for the Abergavenny roads imposes toll on them. Which, then, is to prevail? I am of opinion, that where there is a universal enactment, applying to all England, and a special enactment applying specially to a limited locality, as here to the Abergavenny district, the universal enactment is to be limited by the special one. It is said that in order to be effectual, the Abergavenny Road Act ought expressly to refer to the provision of the general statute; whether this be so or not, I am of opinion that it does, for it specially refers to the exempted matter referred to in the former act, and the only way of giving effect to its words is to hold that it limits the general statute. It may be also observed, that threshing-machines are a modern invention, not alluded to until 14 & 15 Vict. c. 38, and are generally a commercial speculation, and owned by persons who are not occupiers of land, or within the purview of 3 Geo. 4. c. 126. I do not, however, rely on this consideration; but narrow my decision to the words of the statutes.

WILLES, J.—I am of the same opinion, for the reasons already given by my Lord. It is impossible for us, on considering the Abergavenny Road Act, to adopt any other conclusion; for if we did, we should have to strike out special words. It is contended, that, in order to repeal the exemption as to implements of husbandry, in 3 Geo. 4. c. 126, it is necessary not only to mention the particular implements on which the toll is to be imposed, but to proceed further, and put in a *non obstante* clause. If this were so, great difficulties might present themselves; but the 3 Geo. 4. c. 126. is not framed on any such intention; it says that all "matters and things" contained in it shall extend to future acts, unless such "matters or things" are "expressly referred to and varied"; one matter contained is the liability of implements of husbandry, and that is expressly mentioned in the Abergavenny Road Act. It is said that this implement of husbandry is only mentioned in the interpretation clause; but we must read the exposition given by the statute, wherever the interpreted words occur. I must, therefore, abandon my first impressions, which were that the Justice was right. It is clear that there are not only express words in the local statute, but words expressly repugnant to those of the general one.

KEATING, J.—I am of the same opinion, for the same reasons. It is impossible otherwise to give any meaning to the words of the local statute.

An attempt has been made to incorporate the exemption contained in the previous general act, but there is a conclusive answer; we are to see what the intention of the legislature is as disclosed in the act, and there is no difficulty in holding that, by the express words in this act, it was intended to repeal the previous act as respects threshing-machines. I am of opinion that the decision of the Justice should be reversed; though I must say that he might reasonably come to the conclusion he did.

MONTAGUE SMITH, J.—I am of the same opinion. It is not necessary that there should be words repealing in terms the provision as to threshing-machines. Section 4. of the 3 Geo. 4. c. 126. says, that "the provisions, matters and things" contained in it, shall extend to future acts, "unless expressly referred to and varied, altered or repealed." Is there any such express reference? We find the name of one implement of husbandry mentioned in the local act, viz., a threshing-machine, and a toll imposed in respect of it, and therefore one matter contained in 3 Geo. 4. c. 126, the non-liability of implements of husbandry, is expressly referred to and varied. I have some doubt whether this was intended; but we are not to speculate, but must look to the words of the statute, and they are too strong to be got over.

Judgment for the appellant.

Jan. 17, 1866.

THE QUEEN v. THE INHABITANTS OF LEE.

35 L. J. M.C. 105; L. R. 1 Q.B. 241; 13 L. T. 704; 14 W. R. 311;
12 Jur. N.S. 225.

Poor-Rate—Gas-Works—Meters, Retorts, "Purifiers," Steam-Engines, Boilers, Gas-Holders

RATES AND RATING.—*A gas company was rated to the poor-rate in respect of the following articles:—meters soldered to the leaden service-pipes on the premises of consumers, but not fixed in any way so as to interfere with their removal; retorts, or instruments for the production of gas, distinct and severable from the foundation or basement floor of the company's premises, but attached to the floor by hardened fire-clay; "purifiers," or massive iron vessels standing on a brick base, but not fixed to it, though connected on one side with pipes passing through the soil from the retorts; "steam-engines" fastened by screw-bolts to a stone base fixed in the soil, and capable of being detached by unscrewing the bolts; boilers set in brickwork fixed in the soil; gas-holders, or vessels of plate-iron for storing gas, not fixed in any way, but placed so as to rise and fall in circular tanks excavated beneath the soil, and easily moved for the purpose of repairs. According to the practice and course of business in letting gas-works, the tenant would have to take to and find capital for all the articles above enumerated:—Held, that the retorts, purifiers, steam-engines, boilers and the movable part of the gas-holders appeared to be attached to the inheritance, for the permanent improvement of it, and ought to be included in the value of the premises for the purpose of rating; but that the meters must be excluded, as they could not be considered as part of the gas-works, and never were so attached to the houses as to lose the character of chattels.*

Appeal to the Quarter Sessions of Kent against a poor-rate for the parish of Lee. In this rate the appellants were assessed as follows :

Name of Occupier.	Name of Owners.	Description of Property Rated.	Name or Situation of the Property.	Estimated Extent.	Gross Estimated Rental.	Rateable Value.	Rate at 8d. in the Pound.
				Yards.	£.	£.	£. s. d.
Phoenix Gas Company.	Themselves.	Line of Pipes.	Throughout the Parish.	15,230	1,539	1,213	40 8 8

At the hearing of the appeal the rate was amended as hereafter stated, subject to the opinion of the Court upon the following

CASE.

The appellants are a gaslight and coke company, incorporated by 5 Geo. 4. c. lxxviii. (amended by the 27 & 28 Vict. c. clxx.), for the purpose of the manufacture of gas and its supply to parts of the metropolis and its suburbs. It possesses three stations or establishments for the manufacture of gas, in the parishes of St. Mary, Lambeth, St. Saviour's, Southwark, and St. Alphage, Greenwich, respectively, and two for storage, in the parishes of St. Mary, Lambeth, and St. George the Martyr, Southwark, respectively, whence the gas is distributed by mains and pipes in the various parishes of the consumers' houses.

The stations are fitted with all the apparatus necessary for the manufacture and storing of gas. This apparatus, hereinafter more particularly described, and the buildings of the stations, have been from time to time placed by the company upon land purchased by them for the purpose, and of which they are absolute owners, with the exception that a small part of their offices at Bankside is rented by them from other persons. The gas having been manufactured in the establishments above mentioned, is distributed to the various parishes through mains laid beneath the surface of the streets. From the mains it is distributed by service-pipes to the houses of the consumers and to the public lamps. The service-pipes lead to the meters which are used for measuring the gas supplied to the consumers, and from the other side of which other pipes convey the measured gas to the burners.

The mains are the property of the company. The public lamps and the service-pipes which supply them are the property of the parishes. The service-pipes which supply private consumers are laid down and belong to the company for the first 25 feet from the main, but beyond the 25 feet they are laid down and repaired at the expense of the consumers. The meters are not in all cases at so great a distance as 25 feet from the mains. At or near the place where the service-pipe ends is placed a main tap, by which the gas can be turned off, and which belongs to the consumers. Neither the meters nor the pipes beyond the main taps are on the land of the company. No rent is charged for the use of the meters, but the consumers are charged for the gas consumed as measured by the meters at a certain price per 1,000 cubic feet. The property of the company in Lee parish, exclusive of the meters, consists only of mains and service-pipes. In 1863 the assessment was raised to 1,539*l.* gross and 1,213*l.* net rateable value. Against this increased rating the company appealed, and produced the following statement, and gave evidence to establish the accuracy of the figures therein set forth :

The Phoenix Gas Company in Lee Parish.

Gross Receipts :

Total rental for the gaslight for the year ending Dec. 25, 1863	...	...	£143,689
Working expenses (setting them out)	...	£60,872	
Less residue products, viz. coke, &c.	...	33,394	
			<hr/> 27,478

Wages:			
Salaries and commissions	21,537		
Office expenses and stationery	2,104		
Maintenance of works, retorts, &c., including the expenses not only of repairs but also of re-instatement ...	20,576		
Meter repairs and fixing	3,100		
Less meter-rent received:			
Lighting, cleansing and repairing public lamps	2,981		
Stores:			
Bad debts and vouchers	715		
Law expenses	1,000		
Incidental expenses:			
Directors and auditors	2,100		
Rates and taxes, 5s. 6d. in the pound, on an assessment of 15,429l.	4,244		
			<u>85,655</u>
Net receipts			58,034
Occupiers' shares:			
Working capital	50,000		
Present value of meters	35,000		
Present value of retorts	18,000		
Present value of fixtures and utensils	97,000		
	<u>£200,000</u>		
Interest, 5l. per cent. thereon	10,000		
Trade profits, 10l. per cent. thereon ...	20,000		
Risks and casualties 2l. 10s. per cent. thereon	5,000		
			<u>35,000</u>
Gross estimated rental			£23,034
Statutable deductions:			
Probable average annual cost of renewals and insurance of buildings and apparatus	2,655		
Annual sinking fund for renewal of trade fixtures and utensils	3,000		
Annual sinking fund for reproduction of mains and pipes	1,950		
			<u>7,605</u>
Rateable value			£15,429
Rateable value of the whole works			15,429
Estimated rateable value of stations (not including the meters, retorts, fixtures and utensils in respect of which above deductions are made)			8,628
Rateable value of mains and pipes			£6,801
As £143,889 : £6,801 :: £5,144 :	£243		
gross receipts.	rateable value of the mains.	receipts in Lee.	rateable value of the mains in Lee.

The Court of Quarter Sessions reduced the items set down for law

expenses and statutable deductions in the foregoing statement, but found upon the evidence before them that all the other deductions were proper to be made, and amended the rate by reducing the net rateable value of the company's property in the Parish of Lee from 1,213*l.* to 364*l.*

It was contended, on behalf of the respondents, that the deduction which appears in the foregoing statement of a per-centage of 5*l.* per cent. for interest, 10*l.* per cent. for tenant's profits, and 2*l.* 10*s.* per cent. for risks and casualties upon present value of meters, present value of retorts, and "present value of fixtures and utensils," should not be allowed, inasmuch as the matters in respect of which the deduction was claimed, and which are more particularly described hereafter, were fixed to or connected with the land, and, instead of diminishing, increased its value for the purposes of rating.

The meters in all cases are placed on the premises of the consumers. They are not in any way connected with the manufacture, nor are they indispensable, though used for the distribution of gas and the earning of profits. They are maintained in their position by being soldered to the service-pipes, which are made of lead. If the service-pipes were not required to be flexible, soldering would not be necessary, for the meters might be so placed as to remain in position without being fixed in any way. Meters are taken off when they require repair or renewal, or for other causes, and replaced by others, and when repaired are frequently placed in a different house and in a different parish. Their original cost was 45,000*l.*

The retorts are the instruments in which the coals are carbonized and the gas produced; and they consist not merely of the circular pieces of clay to which the heat is applied, but also the arches which contain them, the pipes which permit the gas to ascend from them, the iron faces of them, and the pipes over the arches which convey the gas from them through the purifiers to the tanks, where it is received by the gas-holder. All the parts which are above the floor-level are included in the term "retorts," and the whole of these parts are distinct and severable from the foundation or basement floor, and are not attached to it by mortar or cement, but are packed with fire-clay which hardens by the action of heat, and holds them in their place. The parts of the retorts above the floor-level are very perishable. By the wear and tear caused by the action of heat and other processes of the manufacture of gas, they are soon rendered useless, and require to be renewed every two years. They are, therefore, so constructed as to be removable without difficulty and without injury to the basement on which they rest. The prime cost of the retorts required by the company is 24,000*l.*

Under the word "utensils" are included purifiers, steam-engines, boilers and the movable part of the gas-holders. The purifiers are massive iron vessels, standing on a brick base, but not fixed thereto. They are, however, connected on the one side with the pipes passing through the soil from the retorts in which the gas is produced by screwed bolts fastened into the plates of the purifier, and on the other with main pipes, similarly attached, passing through the soil to the tanks and gas-holders, where the gas is stored for use. The purifiers may be described as groups of hollow cylinders or columns of iron, perpendicularly set up parallel to each other on the brick base, closed at the top by movable lids, retained in their place by their own weight, and rendered gas-tight only by means of their edges resting in a water lute or circular channel containing water, and running round the top of the cylinder. The gas passes from the retorts through the purifiers to the tanks and gas-holders, and in its passage is purified by a chemical process. The present value of the purifiers in the aggregate is 35,000*l.*

The steam-engines are used for driving the machinery, pumps, &c., and are fastened by screw bolts to a stone base fixed in the soil. By unscrewing the bolts the engines can be detached.

The boilers are set in brickwork, which is fixed in the soil. The present value of boilers and engines is 50,000*l.*

The gas-holders are hollow vessels of plate iron, cylindrical in form, open at the bottom, but roofed in with the same materials which are used for storing the gas until required for consumption. They are not fixed in any way; but are so placed that as they fill with, or are emptied of the gas, they rise and fall in circular tanks excavated beneath the surface of the soil, into which the gas passes through the purifiers from the retorts. Around the edges of these tanks are placed iron columns. The gas-holders are fitted on their upper rim or edge with wheels, which run on the columns, and guide the gas-holder in its ascent. In some cases, also, chains are attached to the gas-holder, and pass over the top of the columns. To the other end of these chains can be attached weights, by which the weight and pressure of the gas-holder can be at pleasure regulated. It is usual and necessary at times to take down the gas-holders for repair or other purposes, and they are easily taken down without injury to the foundation or any part of the structure. They do not last more than twenty years. The present value of the gas-holders is 26,500*l.* The balance of the 97,000*l.*, after deducting the present value of the purifiers, steam-engines and boilers, and of the movable part of the gas-holders above described, represents the present value of various trade fixtures, such as pumps and exhausters, which are fixed to the freehold, but under such circumstances, and in such a manner, that, under the law governing the right to remove fixtures, a tenant who, during his term, had erected and fixed them for the purposes of his trade, would during his term have the right to sever and dispose of them. The original cost to the company of the property valued at 97,000*l.* exceeded this sum by 25,000*l.*

It was proved, on the part of the appellants, and found as a fact by the Court of Quarter Sessions upon the evidence before them, that, according to the practice and course of business in letting and hiring gasworks, the tenant would have to take to and find capital for all the property comprised under the heads "meters," "retorts," "tenant's fixtures" and "utensils," and would have to provide 150,000*l.* for that purpose, and that a deduction in respect of such outlay was to be made in estimating according to the provisions of the Parochial Assessment Act, what rent a tenant from year to year would be willing or might reasonably be expected to pay.

The Sessions found that 17*l.* 10*s.* per cent. was a fair per-centage to allow on tenant's capital for interest of money, for his own trouble and skill and for provision against risks, and allowed a deduction at that rate, not only on the 50,000*l.*, which they found to be the amount of working capital which a tenant would require, but also in the further sum of 150,000*l.*

The question for the opinion of the Court was, whether it was competent for the Court of Quarter Sessions to allow a deduction by way of tenant's profits in respect of any, and, if any, of which of the matters and things comprised under the heads meters, retorts, tenant's trade fixtures and utensils, the nature of which is above more particularly stated. If the Court of Queen's Bench should be of opinion that in any of the above-mentioned cases it was not competent for the Court of Quarter Sessions to allow a deduction, they should amend the rate accordingly.

Bovill and Mathew, for the appellants.—The gas company are entitled to a deduction from the rate imposed upon them in respect of the value of the different utensils and machinery specified in the case. First, with regard to the meters. The meters are fixed, not on the company's premises, but in private houses. They cannot in any sense be considered as connected with land occupied by the company. If anybody is the occupier of these meters, it is the tenant of the houses where they are used. With regard to the other articles, it is found as a fact in the case that (according to the usual practice in letting and hiring gas-works) a tenant would have to take to and find capital for them. It is like the case of a farm in Surrey, where the rent is materially lessened by the outlay which the incoming tenant has to make for valuations. The proof of this usage and course of business distinguishes the

case from *The Queen v. the North Staffordshire Railway Company* (30 Law J. Rep. (N.S.) M.C. 68) and *The Queen v. the Southampton Dock Company* (14 Q.B. Rep. 587; s. c. 20 Law J. Rep. (N.S.) M.C. 155). In these cases there was no evidence of any such usage or obligation on the part of the incoming tenant to purchase the stock-in-trade.

O'Malley and White, for the respondents, were directed to confine their arguments to the questions respecting the steam-engines, meters, purifiers and gas-holders.—No deduction ought to be allowed in respect of such articles. If the principle contended for by the appellants was established, land only would be rated.

[BLACKBURN, J.—It must be shewn what rent a tenant would give for this land, enhanced as it is by being used as a gas-works.]

In the cases cited, the same subjects of deduction existed as in the present case. The articles in question are as strongly attached to the freehold as what was held to be rateable in those cases. The purifiers stand immovably by their own weight.

[LUSH, J.—The gas could not be made without these purifiers.]

In *Hellawell v. Eastwood* (6 Exch. Rep. 295; s. c. 20 Law J. Rep. (N.S.) Exch. 154) the machines, which were held to be no part of the freehold, were, no doubt, strongly fastened to the floor, but the question in the case was merely whether they were distrainable. Under a local Poor Act in Birmingham, rating lands, tenements and hereditaments within the parish, it was held that the value of steam-engines and other fixed machinery ought to be taken into account—*The King v. the Birmingham and Staffordshire Gas-Light Company* (6 Ad. & E. 634; s. c. 6 Law J. Rep. (N.S.) M.C. 92). The meters are the property of the gas company, and by means of these meters the company are occupiers of the premises of their customers.

[BLACKBURN, J.—Can Mr. Broadwood be said to occupy the house of any person to whom he lets a piano?]

They also referred to *The King v. Hogg* (1 Term Rep. 721) and *Archbold's Poor Law*, 11th ed. 183.

COCKBURN, C.J.—I am of opinion that the appellants are not entitled to the substantial deductions from the rateable value of their property which are claimed by them. Whatever doubt hung over the case at the commencement of this discussion has been entirely removed by the arguments which we have heard. I entirely agree to the proposition that we must look not at the position of the actual tenant, and the fact that he has had to pay down an additional sum for machinery and fixtures which are necessary for the working of the gas establishment, but that we ought to consider what would be the rent, taking the whole concern as it stands, that an imaginary tenant would be ready to pay. Everything which is merely a chattel, and would not pass under a demise from the actual to an imaginary tenant, should be of course excluded from our consideration. This being the case, there is really no difficulty in saying what, if any, are the deductions which the company are entitled to have made from the rateable value of their premises. In the first place, I think that the counsel who have last addressed us have entirely failed in shewing that meters are anything more than common chattels. With regard to the rest of the articles, they may, I think, be ranged under two classes, both of which may properly be taken into account as enhancing the value of the building. I am satisfied that the retorts are so permanently attached and annexed to the freehold as to become part of it, and that they must not be dealt with as removable fixtures. They are, therefore, rateable as the entire freehold would be. As for the other items, they seem to me to fall within the principle of the cases cited in the argument, those of *The Queen v. the Southampton Dock Company* (14 Q.B. Rep. 587; s. c. 20 Law J. Rep. (N.S.) M.C. 155), and *The Queen v. the North Staffordshire Railway Company* (30 Law J. Rep. (N.S.) M.C. 68). In the latter case

the Court, in a considered judgment, laid down this rule, "That where things which, though capable of being removed, are yet so far attached as that it is intended that they should remain permanently connected with the purposes of the undertaking, as the railway, or the premises connected with it, and to remain permanent appendages to it as essential to its working, these must be taken to be things increasing the rateable value of the land, and in respect of which the company were not entitled to have a deduction made." That principle applies directly to the present case. No one can doubt that the purifiers and the gas-holders are part of the works which are absolutely necessary for the manufacture of gas, which is the purpose of the undertaking; and that it was intended that they should remain permanently connected with the premises. Now, if the company proposed to abandon their undertaking, and to let their premises, the gas-works, which the lessee would propose to take, and to pay rent for, would not be the land stripped of purifiers, retorts, and gas-holders. These articles are as essential to the manufacture of gas as any fixture upon the premises, however firmly it may be attached to the freehold. There is also another rule which applies to these articles, that in *Walmsley v. Milne* (7 Com. B. Rep. N.S. 115; s. c. 29 Law J. Rep. (N.S.) C.P. 97). There the owner of land mortgaged it, and afterwards erected buildings upon it for the more convenient use of the premises in his business of an innkeeper, brewer, and bath proprietor. He affixed a steam-engine and boiler, a hay-cutter, a malt-mill or corn-crusher, and a pair of grinding-stones. The lower grinding-stone was fixed on to the floor of part of the premises by means of a frame screwed to it, the upper one being fixed in the usual way, and the steam-engine, and other articles, except the boiler, were fastened by means of bolts and nuts to the walls or the floors for the purpose of steadying them, but were all capable of being removed, without injury either to themselves or to the premises. (It is possible that some of the articles here, such as the steam-engine, the purifier, and the gas-holders, may be removed without injury to themselves or the premises.) The Court, after saying that it appeared as a matter of fact that all these articles were firmly annexed to the freehold for the purpose of improving the inheritance, and not for any temporary purpose; and that the owner who had mortgaged the premises after having attached these articles to the freehold in the manner described, proposed to take them away as belonging to him, and not passing under the mortgage, go on to say "When the mortgagor (who was the real owner of the inheritance), after the date of the mortgage, annexed the fixtures in question for a permanent purpose, and for the better enjoyment of his estate, he thereby made them part of the freehold which had been vested by the mortgage deed in the mortgagee; and consequently the plaintiffs, who were the assignees of the mortgagor, cannot maintain the present action." So here, we cannot doubt that when these purifiers and gas-holders, and the steam-engine and boiler, which are absolutely essential to the working of the manufactory, were erected, it was intended that they should remain where they were for the benefit of the inheritance. I therefore think that, upon both the grounds which I have specified, the articles in question are so connected with the freehold as to shew an intention that they should remain permanently attached, and that the Sessions were wrong in allowing deductions in respect of them. These deductions must be disallowed, and the rate *pro tanto* increased.

BLACKBURN, J.—I am of the same opinion. By the Parochial Assessment Act, the rateable value of premises is to be determined according to the rent which a hypothetical tenant, making all suitable deductions, would give for the rateable property. The Sessions very properly endeavoured to ascertain the amount of that rent. Now the property in this particular parish is a portion of a larger property belonging to the gas company in this parish and in others. The first thing therefore which the Sessions had to do was to ascertain the rateable value of the whole property of the company, and

afterwards to find out what portion of it belonged to this parish. In this endeavour, they could not ascertain the ordinary rent, as it is not usual in practice to let out such property; and they were, therefore, obliged, as is commonly the case, to ascertain for themselves the elements which a tenant from year to year would take into consideration if the premises were let to him. Now it was admitted early in the case that the question which we have to decide is, what rent would a hypothetical tenant give for the whole value of the rateable property, and although the person who actually did occupy would not pay rent for portions of the property which are fixed to the premises so as to become part of them, although capable of removal, because instead of paying rent for these portions he would purchase them, yet it is allowed that we are to consider what is the rent which a hypothetical tenant would pay looking at the premises with these articles of manufacture annexed to them. It was in applying this principle that the Sessions were wrong. I take it to be clear that what the cases have laid down is this: if you wish to know for how much a furnished house is rateable, you must ascertain what is the rent for the house, and what is the rent for the furniture and fixtures; deduct what is paid for the use of the furniture and those things which form no part of the rateable premises, and the remainder will be the rent for which the house is rateable. A question will then arise whether those things in respect of which you purpose to make a deduction are in themselves part of the premises, or, like the furniture, no part of them. Some things are attached to the premises so as to be part of them, although as between the landlord and tenant, and the heir and executors, there is a right to remove them, and of course no allowance can be made for these. Other articles, such as movable furniture, are manifestly not part of what is let, and are the subject of an allowance. But there are intermediate things with respect to which it is sometimes very difficult to decide whether they are part of the premises or not, and to this class the articles in the present case belong. The rule laid down has been, that where things are attached to the premises so as to become part of them, although there may be a right to remove them, they are to be looked upon as part of the premises. But if anything is fastened to the premises so as still to remain a chattel, though fixed and steadied for the purposes of use, it never ceases, to use the phrase in the case of *Hellawell v. Eastwood* (6 Exch. Rep. 295; s. c. 20 Law J. Rep. (N.S.) Exch. 154), to have the character of a movable chattel, though fixed for the purpose of having the enjoyment of it. The ordinary illustration is the case of a mirror, which is screwed to a wall, but still remains a movable chattel, and is no part of the premises. On the other hand, a grate which is built into a chimney, although it is capable of being removed, would still be fixed to the premises so as to be part of them, and, therefore, part of what would be considered as let to the hypothetical tenant, and for which he would pay rent. In *Hellawell v. Eastwood* (6 Exch. Rep. 295; s. c. 20 Law J. Rep. (N.S.) Exch. 154), the Court were dealing with machinery which was fixed, screwed and attached to the premises, and they laid down the rule as being a matter of fact depending upon the circumstances in each case, but principally upon two considerations, first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can be easily removed, *integre, salve, et commode*, or not without injury to itself or the fabric of the building; secondly, and this is worthy of attention, on the object and purposes of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil law, *perpetui usus causa*, or in that of the *Year Book*, *pour un profit del inheritance*, or merely for temporary purposes, or the more complete enjoyment and use of it as a chattel. In the case before them the Court thought that the articles in question were only put up and fastened for the temporary use and enjoyment of them as chattels; but they clearly and distinctly pointed out two important elements for consideration: first, the degree of

annexation; and, secondly, the object of the annexation. Was the article attached for the improvement of the inheritance or for the enjoyment only of the article itself?

In the case of *Walmsley v. Milne* (7 Com. B. Rep. N.S. 115; s. c. 29 Law J. Rep. (N.S.) C.P. 97), which was similar in its facts to *Hellawell v. Eastwood* (6 Exch. Rep. 295; s. c. 20 Law J. Rep. (N.S.) Exch. 154), the Court of Common Pleas laid down the same rule, and thought the machinery attached to the inheritance for the purpose of improving it, so that it became part of it. So also in the case of *The Queen v. the Southampton Dock Company* (14 Q.B. Rep. 587; s. c. 20 Law J. Rep. (N.S.) M.C. 155) the same idea is conveyed. There the articles were cranes, turn-tables, and other machinery, which were, in one sense, attached to the premises of the company, by being screwed down, some of them firmly attached, and some not. The Court said that an allowance must be made in respect of those articles which were not attached to the freehold, but that no allowance ought to be made for those things which were affixed to the freehold. The rule laid down for the guidance of the Sessions was this: "The articles may be divided into three classes: first, things movable, such as office and station furniture; secondly, things so attached to the freehold as to become part of it; thirdly, things which, though capable of being removed, are yet so far attached as that they were intended to remain permanently connected with the railway or the premises connected with it, and to remain permanent appendages to it as essential to its working." This phrase, as it seems to me, contains the same idea as that in *Hellawell v. Eastwood* (6 Exch. Rep. 295; s. c. 20 Law J. Rep. (N.S.) Exch. 154), where quoting from the *Year Book*, it is said, that one consideration is whether the annexation was *pour un profit del inheritance*; and in the case in the Common Pleas, where the question is stated to be, whether the articles are for the enjoyment of the inheritance. The idea is throughout the same. The articles may be but slightly annexed, but if this is done for the permanent improvement of the inheritance, they are rateable. Keeping this principle in view, I was at first disposed to think that some of these articles belonging to gas-works were not rightly included in the rate. With the exception of the meters, they are all, although but slightly, attached to the premises. And I think it quite clear that they are, in fact, attached with the view of enhancing the benefit of the premises to which they belong, so as to come within the principle laid down in the cases of which I have spoken. With reference to the meters the case is different. The meters are themselves chattels, except so far as they are attached to the houses in which they are put up. They are attached to the houses by means of a pipe which comes through the wall, and is joined to the meter. If they were attached to the house for the purpose of improving it, they would become fixed property. But it is obvious that the meters are kept as the company's meters, to be used as their chattels for measuring the gas, and were never intended to be for the benefit of the house to which they are to be attached at all. They are, therefore, no part of the inheritance of the company. Mr. White, indeed, endeavoured to shew that a meter occupies part of the space of a house, and, therefore, the company, by means of the meter, occupied part of the house. But, although the meter is firmly fixed to the house, and steadied by being fixed, it does not make the company the occupier of any part of the house any more (as I observed during the argument) than Mr. Broadwood can be said to occupy houses by means of pianos which are hired from him. I therefore, think that meters were properly made the subject of a deduction, and that a proportionate sum ought to be deducted in respect of them.

LUSH, J.—I am of the same opinion. The sum to be arrived at is the net annual value of these premises, that is, the rent at which they might reasonably be expected to let from year to year, free from all usual tenant's rates and taxes, and deducting the expenses necessary for their maintenance in their present condition. What is the rateable subject which is comprised

within the premises to be rated here? Now, I apprehend that the premises to be rated are to be taken as they are, with all the fittings and appliances by which the owner has adapted them to a particular use, and which would pass as part of the premises if they were demised to a tenant. That seems to me to express what is laid down in the two cases which have been referred to. Wherever such fittings and appliances have become so far a part of the premises as to pass by a demise of these premises, they form a part of the rateable subject of the inheritance for the purpose of rating. When we have to apply this test to any particular state of circumstances, the question is not what a tenant might remove, not what might be taken in execution under a writ against the owner, but what, as between the landlord and tenant, would pass as part of the premises. In applying this rule, I cannot entertain a doubt that, with the exception of the meters, all the articles which have been the subject of the present discussion would pass as necessarily belonging to the premises. Without the retorts, purifiers, steam-engines and gas-holders, the premises would be worthless for the purpose for which they were erected, and could not be used as a gas-manufactory. They are all of them fixed, and so far annexed to the freehold as to make it plain that they are intended to be permanently placed for the use of the land and buildings as gas-works. The meters are on a different footing. They are not a part of the gas-works, as they are neither upon land occupied by the company, nor fixed in such manner as to be a part of the freehold. I was struck in the early part of the argument with the findings in the case that, according to the practice and course of business in letting and hiring gas-works, the tenant would have to take to and find capital for all the property comprised under the heads meters, retorts, tenant's fixtures and utensils, and would have to provide 15,000*l.* for that purpose, and that a deduction in respect of such outlay was to be made in estimating according to the provisions of the Parochial Assessment Act what rent a tenant from year to year would give. I thought at first that as the tenant would take the premises without making an outlay by purchasing those articles, the rent he would have to pay would be so much less, and would represent the rateable value of the property. But upon consideration, I agree with my Lord and my Brother Blackburn, that this is not a right view of the case. If the landlord agrees that the tenant should pay down a price for part, that is, purchase part of the freehold, it would be absurd to say that its rateable value is diminished. It makes no difference whether the tenant occupies the whole, or whether, by contract between him and the landlord, he purchases the fixed plant which, if not so purchased, would be a part of the permanent premises. I entirely agree in the opinion that, with the exception of the meters, all the rest of the enumerated articles are rateable, and that no deductions in respect of them ought to be allowed.

Deductions disallowed, except in respect of meters; and rate remitted to the Sessions to be amended according to the judgment of the Court.

[IN THE COURT OF QUEEN'S BENCH.]

Jan. 24, 1866.

THE QUEEN v. HEATH AND OTHERS.

35 L. J. M. C. 113; 6 B. & S. 578; 12 L. T. 492; 13 W. R. 805.

See, *Heath v. Weaverham Overseers*, [1894] E. R. A.; 63 L. J. M.C. 187; [1894] 2 Q.B. 108; 70 L. T. 729; 42 W. R. 478 (Q.B.D. Div.). Referred to *Dalton Overseers v. North Eastern Railway*, [1900] E. R. A.; 69 L. J. Q.B. 650; [1900] A.C. 345; 82 L. T. 693 (H.L.). Discussed, *Ferrand v. Bingley Urban Council*, [1903] E. R. A.; 72 L. J. K.B. 734; [1903] 2 K.B. 445; 89 L. T. 333; 52 W. R. 77 (K.B.D. Div.).

Poor-Rate—Highway Acts, 1835, 1862 (5 & 6 Will. 4. c. 50. ss. 27, 33; 25 & 26 Vict. c. 61. ss. 3, 6, 7, 21, 42).—*Exemption from Liability to Highway-Rate—District Board—Precept to Overseers of Parish.*

HIGHWAYS.—*The occupiers of certain lands in a hamlet which maintained its own highways, and was locally situated within, and was assessed to the poor-rate for the township of W, which township separately maintained its own poor, were exempt from liability to contribute to the repairs of the highways in the hamlet before the passing of the Highway Act, 1835. By section 27. of that act all property liable to be assessed to the relief of the poor was made rateable to the repair of highways; but by section 33. all legal exemptions were preserved. After the passing of the Highway Act, 1862, the hamlet was, by an order of Quarter Sessions, combined with the township and other places into a highway district under that act. The highway board for such district issued a precept to the overseers of the township to contribute out of the poor-rates a certain sum for the repair of the highways of the township, now including the hamlet. By section 42. of the Highway Act, 1862, the former act was to be construed as one with that act:—Held, that the occupiers of the lands in question were exempt from contributing to a poor-rate levied by the overseers of the township for the purposes of the relief of the poor, and to meet the precept of the district board as to so much as they assessed in respect of the repairs of the highways; for that substitution of the poor-rate for the highway-rate by the Highway Act, 1862, as the fund out of which the supplies for maintaining the roads have to come, did not take away the former exemption which had been preserved by the Highway Act, 1835.*

The Court of Quarter Sessions for the county of Chester, upon the hearing of an appeal against an assessment for the relief of the poor of the township of Weaverham, in the same county, and for other purposes chargeable thereon, made the 29th of April, 1864, confirmed the rate, subject to the following

CASE.

The township of Weaverham, in the county of Chester, is one of several townships, which together constitute the parish of Weaverham. Weaverham township, however, is a place separately maintaining its own poor, and for which two overseers are annually appointed, under the statute 43 Eliz. c. 2. s. 1.

The hamlet of Gorstage is locally situate within the township of Weaverham, and has from time immemorial maintained its own highways quite separately and distinctly from the rest of that township, and a surveyor of highways was annually appointed for such hamlet until the date of the order of Sessions hereinafter referred to. Gorstage was not, however, a place separately maintaining its own poor, but has always been assessed to the poor-rate made for the whole township of Weaverham. The appellant Robert Heath is the owner in fee simple of a mansion-house, certain farms and lands

situate in the hamlet of Gorstage, called Hefferston Grange, and being formerly part of the possessions of the dissolved monastery of Vale Royal. The said mansion-house, farms and land are now occupied by the appellants Robert Heath, John Gerrard and John Newall. From time immemorial the owners and occupiers of Hefferston Grange have been liable to repair and have repaired at their sole expense a certain road or highway in the hamlet of Gorstage, leading from Acton Bridge to Tarporley, both in the county of Chester, and have in consequence of such liability been exempt from repairing or contributing to the repairs of the other highways in the said hamlet of Gorstage. The occupiers of Hefferston Grange have always been rated in respect of the same to the relief of the poor.

An order of the Court of Quarter Sessions for the county of Chester was made on the 4th of March, 1863, by which, amongst other highway districts, the township of Weaverham was, with certain other places, made into the highway district of the west division of the hundred of Eddisbury.

Since the making of that order of Sessions no surveyor of highways has been appointed, nor any separate highway rate been made for Gorstage; but the highways therein which were formerly repaired by that hamlet have been repaired by the highway board at the expense or on account of the township of Weaverham. For the purpose of obtaining the sum necessary to repair the roads in the said township of Weaverham, including the highways in the hamlet of Gorstage, the highway board of the west division of the hundred of Eddisbury, on the 13th of April, 1864, directed its precept to the overseers of the township of Weaverham, under section 21. of the 25 & 26 Vict. c. 61. requiring them to pay the sum of 300*l.*, by two weekly instalments of 150*l.* each, to the treasurer of the highway board, from the poor-rates of their township, towards the repairs of the highways in the township, and the contribution of the township to the common fund of that highway division.

To enable the overseers of Weaverham to pay the first instalment of the said sum of 300*l.* to the treasurer of the said highway board, and to raise the sum necessary for poor-law purposes in the half-year ending the 29th of September, 1864, the overseers made the rate appealed against. It is a rate made upon every occupier of property liable to be rated to the relief of the poor in the whole township of Weaverham. The rate assessed upon each occupier is 1*s.* in the pound: of this sum 4*d.* in the pound, or thereabouts, is the sum necessary to be raised for the payment of the sum of 150*l.*, being the first instalment of the sum required to be paid by the precept before mentioned for the repairs of the highways, and 8*d.* in the pound, or thereabouts, is the sum necessary to be raised for the relief of the poor of Weaverham. Each of the appellants is rated in the sum of 1*s.* in the pound.

The rate was headed "An assessment for the relief of the poor of the township of Weaverham, in the county of Chester, and for other purposes chargeable thereon according to law, made this 28th day of April, in the year of our Lord 1864, after the rate of 1*s.* in the pound." One ground of appeal was, that the appellants (Heath, Gerrard and Newall) were overrated in respect of the said land and premises occupied by them respectively in the said township of Weaverham, inasmuch as the sum rated and assessed by the said rate upon them respectively, included money payable or intended to be paid by the overseers for the repairs of the highways of the township of Weaverham, under the statute 25 & 26 Vict. c. 61. s. 21: they, the said Heath, Gerrard and Newall, being legally exempt from all liability to repair the highways of the said township, save a certain part of a certain highway mentioned in another (the third) ground of appeal, and from the performance of statute duty on such highways, and from the payment of any composition in lieu thereof, and from highway-rates.

The third ground of appeal was, that the appellants were exempt, as in the former ground stated, in consideration of their sole liability to repair a

certain portion of a highway (now a turnpike-road) within the said township, called "The road from Tarporley to the east end of Acton Forge."

The fourth ground was, that the including in the said poor-rate money payable or intended to be paid for the repairs of the highways, as in the above first-mentioned ground of appeal mentioned, is illegal, inasmuch as the said lands and premises occupied by the appellants are situate in the hamlet of Gorstage, which has from time immemorial repaired, and still is liable to repair, all the highways situate within the said hamlet, except the said part of the said road mentioned in the third ground of appeal, which the appellants are liable to repair as aforesaid.

The fifth ground was, that the hamlet of Gorstage, which is, as in the fourth ground of appeal mentioned, liable to repair the highways therein situate, and in which the said lands and premises are situate, although forming part of the township of Weaverham, has not been combined with the said township by the order of Quarter Sessions, bearing date the 4th of March, 1863, inasmuch as the said township was not either a parish in fact or, as being a place maintaining its own highways, a parish within the meaning of the 25 & 26 Vict. c. 61. s. 3, or of the principal act, 5 & 6 Will. 4. c. 50. s. 5.

The appellants contended that they were by this rate assessed in too high a sum, and that no portion of the sum of 300*l.* payable under the precept of the West Eddisbury Highway Board should be levied upon them, as they are exempt from contributing to the repairs of the highways in Gorstage, whether that hamlet be separated from or amalgamated with the rest of the township of Weaverham. And that they ought only to be assessed at 8*d.* in the pound, or thereabouts, being the sum necessary to raise the money required for the relief of the poor.

If the Court should be of opinion that the appellants ought not to be assessed in respect of the sum payable under the precept of the West Eddisbury Highway Board, then the sum assessed upon them is to be at the rate of 8*d.* in the pound, or thereabouts, and the said rate is to be amended and reduced accordingly, otherwise it is to stand confirmed.

Mellish (*M'Intyre* with him) Nov. 18, 1865), for the respondents in the appeal.—The appellants, as occupiers of property rateable to the relief of the poor of the township of Weaverham, were liable to contribute to the repairs of the highways within that township. The hamlet of Gorstage has by operation of the order of Sessions, dated the 4th of March, 1863, ceased to be a place maintaining its own highways, and has become, for the purposes of the Highway Act (25 & 26 Vict. c. 61. ss. 5, 6, 7), part of the township of Weaverham, and the appellants, as occupiers of land situate in the hamlet of Gorstage, are liable to contribute to the repairs of all the highways within the township. The appellants having become free from their liability, *ratione tenuræ*, to repair a particular road in the hamlet of Gorstage, within the township, are now rateable to the poor-rate and liable to pay rates for repair of the highways of the township generally.—They referred to 25 & 26 Vict. c. 61, ss. 3, 5, 6, 7, 21, 22, 23, 34, 35, and 27 & 28 Vict. c. 101. ss. 7, 32, 33, 34.

Temple (*Heath* with him), for the appellants. It being admitted by the case that the exemption of the appellants and their lands existed down to the passing of the 25 & 26 Vict. c. 61, neither their exemption nor liability is affected thereby. Although section 27. of the principal act (5 & 6 Will. 4. c. 50.) directs generally that all property liable to be assessed to the relief of the poor shall be rated to the highways, yet section 33. of that act preserves legal exemptions; and by section 42. of the 25 & 26 Vict. c. 61. the latter act is to be construed as one with the principal act. The intention and effect of the 25 & 26 Vict. c. 61. was not to alter the liability of parishes, individuals or corporations with regard to the repair of highways, or to abolish legal exemptions, or to make the expense of maintaining the highways a charge against the poor-rate, but only to alter the management of highways and to cause the same parish officers (*viz.*, the overseers) who assess and levy the necessary

expenses relative to the poor to assess and levy also the necessary expenses relative to the highways—*Freeman v. Read* (32 Law J. Rep. (N.S.) M.C. 226; s. c. 4 Best & S. 174). A subsequent act of parliament will not control the provisions of a prior statute unless it were intended to have that operation. And where the intention of the legislature is apparent, that the subsequent act should not have such an operation, there even though the words of such statute taken strictly and grammatically would repeal a former act, the Courts of law, judging for the benefit of the subject, have held that they ought not to receive such a construction—*Williams v. Pritchard* (4 Term Rep. 2), *per* Lord Kenyon. In that case lands had by a prior act been made “free from all taxes and assessments whatsoever,” and a subsequent statute, which imposed the land-tax in terms large enough to include such lands, was held not to repeal the prior exemption. So an exemption by custom from serving on juries was held not to be taken away by a subsequent Jury Act—*The Queen v. Pugh* (1 Dougl. 188). By the act of 1862, sections 34. and 35, the liability of persons to repair highways *ratione tenuræ* is preserved and provided for. The highway rate is included in the assessment appealed against—27 & 28 Vict. c. 191. s. 3, but it can easily be separated, and its relative proportion to the cost of maintaining the poor necessarily must be calculated and known in order to comply with the 27 & 28 Vict. c. 33, which limits the contributions by parishes for highway purposes to certain amounts in the pound and in order to form mortgages of the highway rates—27 & 28 Vict. c. 101. s. 50. and 2nd Schedule to the act. And the overseers must take into consideration the particular circumstances of each case as far as they are visible—*The Overseers of Sunderland v. the Guardians of the Sunderland Union* (34 Law J. Rep. (N.S.) M.C. 121). In making the assessment appealed against, and similar assessments to which the general denomination of poor-rates is given, the overseers are in fact making a highway rate as well as a poor-rate in the strict sense of the word, and should have regard to the law affecting each species of rate. By the 27 & 28 Vict. c. 101. s. 33, if there had been in this township property liable to highway rates but not liable to poor-rates (timber trees or mines, other than coal-mines, for instance), the waywarden would have raised the amount required by the precept of the highway board out of a highway-rate assessed and levied in the manner and in respect of the property in and in respect of which the same would have been assessed and levied if that act had not passed. In that case the appellants’ exemption must have been allowed; but it cannot have been intended by the act that the allowance or disallowance of the exemption should depend upon the accident whether or not such property existed in the township. The township of Weaverham is not a parish within the 25 & 26 Vict. c. 61. ss. 3, 6, 7, and therefore Gorstage has not been legally combined with it.

(*Mellish* referred, as to the last point, to 25 & 26 Vict. c. 61. s. 8.)

Cur. adv. vult.

The judgment of the Court was delivered, on the 24th of January, by—

LUSH, J.—This was an appeal against a poor-rate for the township of Weaverham, in the parish of Weaverham, in the county of Chester, whereby 1s. in the pound was assessed upon the occupiers of all the rateable property in the township. Of this rate, 8d. in the pound was raised for the relief of the poor, the remaining 4d. being for the repairs of the highways. The ground of appeal was that the appellants were not liable to contribute to the repairs of the highways, and therefore that the rate upon them was excessive, and ought to be reduced. The township is a place separately maintaining its own poor, and it contains within its area the hamlet of Gorstage, which has from time immemorial maintained its own highways. The appellants are occupiers of a mansion-house, and of certain farms and lands within the hamlet, the owners and occupiers of which have from time immemorial been liable to

repair and have repaired, at their sole expense, a certain road or highway in the hamlet, and have in consequence of such liability been exempt from repairing or contributing to the repair of the other highways therein, but they have always been rated to the relief of the poor of the township. The Court of Quarter Sessions of the county, by an order made under the 25 & 26 Vict. c. 61, divided the county into highway districts, and, amongst other things, ordered, under section 7, that "in case any township which separately maintains its own poor is divided into any tithings, hamlets, or places, each of which separately maintains its own highways, such tithings, hamlets and places shall be combined, and no separate waywarden shall be elected for such tithings, hamlets and places, and such township shall be subject to the same liabilities in respect of all the highways within it, which were before maintained by such tithings, hamlets and places separately, as if all their several liabilities had attached to the whole township, and one waywarden shall be elected for such township as a whole." By virtue of this order the hamlet became, for highway purposes, merged in the township, and the poor-law parish and the highway parish thus became conterminous. The highway board, for the purpose of obtaining the sum necessary to repair the highways in the township, including those which had theretofore been repaired by the hamlet, issued their precept to the overseers of the township under section 21. of the before-mentioned act, requiring the overseers to pay the sum of 300*l.* to the treasurer of the board. To enable them to pay the first instalment of this sum, and to raise the sum necessary for poor-law purposes, the overseers made the rate against which the appeal was lodged.

It was contended by the appellants, that inasmuch as they were, before the order of Sessions, exempted from highway-rates in the hamlet they are equally exempted from contributing, by means of the poor-rate, to the sum required for highway purposes. On the other hand, it was urged by the respondents that, as the maintenance of the highways in the hamlet is transferred from the hamlet and charged upon the poor-rate of the township, which is and must be raised by an equal pound rate upon all the assessable property in the parish, the exemption which the lands in question before enjoyed is by necessary implication abolished.

Until the passing of the 25 & 26 Vict. c. 61. the fund for maintaining the highways had been raised by a highway-rate upon the parish, township, or hamlet liable thereto. And by the 33rd section of the Highway Act, the 5 & 6 Will. 4. c. 50, it was enacted, that "when property, or the owner in respect thereof, has, previous to the passing of this act, been legally exempted from the performance of statute duty, or from the payment of any composition in lieu thereof, or of any highway-rate, the said property and the owners and occupiers thereof shall be exempt from the payment of the rate hereby imposed." That act is still in force, and by the 42nd section of the recent act it is to be construed as one with the latter act, so far as the provisions of the one are consistent with those of the other. Is there, then, anything in the recent act inconsistent with the provision here made for continuing the exemption to which the property had before been entitled? The 21st section enacts, that "for the purpose of obtaining payment from the several parishes within their district of the sums due from them, the highway board shall order precepts to be issued to the overseers of the said parishes, stating the sum to be contributed by each parish, and requiring the overseers of such parish, within a time to be limited by the precept, to pay the sum therein mentioned to the treasurer of the board, and the overseers shall comply with the requisition of such precept by paying the sums to be contributed by their respective parishes out of any monies in their hands applicable to the relief of the poor; but no contribution required to be paid by any parish at any one time in pursuance of this act shall exceed the sum of 10*d.* in the pound, and the aggregate of contributions required to be paid by any parish in any one year in pursuance of this act shall not exceed the sum of 2*s.* 6*d.* in the pound,

except with the consent of four-fifths of the ratepayers of the parish in which such excess may be levied, present at a meeting specially called for the purpose, of which ten days' previous notice has been given by the waywardens of such parish, and then only to such extent as may be determined by such meeting; provided, that in any parish where, for a period of not less than seven years immediately preceding the passing of this act, it has been the custom of the surveyors of highways for such parish to levy a highway-rate in respect of property not subject by law to be assessed to poor-rates, the monies payable in pursuance of the precept of the highway board shall not be paid by the overseers, but may be raised and paid by the waywardens of such parish out of a highway-rate, to be assessed and levied in manner and in respect of the property in and in respect of which the same would have been assessed, and levied if this act had not passed." It appears clear to us that the object of the legislature in passing this act was not to alter the liability to highway maintenance, but only to extend the area of management, equalize the costs of repair, and simplify the machinery for providing the necessary funds; and it is plain that if there had been in this township lands liable to contribution to the highways but not to the poor-rate, the lands in question would by virtue of the 33rd section above quoted, be exempted as they were before. If, therefore, these lands are now chargeable, it must be as a necessary consequence, not intended by the legislature of their having in cases like the present substituted the poor-rate for the highway-rate as the fund out of which the supplies for maintaining the roads are to come. But we are of opinion that no such consequence follows.

So much of the rate imposed for both purposes as is raised for the support of the poor must, no doubt, be an equal pound rate upon all the occupiers of property liable to be assessed for that purpose; but that being so, the rate cannot be objected to because so much of it as is raised for the highways is imposed upon only part of the property, the residue not being liable to that charge. The two assessments will appear on the face of the rates, so that the ratepayers may see how much is for the maintenance of the poor and how much for highways, and why one occupier who is liable to both is charged with the aggregate, and another who is liable to one only with that one. There is no inequality in this, for every occupier is equally charged with the burden which belongs to him. This mode of working out the requirements of the act appears to us to have been sanctioned, if not required by the 22nd section. That section enacts, that "where any parish as defined by this act and in this section called a highway parish, is not a parish separately maintaining its own poor, in this section called a poor-law parish, the highway board shall issue their precept or precepts to the overseers of the poor-law parish, or of the several poor-law parishes, if more than one, of which such highway parish forms part, and the precept or precepts so issued shall specify the part or parts of the poor-law parish or poor-law parishes constituting the highway parish in which the sum required by the board is to be levied, and if there be more than one such parish, shall apportion amongst such parts the amounts to be levied in such parish." Where in the cases contemplated by this section the overseers require to raise money for the maintenance of the poor as well as for the highways, they must, in order to comply with the statute, adopt the course contended for by the appellant.

For these reasons, we are of opinion that the order of Sessions confirming the rate should be quashed, and the rate amended by reducing the assessment upon the appellants to 8d. in the pound.

Order of Sessions quashed; rate to be amended.

[IN THE COURT OF COMMON PLEAS.]

Feb. 10, 1866.

PEACHE, *appellant*, v. COLMAN, *respondent*.35 L. J. M.C. 118; 1 H. & R. 393; L. R. 1 C.P. 324; 14 W. R. 439;
12 Jur. N.S. 273.Referred to, *Peplow v. Richardson*, 1869, L. R. 4 C.P. 168; 17 W. R. 410 (C.P.).See now, The Licensing (Consolidation) Act, 1910 (10 Edw. VII. & 1 Geo. V.,
c. 24) s. 61.*Public-House—Opening on a Sunday—11 & 12 Vict. c. 49. s. 1.*

INTOXICATING LIQUORS.—*The appellant kept a public-house outside the Sevenoaks Railway Station, which was a mile from Sevenoaks. On Whitsunday, after the arrival of several excursion trains, and before half-past twelve in the day, several persons were in his house drinking; two were Sevenoaks persons, but the only evidence as to the appellant's knowledge that they were there was his remark (upon his attention being called to them as they left), that he was not aware Sevenoaks persons were there:—Held, that the Justices were not bound to convict him on a charge under 11 & 12 Vict. c. 49. s. 1. for having his house open illegally.*

This was a case stated by Justices, for the opinion of the Court, under 20 & 21 Vict. c. 45.

At a petty sessions held at Sevenoaks, in the county of Kent, an information was preferred by the respondent against the appellant under the 11 & 12 Vict. c. 49. s. 1, for opening his public-house on Sunday the 4th of June, 1865, for the sale of wine, spirits, and other fermented and distilled liquors, before the hour of half-past twelve, the same not being for refreshment to any traveller or lodger.

Upon the hearing of the said information a constable was called as a witness, on the part of the respondent, and proved as follows:

"On the 4th of June last (a Sunday) I visited the Railway Tavern ale-house, kept by the defendant John Peache, about twenty-five minutes to twelve in the morning. I found several persons there smoking and drinking. I asked Mr. Peache how his house came to be open at that hour, and Sevenoaks people drinking and leaving. I saw some Sevenoaks people there: one a man of the name of Budgen and his son, and another by the name of Morgan, and another elderly person—I did not know his name. I called Mr. Peache's attention to him, and said, 'You do not call him a traveller?' and he replied, 'Oh, yes, he does belong to Sevenoaks.' I saw the persons mentioned leave the house. The elderly person was in the parlour sitting down, smoking. I left him there. When I left I spoke to Mr. Peache, and he said he was not aware that any Sevenoaks people had been in the house. I asked him, 'What are those that have just gone out?' He said, he did not know; he did not see them; he could not tell everybody."

This witness, on cross-examination by the appellant's attorney, said: "Mr. Peache's house is just outside the gates of the railway station. There were not eighteen persons, I should say, in the house. I saw no one eating bread and cheese: I only went into the parlour. I know there are excursion trains on a Sunday. I was there three quarters of an hour before a train had come in."

In reply to a question by the Justices, the witness said, "Before the parties came away I saw Morgan drink ale, and I saw all the other men in the house."

The appellant's attorney admitted that the elderly person above referred to was a Sevenoaks person, who had gone to meet a friend coming by the

rail; and he submitted that such person was entitled to be at the appellant's house as described.

And for the appellant, a witness was called, who being sworn said, "I live at Hartsbands, Sevenoaks. I recollect the 4th of June (Whitsunday), I was at Mr. Peache's house on the morning of that day. My father came from Tunbridge, and he and I went down to the train to meet my brother and his wife, who were coming from London. The train was late. It got in about a quarter past eleven, and there were a good many passengers. When we got to Mr. Peache's my brother said he should like a glass of ale, and I and my father drank a glass of ale with him. He called for it. I said, 'He is a traveller; I must not drink it, but he may.'"

This witness on cross-examination said, "I saw no one that I knew. My father must pass my house before he got to the railway station."

It was contended that the appellant had committed no offence. That it was impossible he could personally see all parties who flocked to his house on the arrival of trains, and that he had as he believed supplied refreshment to those persons only whom he believed to be *bona fide* travellers on the Sunday in question. That it was a common occurrence for parties in the neighbourhood to come to his house with friends who had come in by the train, and whom such parties had gone to meet, but that on such occasions he did not supply such parties but only their friends with refreshments.

It was admitted by the appellant that the proceedings before the Justices were legal and regular, and that if he had committed the offence charged the said conviction was properly made.

The Justices being of opinion that the evidence given before them and above set out brought the case within the operation of the said 1st section of the said act, the 11 & 12 Vict. c. 49, gave their determination against the appellant and convicted him; but they granted a case, which after stating the above facts concluded as follows:

The question of law arising on the above statement for the opinion of this Court is—

Whether the appellant committed an offence against the statute and was rightly convicted of keeping his house open for the sale of wine, &c., before the hour of half-past twelve on the Sunday in question, under the circumstances detailed in the evidence in this case.

The railway station is about a mile distant from Sevenoaks town, where Budgen, the person referred to in the constable's evidence, resides. Sunday, the 4th of June, was Whitsunday, and on that morning a great number of persons came to the Sevenoaks station by the train.

If the Court should be of opinion that the said conviction was legally and properly made, and the appellant liable as aforesaid, then the said conviction is to stand, but if the Court should be of opinion otherwise, then the said information is to be quashed.

Hayes, Serj., for the appellant.—The charge is for opening the house, not for selling the liquors; and it is clear on the evidence that the appellant opened the house for the refreshment of travellers, and he was not liable to be convicted even though some of the persons supplied were, unknown to him, not travellers. But further, as far as appears, every person in the house may have been a traveller within the meaning of the statute, and the onus of disproving this lay on the respondent. The present case falls exactly within *Taylor v. Humphries* (34 Law J. Rep. (N.S.) M.C. 1).

No one appeared for the respondent.

WILLES, J.—The appellant was convicted under the 11 & 12 Vict. c. 49. s. 1, for opening his house for the sale of fermented liquors on a Sunday before half-past twelve. It appeared that on Whitsunday he opened his house, which is near the Sevenoaks railway station, before half-past twelve, and that before that hour there were several persons in the house, some eighteen or so.

Of these, the large proportion would seem to have been travellers; but amongst them there were some persons belonging to Sevenoaks. With respect to these latter persons, one, as far as appears, did not have any liquor, and as to the two who had, the only evidence as to knowledge is the remark of the landlord that he was not aware that any Sevenoaks persons had been in the house. These persons went away, and the probability is, that they did so because they were conscious that they ought not to be drinking there; but still the only proof as to whether the landlord knew or not that these Sevenoaks persons were drinking in his house is in his own statement, which is, that he was not aware of it. The question is somewhat peculiarly stated by the Justices, who gave no opinion as to the knowledge of the appellant that Sevenoaks persons were drinking in his house, and perhaps they may have felt that the reasonable conclusion was that the house was opened *bona fide*, but that these persons happened to be in the house, and went away because they ought not to have been there. I think, however, that the question of the Justices amounts to asking whether they were bound to convict, and as I think they were not so bound, the conviction ought, therefore, in my opinion, to be quashed.

KEATING, J.—I am of the same opinion.

MONTAGUE SMITH, J.—I am of the same opinion. I cannot see any evidence that the house was opened except for travellers, or that liquor was sold to any one who was not a traveller. An excursion train had just arrived, and the persons in the house might have arrived by it. They might either have been travellers and going home, or might have come to meet their friends at the train, in either of which cases I think that they would equally be travellers within the meaning of the statute; for if the train were late, for instance, it would be hard that those coming to meet it should not be supplied with liquor.

Conviction quashed.

[IN THE COURT OF QUEEN'S BENCH.]

Jan. 23, 24, 1866.

CHARLOTTE WINSOR, *plaintiff in error*, v. THE QUEEN, *defendant in error*.

35 L. J. M.C. 121; L. R. 1 Q.B. 289; 6 B. & S. 143; 14 L. T. 195; 14 W. R. 423; 10 Cox C.C. 276; 12 Jur. N.S. 91: affirmed, [1866] E. R. A. 2497; 35 L. J. M.C. 161; L. R. 1 Q.B. 390; 7 B. & S. 490; 14 L. T. 567; 14 W. R. 695; 10 Cox C.C. 327; 12 Jur. N.S. 561 (Ex. Ch.).

Indictment for Murder—Discharge of Jury without Verdict—Judge's Discretion—Venire de novo—Prisoner's Life twice in Jeopardy—Discharge of Jury no bar to Second Trial—Sunday Dies non juridicus—Refreshment to Jury after Retirement—Admissibility of Accomplice jointly indicted—Court of Error.

CRIMINAL LAW.—The record shewed that on the trial of W. and H., who were jointly indicted, for murder, the jury, after five hours' deliberation, at five minutes before midnight on Saturday night were discharged by the Judge without giving a verdict, and without the consent of the prisoner or of the prosecution, on the grounds that they had not agreed, and declared they could not agree, upon any verdict, and that all the rest of the assize business was finished, and the Lord's Day was immediately at hand, and that he, the Judge, was required to be in another county on Monday, in the execution of the Commission, and that, for the above reasons, the Judge "decided that it was necessary to discharge the jury." W. was afterwards given in charge to another jury and tried, alone,

upon the same indictment, when a verdict of guilty was returned, and judgment of death recorded; H. being admitted as a witness against her without having been either acquitted or convicted on the indictment:—Held, on a writ of error, that the judgment below must be affirmed; that the second trial was legal, since the discharge of the jury on the first trial was no bar to the second; that the discharge of the jury was a matter for the discretion of the presiding Judge alone, and could not be reviewed in a Court of error; that, even if that discretion had been improperly exercised, it would have afforded no bar to a second trial; and (per Blackburn, J.) that in all cases where, on an indictment, there has been no verdict found, or the verdict has been imperfect, the proper course is to award a venire de novo, and try the accused again;—and, semble, that this is applicable to indictments for capital felonies and for misdemeanors alike.

Held, also, that the question of the admissibility of the accomplice as a witness could not be raised on a writ of error; but, semble, that if it could H. was admissible, although the indictment with regard to her had not been disposed of.

Quære—Whether a verdict taken and recorded on Sunday would be valid.

Quære, also—Whether a Judge has the power to order refreshment to a jury after they have retired to consider their verdict.

Writ of error directing the Justices of Oyer and Terminer for the county of Devon, and Justices assigned to deliver the gaol of that county, to send up a certain record.

The record set forth, that at the general session of oyer and terminer held at Exeter for the county of Devon on the 13th of March, 1865, before Crompton, J. and Channell, B., the grand jury presented that Charlotte Winsor and Mary Ann Harris, on the 14th of February, 1865, at the parish of St. Mary Church, in Devon, feloniously, wilfully, and of their malice aforethought, did kill and murder Thomas Edwin Gibson Harris, against the peace, &c., and afterwards, at the same general session of gaol delivery, on the 17th of March ensuing, Winsor and Harris severally pleaded not guilty to that indictment, and a jury were impanelled and sworn to speak the truth concerning the premises in the indictment specified. That after the trial had proceeded for some hours, at a late hour on Friday, the Court adjourned till the next day; and that on that day, the 18th of March, the trial proceeded, and the case on the part of the Crown and of the prisoners respectively having been concluded, the Justices charged the jury, who, after the conclusion of the charge, having been then kept together for the space of thirty-two hours or thereabouts during the trial, retired from the bar to consult upon their verdict, and after the further space of five hours, that is to say, at five minutes before midnight in the night of Saturday the 18th of March, the jury returned to the bar and (in the words of the record),

“ Being asked by the Court here whether they have agreed upon their verdict, they say that they have not agreed, and unanimously declare that, after full consideration, they are wholly unable to agree, and cannot agree, upon any verdict to be given by them on the premises aforesaid; and therefore, because it manifestly appears to the Court here that the said jurors, after five hours’ deliberation and such consideration amongst themselves, have not agreed upon any verdict, and declare that they have not agreed and are unable to agree upon any verdict to be given upon the premises aforesaid, and because all other the business of the said session of gaol delivery is finished and completed, and because the Lord’s Day is immediately at hand, and because the said Justices of our said Lady the Queen are required by her letters patent to proceed to and be in Her county of Cornwall on Monday now next ensuing, in the execution of the said letters patent, and because it manifestly appears to the Justices here that, for the reasons and causes aforesaid, it is necessary to discharge the said jury, and the said Justices do decide and adjudge that it is necessary to discharge the said jury, and they do on the ground of such necessity as aforesaid

altogether discharge the said jury from giving any verdict upon the premises, and they are accordingly discharged from giving their verdict upon the premises aforesaid. And the said C. Winsor and M. A. Harris are by the Justices here forthwith committed to the custody of the sheriff of the county of Devon, in the common gaol of the county safely to be kept until they shall be thence delivered in due course of law; and thereupon the sheriff is commanded that he have the bodies of the said C. Winsor and M. A. Harris at the next general session of general gaol delivery to be holden for the county of Devon, to answer the premises in the said indictment above specified and charged on them."

The record then stated that at the said next gaol delivery for Devon, held at Exeter on the 26th of July, and duly adjourned till the 28th of July, before Willes, J. and Keating, J. (the commission being set out at length), "come as well the said C. Winsor and M. A. Harris, under the custody of the said sheriff, as the said clerk of assize; and the said clerk of assize, who prosecutes for the Queen, prays of the Court that the said C. Winsor may be tried upon the said indictment separate and apart from the said M. A. Harris, and that the said M. A. Harris may be examined and give evidence on behalf of the Queen upon the trial of the said C. Winsor for the felony and murder aforesaid. And the Court doth allow the said prayer of the said clerk of assize. Therefore let the jury thereupon here immediately come," &c.

The record then stated that Winsor's counsel then and there objected, that in consequence of the proceedings on the said indictment above set forth, Winsor could not be legally tried, and must be discharged from the indictment and inquisition; that the Justices overruled the objection and ordered Winsor's trial to proceed; that the jury were duly impanelled and sworn "to speak the truth concerning the premises in the said indictment specified"; that Winsor's trial was adjourned to the next day, the 29th of July, on which day it proceeded, and the jury returned a verdict of guilty against Winsor, who was thereupon sentenced to be hanged.

The record did not state, but it was admitted as a fact, that Harris gave her evidence against Winsor without having been either acquitted or convicted on the indictment, or a *nolle prosequi* entered.

Error was assigned by the plaintiff on twenty-four grounds, which were in substance: that on the first trial the jury were discharged without having agreed to a verdict; and this without the consent of Winsor or of the prosecutor; without any fatality or illness or misconduct having occurred in Winsor, in the jury, or the Justices; without the jury being in any way incapacitated from giving a verdict; without any sufficient legal cause; and that the jury ought to have been directed to return a verdict of not guilty, or judgment pronounced for Winsor; that Winsor was wrongly deprived of her right to a verdict or a termination of the first trial: that there was time to conclude the first trial before the Justices were required to be in Bodmin: that the first trial was wrongly adjourned to the next gaol delivery: that there was a discontinuance: that the second trial and the verdict, judgment, and all the proceedings were illegal and void because of the above facts, and because the jury were not correctly sworn; and because Winsor's life was in peril on the first trial for the same murder as that for which she was tried on the second; and because Harris was admitted as approver on the second trial, she having been jointly indicted with Winsor, and neither acquitted nor convicted.

Folkard (with him *Collins*), for the plaintiff in error.—It is contended that the discharge of the jury on the first trial was wrongful, and that all the proceedings on the second trial were illegal and void for that reason; also that the second verdict was bad, because Harris's evidence was inadmissible. The discharge of the jury on the first trial was irregular and illegal. "A jury sworn and charged in case of life or member cannot be discharged by the Court or any other, but they ought to give a verdict"—*Co. Litt.* 227, b. "To speak it here once for all, if any person be indicted of treason, or of felony, or larceny, and plead not guilty, and thereupon a jury is returned, and sworn, their verdict must be heard, and they cannot be discharged,

neither can the jurors in those cases give a privy verdict, but ought to give their verdict openly in court"—3 *Inst.* 110, 2 *Hale, P.C.* 294, n. (a), 1 *Chit. Cr. L.* 634. "A jury sworn and charged in a capital case cannot be discharged without the prisoner's consent till they have given a verdict"—2 *Hawk. P.C.*, by Curwood, 619. Blackstone says the same: "Unless in cases of evident necessity"—4 *Comm.* 360. "In capital cases a juror cannot be withdrawn though all parties consent to it"—21 *Vin. Abr.* 337, Trial X. e. 4, *Carthew*, 465. Rather than discharge the jury the Judge should have directed them to find not guilty, as in all cases of doubt—2 *Reeves's Hist. Eng. Law*, 270. He might have carried them about with him in carts, and taken the verdict in another county.

[COCKBURN, C.J.—We do not know the terms of the Commission of those days. The Queen's Bench was ambulatory. It is not shewn that the carrying in carts ever actually happened. Is there any authority that the verdict received in another county would be good?]

The King v. Ledgingham (1 Vent. 97) is a dictum to that effect.

[MELLOR, J.—2 *Roll. Abr.* 712, cited in that case to support that proposition, does not support that part of it.]

There is also 2 *Hale, P.C.* 297, and the authorities there cited. Also, *Bac. Abr.* tit. 'Juries,' G., 1 *Salk.* 201, 7 *Mod.* 1, and *Morris v. Davies* (3 Car. & P. 429). The great object being to insure a verdict, juries were finable if they gave no verdict, but not if they found against evidence—*St. John v. Abbot* (Barnes's Notes of Cases, 441). A juror ought not to be withdrawn in order that the prosecution may bring further evidence—*The King v. Jeffs* (2 Str. 984). *Whitbred and Fenwick's case* (7 How. St. Tr. 315) has always been condemned.

[BLACKBURN, J.—Though very oppressive, it does not follow that the second trial was not perfectly legal.]

Lord Dalemere's case (11 Ibid. 520).

[BLACKBURN, J.—That was considered and disposed of in *Kinloch's case* (Foster, C.C. 25).]

Horne Tooke's case (25 How. St. Tr. 1), *Rookwood's case* (13 Ibid. 165, 166, 173), *Shield's case* (28 Ibid. 647), and *The King v. Keite* (1 *Ld. Raym.* 139). In *The King v. Kell* (1 *Crawf. & Dix.* 151) the twelve Irish Judges decided that even if the jury were discharged for the illness of the prosecutrix the prisoner could not be tried a second time. It is not necessary to go that length here, and it is admitted that where the necessity arises from the act of God the jury may be discharged—*The King v. Scalbert* (2 *Leach C.C.* 620), *The King v. Stevenson* (Ibid. 546), *The King v. Streek* (2 Car. & P. 413), *The King v. Edwards* (Russ. & R. 224).

[MELLOR, J.—*Meadow's case* (Foster, C.C. 76).]

The King v. Wade (1 *Moo. C.C.* 86), *Mansell v. the Queen* (1 *Dears. & B.* 375; s. c. 27 *Law J. Rep.* (N.S.) M.C. 4) and *The King v. Edwards* (3 *Campb.* 206). Even if the jury could legally be discharged at all, five hours is far too short a time for deliberation. In the other cases they were kept much longer, fifteen or twenty-four hours. Even if the jury could properly be discharged in misdemeanors, they could not in felonies; certainly not in capital felonies.

[COCKBURN, C.J.—It is difficult to see any distinction in principle between felonies and misdemeanors in that respect.]

The jury if they cannot agree ought not to be discharged till the end of the assizes—*The Queen v. Lecken* (3 *Crawf. & Dix.* 174), *The Queen v. Leary* (Ibid. 212); and *Conway and Lynch v. the Queen* (7 *Ir. Law Rep.* 149) is conclusive in favour of the plaintiff in error. The present case is distinguishable from *The Queen v. Davison* (2 *Fost. & F.* 250), *Newton's case* (13 *Q.B. Rep.* 716; s. c. 18 *Law J. Rep.* (N.S.) M.C. 201; and 3 Car. & K. 85) and *The Queen v. Charlesworth* (31 *Law J. Rep.* (N.S.) M.C. 25; s. c. 1 *Best & S.* 460).

[MELLOR, J. referred to an indictment for murder in which he was of counsel for the prosecution, tried before Mr. Justice Coltman at Coventry, when the jury were discharged because unable to agree before the Judge had to leave the town for Warwick. The prisoner was tried a second time at the next assizes

before Mr. Justice Maule, without any objection being made by either Judge or counsel, and was acquitted on the merits.]

In many cases it would be a great hardship on a prisoner to be tried twice, and he would be unable to meet the expense of a second trial. If the Judge has a discretionary power to discharge a jury under these circumstances, he might do so in five minutes after the jury have retired. It is not advisable to give such a power to any Judge, and it would be monstrous to give it to Chairmen of Quarter Sessions and Recorders.

[BLACKBURN, J.—Have you any case to shew that even if the Judge's discretionary power is wrongly exercised, that can be reviewed in a Court of Error, except *Conway v. the Queen* (7 Ir. Law Rep. 149)?]

In *Newton's case* (13 Q.B. Rep. 716; s. c. 18 Law J. Rep. (N.S.) M.C. 201; and 3 Car. & K. 85) Mr. Justice Coleridge said: "I agree with the Judges in *Conway v. the Queen* (7 Ir. Law Rep. 149), in thinking it most desirable that the discretion of the Judge should be subject to review." Instead of discharging the jury the Judge should either have adjourned till Sunday, and then taken the verdict, or till Monday, and meanwhile given the jury refreshment. All ministerial acts are good on Sunday, though not judicial—*Com. Dig. tit. 'Temps.'* B. 3. Receiving a verdict is a ministerial act. The Exchequer used to sit "sometimes on Sundays"—2 *Mad. Hist. Ez.* (2nd edit.) 5. So in *Morris v. Davies* (3 Car. & P. 429); see *Rouberry v. Morgan* (9 Exch. Rep. 730). Parliament, the highest Court in the realm, sits on Sunday if expedient; and its acts on that day are valid.¹ As to refreshments, it is lawful to give them to the jury—*The Queen v. Locke* (3 Car. & P. 393) and *Doct. and Stud.* 271, and 3 Car. & K. 90 (note e).

[COCKBURN, C.J.—The bailiff is sworn to keep them without food. Besides, who is to pay for it?]

The second trial was illegal and void, because Winsor was twice in peril for the same offence—*The King v. Emden* (9 East, 446), *The King v. Sheen* (2 Car. & P. 634), *The Queen v. Drury* (18 Law J. Rep. (N.S.) M.C. 189), *Campbell v. the Queen* (11 Q.B. Rep. 799; s. c. 17 Law J. Rep. (N.S.) M.C. 89). It was also void because, wherever there is an imperfect verdict, no new trial can take place—*Harrison v. Harrison* (9 Price, 89), *The King v. Maubey* (6 Term Rep. 638). No new trial can be granted in felonies—1 *Chit. Crim. L.* 630. It was also void because Harris was admitted as an approver, being jointly indicted, not having been either acquitted or convicted. It is true that the record does not state this; but in fact it was so; and on the part of the Crown it was agreed that these facts should be admitted. As to approvers—3 *Inst.* 129.

[BLACKBURN, J.—Harris was not an approver in the old sense; for approvers were only admitted to give evidence on condition that they pleaded guilty, and if the accomplices were convicted, they were to go free; if otherwise, the approvers were to be hanged *instantly*.]

Unless a verdict was taken or a *nolle prosequi* entered, her evidence ought not to have been received—3 *Russell on Crimes*, (4th edit.), 626, 2 *Starkie on Evidence*, 11, citing 1 *Hale*, 305, *The Queen v. Jackson* (6 Cox. C.C. 525), *The Queen v. O'Donnell* (7 *Ibid* 337), *The Queen v. Stewart* (1 *Ibid* 174) *The Queen v. Archer* (3 Cox, 228), *The King v. Rowland* (Ry. & M. 401), 1 *Macnally on Evidence*, 56, *Child v. Chamberlain* (6 Car. & P. 213), *The Queen v. Hinks* (2 Car. & K. 462), *The Queen v. George* (Car. & M. 111), *Starkie on Evidence* (4th edit.), 128. The effect of the 6 & 7 Vict. c. 85, and the 14 & 15 Vict. c. 99. is to prevent any defendant in an indictment from giving evidence until the indictment is disposed of.

[BLACKBURN, J.—Even if Harris was inadmissible, how can that be matter of error?]

The Solicitor General (Sir R. P. Collier (with him Hannen), for the Crown.

(1) In *Newton's case* (13 Q.B. Rep. 716; s. c. 18 Law J. Rep. (N.S.) M.C. 201; and 3 Car. & K. 85) Rolfe, B. sat twice on Sunday to ask the jury, who had been locked up on Saturday night, if they were agreed; and on the second occasion discharged them—3 Car. & K. 90-92. This was not mentioned to the Court.

It is contended that the discharge of the jury was entirely a matter for the Judge's discretion, and cannot be reviewed here; that if it is reviewable, the Judge was right; that if he was wrong, that is no legal bar to the second trial. It is clear that Coke's rule as to the discharge of juries did not long prevail, for *Ferrars's case* (Sir T. Raym. 84) and *Mansell's case* (1 Anders. 103) are at variance with it. *Doct. and Stud.*, 272, is more correct. All the Irish cases are in favour of discharging the jury when the assize is over; and here it was over. The universal practice now is, to try prisoners twice, if the jury have been discharged without verdict—*Shield's case* (28 Ibid. 647), *The King v. Cobbett* (3 Burn's Justice (edit. 1845), 974) and *The Queen v. Newton* (13 Q.B. Rep. 716; s. c. 18 Law J. Rep. (N.S.) M.C. 201; and 3 Car. & K. 85). In *Gray v. the Queen* (11 Cl. & F. 427) the prisoner was tried four times; the jury having been discharged once for illness and twice because unable to agree.

[BLACKBURN, J.—(Having sent for and read the record in *Gray v. the Queen* (11 Cl. & F. 427).)—The proceedings on the former trials do not appear on the record, and the Lords had nothing to do with them. If they had appeared, the question might have been raised whether there was error in awarding jury process after a previous discharge.]

There cannot be any distinction in principle between felonies and misdemeanors in this respect.

[BLACKBURN, J.—The old law as to all felonies being graver than any misdemeanor is still unchanged, though many of the reasons for the law do not now exist. Some misdemeanors are graver offences than some felonies.]

The only judge of what is a sufficient "necessity" is the Judge who presides. Mr. Justice Erle, in *Newton's case* (13 Q.B. Rep. 716; s. c. 18 Law J. Rep. (N.S.) M.C. 201; and 3 Car. & K. 85), uses the expression "need in a high degree."

[BLACKBURN, J.—I think Mr. Justice Coleridge in that case correctly says, "It cannot be taken to mean necessity in the strict absolute sense of the word. The true question in all cases is, whether the whole circumstances of the case were such as to make the act of the Judge a proper exercise of his judicial discretion."]

In *The Queen v. Davison* (2 Fost. & F. 250), the Judges were agreed that the Judge's discretion cannot in any way be reviewed. If the discharge is a bar at all, it could be pleaded. It would be absurd to have a jury sitting to decide the issue whether the illness of the jury or the Judge had been such as to justify the Judge in discharging the jury. In *Conway v. the Queen* (7 Ir. Law Rep. 149) Mr. Justice Crampton outweighs the other Judges, and he is followed in *The Queen v. Charlesworth* (31 Law J. Rep. (N.S.) M.C. 25; s. c. 1 Best & S. 460). Again, if the Judge's discretion is reviewable, it is contended he was right. He could not have received the verdict on Sunday, for it is clearly a judicial act, and the authorities cited by the other side are conclusive that such acts on Sunday are void. There is no authority for giving the jury refreshment after retirement.

[MELLOR, J.—The passage in *Doctor and Student*, 271, draws no distinction between giving the jury refreshment before retiring and after.]

Again, if the Judge was wrong, this is no bar to the second trial. There are no authorities to the contrary except *Conway v. the Queen* (7 Ir. Law Rep. 149), and till that case no such plea can be found. That a *venire de novo* can issue in felony, after a bad verdict, was decided in *The King v. Fowler* (4 B. & Ald. 273). See also, per Holt, C.J., in *The King v. Keite* (1 Ld. Raym. 141; s. c. Skinner's Rep. 667), and *Campbell v. the Queen* (11 Q.B. Rep. 799; s. c. 17 Law J. Rep. (N.S.) M.C. 89). As to Harris's evidence, there is nothing in the 6 & 7 Vict. c. 85. or the 14 & 15 Vict. c. 99. to exclude it—see 2 *Taylor on Evidence*, s. 1223. But this question cannot be raised on a writ of error.

Folkard replied.

COCKBURN, C.J.—The question involved in this case has been so recently before the Court, in *The Queen v. Charlesworth* (31 Law J. Rep. (N.S.) M.C. 25;

s. c. 1 Best & S. 460), and has been so fully discussed in the argument during the last two days, that nothing would be gained by taking further time to consider, more especially as there is no doubt in the minds of any one of the members of the Court as to the judgment we ought to pronounce. I have no hesitation in saying that it is within the province of a Judge presiding on a criminal trial, after the jury have retired to consider their verdict, and have remained in deliberation a full and sufficient time, if the jury agree that there is no chance or reasonable expectation of their coming to a unanimous decision, —and in my judgment it is competent to the Judge—in his discretion to discharge them. We are dealing here not with one of the fundamental principles of our law, such as the maxim that the Judges shall decide questions of law and juries questions of fact, or that a verdict to be binding must be unanimous, but with a matter of practice which has fluctuated at different times, and which may be considered to be not even now finally settled. The rule laid down by Lord Coke in his *Institutes*, if it ever truly expressed the law, was very soon departed from. In a generation or two at least after his time, we find from Hale—an authority of the greatest eminence—that the practice universally prevailed in the administration of criminal justice, where the proof turned out to be defective, to discharge the jury in order that the prisoner might be tried again when the prosecution were better prepared. We find that eminent lawyer and most humane man speaking with approbation of that practice, as one essential in order to prevent the frustration of justice where evidence was absent but might have been forthcoming; and he speaks of the practice as having prevailed for many years. Afterwards, in consequence of the way in which the practice was abused in political trials, and possibly of the great grievance and hardship on an accused person, who, after defending himself on the first trial, might be wanting in the means of defence for the second, the Judges adopted another plan. Not that there appears to have been any judicial decision on the point, but the Judges, in consultation, laid down a rule that in criminal trials, at all events in trials for felony, the jury should not be discharged at the discretion of the Judge; but if that resolution was ever acted on, it was certainly only for a limited time. In *Kinloch's case* (Foster, C.C. 25), which occurred in the trials under the Commission after the Rebellion of 1745, we find the Judges dissenting from that proposition in the general terms in which it was laid down. In that case the jury having been discharged in order to put the prisoners into a better position, and give them an opportunity of putting on the record a plea which they had not yet pleaded, it was afterwards objected that the jury having been discharged the accused could not be tried a second time, and in the opinion of all the Judges, except one, that was not a sufficient answer; and Justice Foster shewed that the proposition, as laid down in the general terms, could not be supported. Soon after this we have the great commentator on the English law laying down the rule, that juries could not be discharged by the Judge, except “in cases of evident necessity.” Since that time, the question has arisen several times, and the illness of a juror or the illness of a prisoner has been held a sufficient ground for the discharge of a jury, and no one has questioned that the accused might be put upon his trial a second time. In *The King v. Cobbett* (3 Burn's Justice (edit. 1845), 974), that most learned and cautious Judge, Lord Tenterden, discharged the jury of his own act and in the exercise of his own discretion, after they had been in deliberation fifteen hours; and other cases were cited in which Judges have taken upon themselves to do the same thing. So far from Mr. Folkard's observation being well founded, that it is essential to the pure administration of justice that this discretionary power should be abridged, I think, if you look at the true principle on which justice ought to be administered, the contrary is the fact. Our ancestors insisted on unanimity as the essence of a verdict, but were very unscrupulous as to the means by which they obtained it; whether the minority gave way to the majority, or the reverse, was a matter of indifference. It was a contest between the strong and the weak, the able-bodied and the infirm, which could best sustain the hunger, and thirst, and the other miseries incidental to the situation.

It was said to be competent for the Judges to take a jury, who could not agree, about with them in carts to the confines of the county where the trial was held, or even beyond. I doubt if such a thing ever was done. I doubt the authority of the loose *dicta* found in the *Year Book*, and copied servilely afterwards by text-writers into their books; I doubt if they ever were law, and there is certainly no such thing on record. But we now look at trial by jury in a very different way. We do not desire that the unanimity of a jury should be anything except the unanimity of conviction. It is true that one or two jurymen, if they have only doubts, or weak convictions, may be justified in giving way to the majority; but I hold it to be of the very essence of a jurymen's duty, if he has a firm conviction, either in the affirmative or the negative, not to give up his conviction, though the majority may be against him, in order to purchase his own ease or freedom from restraint. That being so, when a reasonable time has elapsed, and the Judge is convinced that unanimity can only be obtained by the sacrifice of honest conviction, why should he put the jury to torture, to the misery endured by men shut up without food, drink, or fire, in order that the minority or the majority (who can tell which?) may give way? So far, then, from this being a mischievous power, I think it is one essential to the upholding of a pure and honest administration of justice by jurymen.

What, then, is there to shew us that this discretion cannot be exercised? We have, no doubt, the case of *Conway v. the Queen* (7 Ir. Law Rep. 149), in which the majority of the Irish Court held that the discharge of the jury after twenty-four hours' deliberation could not be justified in the exercise of the Judge's discretion, and that the prisoners could not be tried a second time. In *The Queen v. Charlesworth* (31 Law J. Rep. (N.S.) M.C. 25; s. c. 1 Best & S. 460), I observed that the judgment of Mr. Justice Crampton, who dissented from the rest, carried to my mind perfect conviction. His arguments were overwhelming, and no attempt to answer them was made by the Judges who differed from him.

Since that the matter has arisen two or three times in analogous questions. In *The Queen v. Newton* (13 Q.B. Rep. 716; s. c. 18 Law J. Rep. (N.S.) M.C. 201; and 3 Car. & K. 85), though the decision of the Court was not necessary, yet the question was incidentally considered, and it is impossible to read the judgments of Lord Denman and the rest of the Court, without being satisfied that their view was that the discharge of the jury under such circumstances was no reason why the prisoner should not be tried a second time. A case more directly in point was *The Queen v. Davison* (2 Fost. & F. 250). It is true that that was a misdemeanor, and this is a felony, but the trial by jury is the same, and the principle of administration is the same, for both classes, and I am utterly at a loss to see any distinction in principle between the two. Now this case is a much stronger one than that of *Conway v. the Queen* (7 Ir. Law Rep. 149), because there, if the discharge of the jury on the first trial was a wrongful exercise of the Judge's discretion, it followed that the accused could not be put a second time on their trial, and *a fortiori* not a third. In that case all that appeared was that the jury had been twenty-four hours, and, as it was alleged, a reasonable time, in deliberation, and I think that was sufficient. But this case goes further, because not only had the jury been five hours in deliberation, but it was within a few minutes of midnight on the Saturday; and, further, on the Monday the Judges were bound to be at Bodmin, that being the commission day of the assize. Now the Judge was placed in a position of great difficulty in consequence of Sunday intervening. If the next day had been a week-day, for instance, if the trial had concluded on a Friday night, I do not doubt that the Judge would have considered that he ought not to have discharged the jury after so short a space as five hours, for I quite agree with Mr. Folkard, that if we could review the Judge's discretion, five hours was not so long a time that you could fairly assume that the jury would not, by remaining longer in deliberation, come to a unanimous decision. But the intervening day being Sunday, great difficulty presented itself.

The first question which arose was whether the Judge could adjourn to the Sunday, and take the verdict on that day. It is laid down distinctly by Lord Coke and Comyns that Sunday is not a juridical day, and it is idle to contend that the delivering of a verdict by the jury, the receiving it by the Judge, and the recording it—which is also, though the act of the officer, the act of the Court—are not judicial acts. I entertain the gravest doubts whether it would be consistent with the validity of these acts, as judicial acts, to receive and record the verdict on the Sunday.

Then it is said that the Judge might have adjourned till the Monday, and kept the jury confined over the Sunday, and received the verdict on the Monday. But then arises this startling dilemma, that since it would have been impossible, because inhuman, to keep the jury without meat or drink all the Sunday, then the only alternative would have been to give the jury refreshment. There is no authority for saying that this can be done; the authorities rather point the other way. There is no satisfactory authority—for the passage in *Doctor and Student* does not go that length, and if it did, it is not sufficient to militate against the whole course of practice—which establishes that you can give refreshment to a jury after they have retired to deliberate. The oath administered to the bailiff has a strong tendency to confirm this. He is sworn to keep them without meat, drink, fire, candle-light only excepted, and not to speak with them himself, nor to allow any one else to speak with them without the leave of the Court. Now the exception as to the leave of the Court is as to speaking with them, not as to allowing them meat or drink, and I question very much whether as this system of coercion has been handed down to us by our ancestors, the Judge could take on himself, without the intervention of the legislature (and the sooner it occurs on that point the better), to remove this coercion by a simple act of his discretionary authority in ordering the jury refreshment. The Judge, therefore had the choice of three courses; either to discharge the jury, or to take the verdict on the Sunday, or to keep the jury in confinement till the Monday, allowing them the necessary refreshment to sustain their strength. The Judge, therefore, was placed in a great difficulty. I am not here to review his discretion. I am at a loss to know how I should have acted under the same circumstances. It was a position in which, if the exercise of discretion ever was called for, it was so then; and unless it can be shewn that the Judge had not the discretionary power, it is a case in which we ought not to say that the discretion was improperly exercised.

These are the facts on the record, with this addition, that it was adjudicated by the Judge that a reasonable time had elapsed, and that it was necessary under the circumstances to discharge the jury; and this brings me to the second question, which is,—this necessity being set forth on the record, is it competent to us to review it? I think certainly not. The first question is, how is it to be reviewed? It seems to me to be a mistake to say that necessity is a question of law. It may be a rule of practice that a Judge should not discharge a jury except there is a necessity for it, but that necessity is a conclusion from all the facts of the case. Who ever heard of a Court of Error sitting to determine a question which is purely one of fact, not of law? It was well put by the Solicitor General, that if this can be taken advantage of by stating it on the record, then it might be made the subject of a plea, as in the Irish case. Then a replication would follow, and if the replication was a traverse of the facts, who is to try the facts, the Judge or the jury? It is impossible for us to deal with this as a matter of error. It is a matter for the Judge's discretion, and no exercise of that discretionary power has ever been, so far as I know, made the subject of error. This was the view unquestionably taken by Mr. Justice Patteson, Mr. Justice Coleridge, and Lord Chief Justice Erle, in *The Queen v. Newton* (13 Q.B. Rep. 716; s. c. 18 Law J. Rep. (N.S.) M.C. 201; and 3 Car & K. 85). It was the clear and unequivocal language of the Lord Chief Baron, of Baron Martin, and of our Brother Hill, in *The Queen v. Davison* (2 Fost. & F. 250), that the exercise of discretion in such a case is not a matter for review in a Court of Error on error alleged on the record. That was a case of misde-

meanor, but there cannot be any distinction in that respect between a felony and a misdemeanor; the principle in the two cases must be the same. It is clear, therefore, that even if this were a case in which the discretion had been improperly exercised (which I am very far from saying was the case) it cannot be reviewed in error. It is true that, as the Judges of old felt, this discretionary power might be abused, and was abused in the times such as, I trust, this country will never see again. But I do not believe that such a discretionary power ever would be abused in future. At the same time men are open to the infirmities of human nature. There might be dishonest and compliant Judges among us, though I trust in God that that will never happen again. You must frame your rules, so far as you can, to keep the administration of justice beyond the possibilities of corruption. But if a rule is essential to the working of the administration of justice, you must trust to the honesty of those to whom that is committed, and to the means you have of punishing corruption. I think, therefore, that this discretion is a very useful and salutary one. I say, first, it was a discretionary authority which the Judge had power to exercise; and, secondly, whether it was properly exercised or not, it is not a matter that can be brought before a Court of error, as error on the record.

It has been urged on us that according to the law of England no man can be put in peril twice on the same charge. I quite agree with that, but we must take that fundamental maxim of the criminal law according to what is meant by it, which is that a man shall not again be put in peril after a verdict has been pronounced, that verdict being one which on a good indictment it was competent for a jury to pronounce. It means that you shall not harass a man a second time if he has once been convicted and sentenced; still less shall you harass him if he has been pronounced not guilty by a jury. But it does not follow that if from any reason a trial has proved abortive, the question shall not be again submitted to the jury and determined.

It was also urged that there was a difficulty about issuing a second jury process. I do not feel the force of that. It cannot be disputed that there are many instances where, a jury having been discharged in the proper exercise of a judicial discretion, a second trial might take place, for instance, in the case of the illness of the prisoner, of the jury, of the Judge himself. In such cases a *venire de novo* is the proper process for summoning a jury for a second trial, and it follows indisputably that such would issue. If, then, the jury were properly discharged here, it follows, as much in the present case as in those to which I have referred, that that process must issue.

It was also urged that the evidence of the accomplice, the prisoner's partner in guilt, was improperly received. We cannot take that into account. It was urged that the accomplice came forward to give evidence under peculiar circumstances. The prisoners were joined in the same indictment, and on the first occasion were tried together. On the second it was proposed by the prosecution to sever them, in order that Harris might be a witness against the other prisoner. No doubt this did bring about that state of things which the resolution of Judges, as reported in Lord Holt's time, was intended to prevent. Whereas, on the first trial that most important evidence could not be given against Winsor, it was given upon the second, so that the discharge of the jury produced to her that prejudice. We are not, however, dealing with that now. I felt the force of what was said about the fellow prisoner coming forward to give evidence without having been first acquitted, or convicted and sentence passed. I think that was much to be lamented. In all such cases, where two persons are joined in the same indictment, and it is thought desirable to separate them in their trials, in order that the evidence of the one may be taken against the other, in order to insure the greatest possible amount of truthfulness on the part of the person who is giving evidence under such remarkable circumstances, I think it would be far better that a verdict of not guilty should be taken first, or if the plea of not guilty be withdrawn and a plea of guilty received, that sentence should be passed, in order that the mind of the witness may be free from all the corrupt influences which the fear of impending punishment and

the desire to obtain immunity at the expense of the prisoner might be otherwise liable to produce. But we are not dealing with that question now: it cannot be brought before us in a Court of error. The evidence is not set forth on the record, and it is only in civil cases that advantage can be taken of it by a bill of exceptions. Whether these circumstances should have any influence elsewhere it is not for us to pronounce an opinion. Therefore, under all the circumstances, being of opinion that the facts warranted the exercise of the judicial discretion, and further, that even if they did not, or, to speak more accurately, if the discretion was injudiciously exercised, it is not a matter for us to review; and overruling all the objections for the reasons I have given, the only course open to us is to pronounce judgment for the Crown.

BLACKBURN, J.—I am entirely of the same opinion. This is a writ of error, and we, sitting here on appeal upon the writ of error can only inquire whether the verdict and judgment were in point of law good or in point of law bad; and I am clearly of opinion that the conviction as it appears on the record was in point of law good. If this matter had now occurred for the first time, or if it had not been recently discussed, I should have wished for more time to consider the case, and to have entered more fully into the authorities than I shall now do; but in fact the matter was exhaustively considered by Mr. Justice Crompton in the Irish case, where he examined all the authorities, and gave a most admirable judgment, which, though it did not convince his brother Judges, has convinced me that he was right and the others wrong. Since that we have in this Court, in *The Queen v. Charlesworth* (31 Law J. Rep. (N.S.) M.C. 25; s. c. 1 Best & S. 460), had occasion to consider the subject, and there, except that that was a misdemeanor and this is a felony, the point raised was the same. As I perfectly agree with what my Lord has now said, having listened attentively to him, I do not think it necessary to cite the authorities or to go into the matter at any great length.

I take it that upon the law there is no doubt as to this, that where a person is properly charged with a crime, whether a felony or misdemeanor, and where the prisoner has pleaded not guilty, the first step is to issue a jury process, by which the jury are brought together to try that question; and when they have been brought together, and the trial has begun, the right course, unless there is some reason to the contrary, is, that the jury should return a verdict of guilty or not guilty, if possible. When the jury have once found that verdict of conviction or acquittal the matter has become *res judicata*, and after that there can be no further trial. If when the jury have found the verdict, a jury process were awarded upon the same indictment to try the matter over again, that would be bad, and the proper remedy would be to bring a writ of error, the error being that whereas there was an acquittal or a conviction, which terminated the whole matter, process had been issued for a fresh jury. If, instead of that, a second indictment was found, it would be necessary for the prisoner to plead *autrefois acquit* or *autrefois convict*, as the case might be, but in each case the question would be, had the matter been determined by the jury and become *res judicata*? It is material to recollect that where there is a second indictment there are the pleas of *autrefois acquit* and *autrefois convict*; but, except the very strange pleadings in *Conway v. the Queen* (7 Ir. Law Rep. 149), which were obviously bad for many reasons, though all objections in form were there waived, there never has been a plea to the effect that the prisoner had been given in charge to the jury and that the jury had come to no conclusion, and that that had the same effect in preventing the prisoner being tried again as if there had been a verdict of guilty or not guilty. The fact that that has never been done is to my mind an extremely strong argument that it cannot be done. If, instead of a fresh indictment, the matter proceeded on a *venire de novo*, and the question were properly raised, as it is here, whether the proceeding to get together a second jury was correct, the question would be, to my mind, the same. Would the fact that the prisoner had been given in charge to the first jury, who come to no conclusion, for the reasons stated on the record, be a bar

to the second indictment? If so, the proceedings to summon a second jury would be erroneous, and the verdict bad; but if the facts would have afforded no effectual defence to the second indictment for the same matter, I cannot see how they could furnish an answer in error on the ground that a jury were a second time brought together to try an issue on an indictment which had never been disposed of.

Now as to the reasons—or, rather I should say, the list of cases—that were urged on the other side, there is the dictum—for it is not more—of Lord Coke that a jury once charged with a prisoner in case of life or member ought not to be discharged, but ought to give their verdict and dispose of it. Every one agrees that that, taken merely as a direction as to what should be done, if possible, is quite right; but upon that is founded the argument, that if the first jury did not dispose of the plea of not guilty, no other jury could dispose of it, and therefore no second jury process could issue. I cannot see any reason in that. Down to the Revolution from the time of Hale, that was not acted upon. In *The Queen v. Charlesworth* (31 Law J. Rep. (N.S.) M.C. 25; s. c. 1 Best & S. 460) we entered into details in pointing that out. After the Revolution, the practice was very much reprobated, and undoubtedly it had been for some time so strongly urged that the practice was improper of discharging a jury for such reasons as were given on the State trials that there was a general notion that if a trial went off for any reason, that was equivalent to an acquittal. *Kinloch's case* (Foster, C.C. 25) shewed that that was a mistake. There it was decided, that when the jury had been brought together it was for the presiding Judge, acting in his judicial discretion, to determine whether it was a case for discharging the jury, and this not merely in the case where a jurymen is taken ill, or for some similar reason, but where, as in that case, there was no need to discharge the jury; where it was done because of a mistake which was no defence; where it was done under a mistaken notion by the Judge with the assent of the counsel for the Crown and the prisoner's counsel, for the purpose of allowing the prisoners to plead another plea. In that case, reported in *Foster*, it was held, that if the Judge did so determine, the discharge of the jury was no answer to the indictment; that the Judge had such a discretionary power, but a power which was to be exercised only when he saw very clearly that it ought to be exercised. I am not aware that down to *Conway v. the Queen* (7 Ir. Law Rep. 149) that case was ever departed from. It is obvious that in some cases which are not disputed the jury must be discharged, such as where a jurymen falls ill, and it must be for the Judge to determine whether the illness of the jurymen is such that the trial cannot go on. If a jurymen has merely fainted because the court is close, it would be proper to wait a few minutes and proceed; but if he is taken ill so that there is no likelihood of his going on without danger to his life, the jury must be discharged. To put a case, the assizes sometimes, as in Liverpool, last for a fortnight or more, and if the Judge cannot discharge the jury except upon evident necessity, then what must be done if the jury say they cannot agree at the beginning of the assize? Are the jury not to be discharged till the fortnight has expired? Who is to say whether or not the jurymen is likely to recover? The Judge upon the facts and the evidence before him must determine what his duty is, and he determines it as a mixed question of fact and law. So if the jury have been long in deliberation and a verdict has not been obtained, a precisely similar question arises for the Judge. It cannot be said that he is bound to wait till one of the jury falls ill. That would be too barbarous a rule. Nor can it be said that he ought to stop till the moment the jury have said they are not likely to come to a conclusion. We know juries are in the habit of saying they are not likely to agree, but they are advised to talk it over; and whether they talk it over, or whether they are coerced, we know that, finding it unpleasant to be in custody, they do agree; but it must be more or less a question of the Judge's discretion, and I agree with Lord Tenterden that few things are more painful to the Judge than to have a question of discretion to decide. As far as our pleasure goes, we should be glad to have a fixed rule—to save us from

all discretion; but it is a matter on which the Judge must exercise his discretion not capriciously but upon the facts.

Then comes the question, can we in a Court of Error review the discretion? In *Conway v. the Queen* (7 Ir. Law Rep. 149) the majority of the Irish Judges held that they could. I invited Mr. Folkard during the argument to cite any other case, criminal or civil, in which the decision of the Judge upon a discretionary question like this was reviewed in a Court of Error, and he was unable to refer to one. So far as my own knowledge goes, there is none. Could we review that discretion any more than we could review the verdict of the jury? The verdict may have been found against evidence, but that cannot be reviewed in error, because the evidence on which the jury decided cannot be brought up. So where the Judge, on a mixed question of law and fact, decides judicially on the facts and the evidence that it was necessary to discharge the jury, we cannot review the matter. Upon that I am decidedly of opinion that Mr. Justice Crampton was right, and the other Irish Judges wrong. It becomes, therefore, unnecessary to consider whether here the exercise of my Brother Channell's discretion was right or wrong; but I may observe that, under the circumstances, the trial having been protracted till a few minutes before midnight on Saturday, the Judge was compelled to determine about as difficult a question as could be determined. If, as Mr. Folkard suggests, he had waited and kept the jury together as if it were a week-day, and they had returned a verdict on the Sunday, would that have been lawful and right? I do not decide that question, which is not raised here; but I do not think there can be the smallest doubt about this, that to act judicially on Sunday on any business would be indecent and improper, and should never be done if it can be helped. It is on the authorities a matter of the gravest doubt whether a verdict taken on Sunday would not be void in law, so that it might be upset in a court of error. This not being a point before us, I do not give any determination upon it, but it is a question for the gravest consideration; and where a Judge is driven so close to midnight before Sunday, we could never say that if a Judge had the discretion it was an improper exercise of it to avoid that question by discharging the jury. Then it is said he might have adjourned till Monday, and given the jury refreshment during the Sunday. Here, again, I do not mean to decide a question which is not before us. It may be doubtful whether, if the Judge ordered the jury refreshment, it might not vitiate the verdict; or whether the maxim would apply, *quod fieri non debet, factum valet*, and the verdict be good notwithstanding. Here, again,—where the Judge might well say, “Am I to raise such a difficult and nice question?”—can we say the discretion was improperly exercised? I think, under these difficult circumstances, the Judge did right, but that is not what we have to decide, because the Judge having exercised his discretion in a matter over which he had jurisdiction, that in a Court of Error cannot be reviewed.

Then there remains the further point, on which I shall say very little. Even supposing the Judge was wrong, does his wrongful discharge of the jury itself entitle the prisoner to an acquittal? I think not. The nearest cases to this are those where the jury have found an imperfect verdict. There is no moral guilt in the Judge who receives the verdict and omits to perceive that it is imperfect; but his duty clearly is to say to the jury—“You have not found a complete verdict; answer the other questions of fact;” and when he receives an imperfect verdict, and discharges the jury, it is clear that the Judge makes a mistake. It is equally clear that in civil cases and in misdemeanors where the verdict is not complete, the proper course is to award a *venire de novo*, and try the case over again. The question has been raised whether a *venire de novo* could issue in capital felonies. The dictum of Lord Coke, and the doubt founded on it, raised the doubt in *The King v. Huggins*, which Lord Chief Justice Raymond himself reports, and it is a most authentic report. He says, 2 *Lord Raymond*, 1584, that in the argument for the Crown it was stated that “in criminal cases writs of *venire facias de novo* have been granted. That in capital cases a *venire facias de novo* must go, 1. In cases of mis-trial.”—Such a

case was *Gray v. the Queen* (11 Cl. & F. 427), and there the House of Lords awarded a *venire de novo*.—"2. For misbehaviour of the jury in giving their verdict." There Lord Raymond refers to a case in the *Year Book* of Hen. VII., and adds, that was agreed. "3. As to granting a *venire facias de novo*, after a special verdict found, they were so candid as to own, that though there was search made with the greatest diligence, yet they could not find one instance, nor so much as an opinion of a Judge, except what was said by Lord Chief Justice Holt in the case of *The King v. Keite* (1 Ld. Raym. 141; s. c. Skinner's Rep. 667), who says, 'I should not be much against a *venire de novo*.' And this was remembered by some others that heard that opinion." *The King v. Huggins*, therefore, came merely to this, that the point was argued and gravely considered, but was not determined. In *Campbell v. the Queen* (11 Q.B. Rep. 799; s. c. 17 Law J. Rep. (N.S.) M.C. 89), where the verdict was imperfect, the Queen's Bench decided that, upon an imperfect verdict in a case of felony, a *venire de novo* should be awarded. That was the order of the Court below. When the case came into the Court of Error, that very learned Judge, Baron Parke, considered the case much with the other Judges, and he—evidently, having *The King v. Huggins* before him, for he refers to it,—thought that the *venire de novo* was rightly awarded. He said, indeed, that it was not necessary to decide the question, which was left in grave doubt, whether a *venire de novo* would issue in a case of felony for a defective verdict; but he pointed out that in the case below there was a misawarding of the jury process, and referred to *Gray v. the Queen*. It was on this ground that the Court of error affirmed the decision of the Court of Queen's Bench below, that a *venire de novo* might issue in a case of felony; they did not indeed determine that it would lie upon an imperfect verdict, but they by no means reversed the judgment of the Court below on that point; and, looking at that case of *Campbell v. the Queen* (11 Q.B. 799; s. c. 17 Law J. Rep. (N.S.) M.C. 89), there is a solemn decision of the Queen's Bench, not reversed or questioned, that a *venire de novo* will lie in a felony on an imperfect verdict. There is the opinion of the Exchequer Chamber that it was not necessary to confirm that, because there was error in the jury process; but there was no reversal, nor even a shaking of the decision below. I mention this to shew that there is no authority the other way. I quite concur with Mr. Justice Crampton in the Irish case, that the true principle is this, that where, after jury process has been issued, there has not been a verdict decisive either of guilt or innocence, in any case, whether it be from error in the Judge or the fault of the jury, or the Judge improperly discharging the jury, in all cases indifferently, the indictment has not been disposed of, and there ought to be a *venire de novo*. Consequently I think there was no doubt, after what took place at the first trial, that the case was properly tried a second time.

At the second trial the objection was made that the evidence of the fellow prisoner was received. It is enough to say that that objection does not appear upon the record, and could not be brought into error, for the improper reception of evidence cannot be made matter of error. So far as I can form an opinion on a matter not before us, I do not think she was an inadmissible witness; but she was within the category of accomplices. It would be right to tell the jury to look at her evidence with great caution, and to take into account that she was an accomplice; and I do not doubt that the Judge did carefully direct the jury as to that, and that there was ample confirmatory evidence. It would, no doubt, be much better that where an accomplice is a witness, the objection to that evidence should be made as slight as possible; and, therefore, I agree that it would, as a general rule, be judicious, where the accomplice is indicted with the prisoner, to dispose of the indictment by acquitting or convicting the accomplice before she is called as a witness, so that the temptation to strain the truth should be as slight as possible. But that, I think, is not an objection to the admissibility of the witness, but it only affects the degree of credit which should be given to her.

MELLOR, J.—I am entirely of the same opinion. I think that our judgment

must be for the Crown on all the errors assigned. Though it is a good general rule not to discharge a jury till a verdict is given, and though there are distinctions in the procedure with regard to felonies and misdemeanors, since in misdemeanors the common practice now is to allow a jury to separate, a practice which does not prevail in the case of a felony; yet I think no general rule of that sort can be absolutely binding without leading to manifest absurdity. Now if a Judge is to exercise no discretion, if he is bound, as was said in one of the old *dicta*, to carry the jury with him to the confines of the county, or rather all round the circuit, still there must be a time at which they must be discharged: and there is something so inexpressibly inconsistent with modern ideas in such a notion as that of a Judge carrying a jury with him to the confines of a county, and then turning them out if they are not agreed, that I apprehend no Judge would do anything so grotesquely absurd. I think the Judge must of necessity have a discretion, because, if not, the business could not go on, and Mr. Folkard appears to deny that what is every-day practice is correct. When a Judge has waited a time which in his opinion is abundantly sufficient, and finds it hopeless to expect that they will agree, what is he to do? As to the taking the jury to the confines of the county, I have disposed of that. Is there then any other course? He might wait till the end of the assizes. My Brother Blackburn has pointed out that in some cases, where the assizes last a fortnight, a monstrous absurdity would arise from that view, that they are to be kept there in confinement. Is there ever to be a period when the Judge is to exercise his discretion? I think there is; and if you admit that, it must be in the Judge's discretion to say when that period has arrived. Now the record states several reasons on which the Judge had adjudicated that it was necessary to discharge the jury, viz., that the jury had been out five hours, and unanimously declared they could not agree; that it was a very short time from the Lord's Day; and that all the business was finished at that place, and that the Judge was required by the Commission to be elsewhere on Monday. Under these circumstances it is impossible to say that the Judge ought to have taken the course pointed out by Mr. Folkard. For the reason given by my Lord, the keeping a jury till the Monday without meat, drink, or fire is perfectly incongruous with modern opinions, and it would be so startling a thing to do, that one cannot help thinking that the Judge must have a discretion not to wait till the jury are placed in circumstances affecting their health, and really endangering their lives.

Again, it is said the Judge might have taken the verdict on the Sunday. I think that too has been abundantly answered by my Lord. First, the prisoner must be present: the Judge cannot take it at his own chambers; he must come into court, and the prisoner must hear the verdict pronounced by the jury, and it must be recorded. All this goes to shew that it is not a ministerial, but a judicial act, and one of the highest importance. Can it then be done on a Sunday? Without absolutely deciding that it cannot, it is open to doubt, and I think it could not.

The next question is, can this discretion be reviewed in a Court of error? I think not. I am clearly of opinion, in the language used by Mr. Justice Coleridge, in *The Queen v. Newton* (13 Q.B. Rep. 716; s. c. 18 Law J. Rep. (N.S.) M.C. 201; and 3 Car. & K. 85), where the Judges agreed, that the word "necessity," though it has got into the later text-writers as qualifying the old rule, must mean that the circumstances of the case must be such as in the opinion of the Judge to render it proper to exercise his judicial discretion. He must act upon them as they appear to him at the time. Suppose the illness of one of the jury: Mr. Folkard admits that that is a case of necessity. How is that to be reviewed in a Court of error? If the judge determines that it is necessary to discharge the jury because one of them is ill, and that is stated on the record, this Court cannot review it, because the actual fact of the necessity is found by the Judge. The absurdity of putting any other construction on his duty and the power of reviewing it may be shewn in this way. Suppose

the Judge says, "I am too ill to proceed; I must discharge the jury." Is a Court of error to say that the Judge was not too ill? Conceive a plea that the Judge was too ill, and decided that he was too ill to continue the trial, and therefore discharged the jury, the question for a jury on the issue joined would be, whether the Judge was ill. Could anything be more indecent or absurd than that a jury should try that question, and whether his discretion was properly exercised?

Upon all these grounds, I think my Brother Channell exercised the most prudent discretion possible, under embarrassing circumstances, and that any other exercise of discretion would have been a matter of grave doubt. But, supposing he exercised his discretion erroneously, is that equivalent to a verdict? Did any one ever hear of such a plea till *Conway v. the Queen* (7 Ir. Law Rep. 149)? I have never heard of any plea in bar to an indictment of felony, except those of *autrefois acquit*, *autrefois convict*, *autrefois attain*, and pardon. The only other pleas are to the jurisdiction. If it cannot be made out to be a case within one or other of those pleas, it cannot be taken advantage of by any mode of pleading. For all these reasons, I think the Judge has a discretion, and he must exercise it, if at all, publicly before the bar, and under the responsibility of his oath to parliament; and I do not think there is the least danger that any Judge would exercise it arbitrarily, negligently, or corruptly.

As to the course that was taken on the second trial, I entirely agree with my Lord. It did happen as an accident that the prisoner was on the second trial in a different position from that on the first. The accomplice had not been acquitted, nor had she pleaded guilty, and she therefore remained liable to be tried. That is a state of things which it is desirable to avoid. Though I do not think there was any objection in point of law to the admissibility of the evidence, I agree with my Lord's view as to the danger of that course of procedure, which offers so many temptations, especially to an ignorant witness, who is possibly to be tried for her own life, and who is permitted to give evidence, which ought always to be given without fear of any consequences of that sort. On all these grounds, I think our judgment should be for the Crown.

LUSH, J.—After the elaborate judgments given by my Brothers, if this had been an ordinary case, I should have simply stated my concurrence; but considering the importance of the question, I think it right that each Judge should state the grounds for the conclusions to which he comes. I entirely agree in the judgment of the rest of the Court. There are, in substance, two errors relied on by the prisoner. The one on which the greatest stress was laid, divested of all technicality, amounts to this: that the trial at which the prisoner was found guilty was void, that the jury had no jurisdiction to take her in charge or to find a verdict against her, and that the Judge had no jurisdiction to sentence her, because she had before been given in charge to another jury upon the same indictment, who had been discharged from giving a verdict under the circumstances stated on the record. It is alleged that to put a person on his trial a second time under those circumstances is in violation of the well-known fundamental maxim, that a man shall not be twice vexed for the same offence. Is the maxim applicable to civil as well as criminal proceedings? I think clearly there is no distinction between the two. Whenever the rule applies, it applies to both, and the law has furnished its own exposition of the meaning of the maxim by supplying the pleas in a criminal case of *autrefois acquit* or the converse; and, in a civil case, of judgment recovered, or the converse. The meaning of the rule is, that when the matter has gone to its end, the verdict or judgment shall be a bar to a second litigation upon the same matter. That is the meaning, so far as all the illustrations go, and so far as any *dicta* can be found in the books about it. Now it is sought to engraft upon that another meaning, that where the first proceedings have become abortive, they should still be a bar to the second proceedings in respect of the same cause. But there is no authority for that, not even one *dictum* to be found

in the books, and it is certainly not within the reason and principle of the law. Even Coke, in that passage where he says that a jury once in charge of a prisoner cannot be discharged, does not intimate that if the jury should be discharged that discharge would be equivalent to an acquittal, and pleaded in bar by the prisoner. Nor is there anything in any of our books to favour that proposition, and it does not appear that that proposition ever was started until the pleas in *Conway v. the Queen* (7 Ir. Law Rep. 149), which is the only authority for it. I must say, with great respect to the majority of the learned Judges in that case, that I cannot go along with them in their ruling; that it seems to be at variance with principle and authority, and I adhere, with the other members of the Court, to the far preferable judgment of Mr. Justice Crampton, and do no violence to the maxim by holding that when the first trial has become abortive, by any means whatever, the proceeding is not legally a bar to a second trial for the same offence. That is enough to dispose of this case, because, if it is not a legal bar, there is an end of the appeal by writ of error.

As that important matter has been much discussed, I desire shortly to state my own views on the question, whether a Judge has the power in a criminal case to discharge a jury where he is satisfied that they are unable and will be unable to agree in a unanimous verdict. If there were no authority one way or the other, it seems to me such a power is necessarily vested in a Judge, because while our law requires unanimity, there must be a time, if the jury continue to disagree, at which they must be discharged. I must say I have read with feelings of humiliation as a lawyer the *dictum* which has been imported into our text-books and regarded for so long as an authority, that if the jury do not agree the Judges may carry them round the circuit from town to town in a cart. That has been traced up to its source, and I am glad to find it rests on no foundation of judicial decision or actual practice. But even that *dictum* assumes that a time may come when the jury must be discharged; and so long as unanimity is required, and there is only a limited time for the performance of the duty, the Judge must of necessity have power to discharge the jury at some time or other. If so, who is to be the judge of what is the proper time? It can be no one but the Judge himself. Now it has been the practice in cases of necessity for the Judge to discharge the jury, and to do an act which he is necessarily invested with the power to do. If that be so, and the Judge has *bona fide* exercised that power, is it a discretion capable of being reviewed in a Court of Error? It seems to me that to say that it is a matter of discretion involves in itself the proposition that it cannot be reviewed in error. The province of a Court of Error is to correct that which is against the law; it cannot be against the law for the Judge to exercise a power which the law gives him. But, to go further, if it were allowable for us to review the decision at which the learned Judge arrived, and to inquire into the case, I agree with my Brother Mellor, that after the Judge had kept the Jury for what was in his judgment a sufficient time, and had exhausted argument and persuasion, and the jury having announced to him that they would be wholly unable to agree, I think that to keep them still in custody under the privations to which they would have been exposed, would be a coercion not justifiable in the present day on the principles on which justice ought to be administered. I think, therefore, that the Judge could not with propriety and prudence have done otherwise than to discharge the jury at that time.

The second ground of error was as to the admissibility of Harris on the second trial. That simply impeaches the propriety of the second verdict; as to that, it is enough to say that in my judgment she was admissible; but whether she was or was not, the admissibility of the evidence is not and cannot be raised on the record, and cannot therefore be treated as a ground of error. For these reasons, I am of opinion that our judgment must be for the Crown.

BLACKBURN, J.—after referring to *Mansell v. the Queen* (1 Dears. & B. 375; s. c. 27 Law J. Rep. (N.S.) M.C. 4)—Is it necessary for us to fix the day of execution?

COCKBURN, C.J. (after consulting with the rest of the Court, and the Master of the Crown Office)—Our judgment is, that the judgment of the Court below be affirmed, and that the keeper of Newgate gaol present here in Court do re-deliver the plaintiff in error, Charlotte Winsor, to the custody of the Sheriff of the county of Devon and keeper of Her Majesty's gaol for the same county, and that the Sheriff do execution upon the said Charlotte Winsor for the felony and murder, in pursuance of the judgment of the Court of Gaol Delivery for Devon, according to due form of law.¹

[IN THE COURT OF QUEEN'S BENCH.]

Jan. 20, 1866.

THE OVERSEERS OF THE POOR OF THE TOWNSHIPS OF HILTON AND WALKERFIELD, *appellants*, v. THE OVERSEERS OF THE POOR OF THE TOWNSHIP OF BOWES AND OTHERS, *respondents*.

35 L. J. M.C. 137; L. R. 1 Q.B. 359; 14 L. T. 512; 14 W. R. 368.

Distinguished, *R. v. Rhymney Railway*, [1869] E. R. A.; 38 L. J. M.C. 75; L. R. 4 Q.B. 276; 17 W. R. 530 (Q.B.).

Poor-Rate—General Inclosure Acts—Revenue from Sale of Rights of Shooting—Severance of Right of Shooting over Land and Ownership of Part of the Soil of it.

COMMON RATES AND RATING.—*The Manor of B. (except the mines, &c.) was conveyed to trustees in trust to hold the rents and profits for the benefit of the owners of ancient tenements within the manor. By a provisional order, confirmed by an inclosure act, a moor, part of the manor, was converted into a stinted pasture, part of which was allotted to the trustees and part to the owners of ancient tenements, according to the value of the property of each tenant. The provisional order contained the reservation "that the right and interest in all mines, &c., also the right of all manner of game upon the said lands, be not in any way affected or interfered with by this inclosure, and that all persons entitled to such mines, &c. and game having the same rights of entry and other rights as heretofore used and enjoyed":—Held, that the revenue derived by the trustees from the sale of licences to shoot on the moor was not ratable, as the effect of the provisional order was to sever the right of shooting from the soil, and to make it an incorporeal hereditament, unconnected with the ownership, either of that portion of the moor allotted to the trustees or that allotted to their cestuis que trust, the owners of ancient tenements.*

CASE stated by Justices under 12 & 13 Vict. c. 43. s. 12.

In the reign of Charles the First the owners of lands and tenements within the manor of Bowes, in the North Riding of York, were customary tenants of the Crown. The manor of Bowes, with its moors, wastes and royalties, was then the property of the Crown, and consisted of portions of the manors or lordships of Middleham and Richmond, in the same county, or of one of them. The whole of the manor was sold by Charles the First to the mayor, commonalty and citizens of London. In 1656 the then customary tenants purchased, through the negotiation of a Mr. Hanby, their several tenements of the corporation of London, and took a conveyance of them to trustees. The trustees subsequently conveyed to every customary tenant his land in fee, upon

(1) The Attorney-General afterwards granted his *fiat* for a writ of error to the Exchequer Chamber.

receiving his share of the purchase-money, calculated in the proportion which his customary yearly rent bore to the whole rents of the manor. At the same time the owners of ancient lands or tenements within the manor purchased, through the same negotiation, the manor and its moors, wastes and royalties, with some hereditaments which the Crown had held in its own possession, and the same were conveyed to Mr. Hanby by deed, dated the 4th of August, 1657. The following is a description of the parcels in this deed: "All that the lordship or manor of Bowes, with the rights, members and appurtenances thereof, in the said county of York, and all that toll, tollage or custom within the said manor of Bowes, with all its rights, members, liberties and appurtenances thereunto belonging and appertaining, in the said county of York, and all that common furnace, with the appurtenances situate and being in Bowes aforesaid, and all that close of ground and pasture, together with the cottage thereupon built, and all other the appurtenances thereunto belonging, situate, lying and being below the castle in Bowes aforesaid, which said tollage, custom, common furnace, close of ground and cottage, with the appurtenances, and a mill formerly granted unto the said Christopher Hanby, are, in the indenture now in recital, expressed to be charged and for ever to continue charged with and liable to the payment of the yearly fee-farm rent of 20*l.* 0*s.* 4*d.* And also all wastes, waste ground, commons, heaths, furzes, moors, marshes, ways, void ground, woods, underwoods, streams, banks, rivers, waters, watercourses, fishings, fowlings, hawkings, huntings, mines of coal and lead, opened and not opened, quarries, reversions, rents, services, heriots, fines, amerciements, courts leet, courts baron, and view of frankpledge, and all other courts, liberties, perquisites and profits of the said courts, and of all other the premises, goods and chattels of felons and fugitives, felons of themselves, and of persons outlawed, attainted, condemned, and of persons put in exigent, waifs, estrays, deodands, estovers, common of estovers, fairs, markets, and profits of fairs and markets, courts of pie poudre, duties, customs, pickage, emoluments, immunities, freedoms and hereditaments whatsoever within the townships, parishes, hamlets, precincts, territories of Bowes, Boldron, Sleightholme, Stoneykeld and the Spittle, or elsewhere within the said county of York, to the said manor or lordship of Bowes belonging or appertaining, or accepted, reputed, known, placed, letten or enjoyed as part, parcel, member, appendant or appurtenant of or to the said manor or lordship, or reputed manor or lordship aforesaid."

The grant contained an exception of fee-farm rents, and anything previously conveyed or contracted to be conveyed by the corporation.

By deed, dated the 1st of October, 1658, Mr. Hanby conveyed the manor, with the wastes, commons and hereditaments mentioned in the deed of 1657 (except the tollage, the castle, some closes of land and rights of pasture connected therewith, and all mines of lead and coal within the wastes and commons of the manor), to trustees; and by declaration of trust, dated the 29th of November, 1682, it was declared that "the trustees should and would from time to time, and at all times from thenceforth for ever permit and suffer every of the persons mentioned in the schedule thereunto annexed, their heirs and assigns, being tenants of the several messuages, lands and tenements in the said schedule contained, and then in their several and respective tenures and occupations, to have and convert to their own uses respectively a ratable share and proportion of the rents, issues and profits of the said manor and premises, and of every part and parcel thereof so granted as aforesaid, according to the proportion of the several ancient yearly rents of the said messuages, lands and tenements, and of the monies by them respectively paid for the purchase of the premises, which said rents and monies were set down, expressed and declared in the schedule thereunto annexed." A schedule was added to the trust deed, in which was set forth a list of owners, their ancient rents, and the amounts subscribed by each towards the general purchase.

In 1841 the then trustees filed a bill in Chancery to have the *cestuis que trust* ascertained, and the trusts carried into effect under the direction of the

Court. In this suit it was established that the persons beneficially interested were, in fact, all the then owners of ancient tenements in the manor, and a schedule was made comprising their names, and the respective yearly values of their tenements; the final decretal order of the Court, made the 7th of November, 1853, being, that the revenues of the trusts (after satisfying current costs and charges) should be divided by the trustees triennially amongst the parties entitled, and that new trustees should be appointed. By deed, dated 1854, the manor, moors, wastes, royalties and hereditaments were conveyed to the new trustees, upon the trusts and for the purposes mentioned in the deed of the 29th of November, 1682, and the decrees of the 7th of November, 1853.

The trustees, individually, are owners of ancient lands in Bowes, and one of them is a resident inhabitant of the township.

Amongst the hereditaments conveyed to the trustees with the manor and royalties is a certain moor in the township of Bowes, referred to in the parcels of the deeds of 1657 and October and November, 1682, containing at present about 11,000 acres, but of somewhat greater extent at the time of those deeds. In 1766 an act of parliament was passed for enclosing Bowes Moor and several open fields or pastures in Bowes. Under this act a portion of the moor was divided and inclosed. By the same act the Commissioners had power, on request of the majority of commoners, to except out of the inclosure any part of the moor which might be considered not worth the expense of cultivation, and the excepted parts were to remain as if the act had not been made; and the 11,000 acres and upwards of present moor were excepted out of the inclosure, not being considered then capable of profitable cultivation.

Up to and subsequently to 1766, when this division and inclosure took place, the right to depasture upon the moor was vested in and exercised by the owners of ancient lands and tenements only, being the same persons as were entitled to the manorial rights under the trust deed of 1682; but, between that year (1766) and 1856, the owners of some of the allotment lands set out under the Inclosure Act had acquired rights of common on the moor by user.

This has given rise to two classes of owners, namely, owners of old land, which is ancient land, and owners of new land, which is an allotment under the inclosure of 1766, and owners of which acquired rights of common by user, as before mentioned. The difference between these classes is, that the old land is entitled to manorial rights and the benefit of the trusts of 1682, while the new land is entitled to rights of common only, and not to participation in the manorial rights or profits of the said trusts.

In 1856 a provisional order was made, by the Inclosure Commissioners, under the authority of the General Inclosure Acts, for converting the moor into a stinted or regulated pasture. This order contained the following reservation:

“ And that the right and interest in all mines, minerals, stones, and other substrata under the lands to be inclosed, and also the right of all manner of game upon the said lands, be not in any way affected or interfered with by this inclosure; and all persons entitled to such mines, minerals, substrata and game have the same rights of entry and other rights as heretofore used and enjoyed.”

This order was afterwards confirmed by the 20 Vict. c. v. Since the passing of the last-mentioned act each freeholder has had allotted to him thereunder a proportionate number of stints or pasture-gaits, according to the value of his property, and 361 stints were awarded to the trustees as lords in trust of the manor, which stints they hold in trust for the same class of freeholders as are entitled to the manorial rights and profits under the trust deed, and the profits derived from these stints form an item in the trustees' annual account of receipts and expenditure, hereinafter referred to. The remaining stints were awarded exclusively to the owners of ancient lands and tenements,

except in the case of the owners of allotment lands, who had gained rights of common by user as before stated.

An annual meeting of the owners of stints or cattle-gaits is held on the first Monday in February, when five persons are appointed by them field-reeves, under the General Inclosure Act, and these field reeves have full power and authority to manage and regulate the moor so far as relates to the herbage; and in order to defray the expenses, they raise money by a rate levied under the powers of the General Inclosure Act. The field-reeves, among other duties, have to protect the moor from overstocking by stint-owners, and from trespasses by strangers' cattle. Another duty of the field-reeves is to look after and take care of the cattle on the moor, and for this purpose they hire shepherds, and, by arrangement between the trustees and field-reeves, these shepherds assist the gamekeepers and watchers to preserve the game on the moor, a yearly sum being allowed for that purpose by the trustees towards the expense. The trustees appoint a gamekeeper, who is paid by them exclusively, and whose time is entirely devoted throughout the year to the preservation of the game on the moor. They also employ night and other watchers when necessary. In the grouse season the trustees issue tickets, now charged 20*l.* each, which are licences to shoot, and enable the holders to sport on these moors for twenty days from the 12th of August, and then (after an intermission of the month of September) for ten days in October. [A copy of one of these tickets formed part of the case.] The trustees also let the stone and flag quarries on the moors, and publish a yearly account of their receipts and expenditure. A copy of the last yearly account is hereunto annexed, and is to be taken as part of the facts stated and awarded. The trustees divide the balance in their hands triennially amongst the parties entitled, who are the owners of ancient lands and tenements within the manor, the trustees themselves also participating, as owners. The revenue derived from the sale of these tickets varies. The following is a statement of receipts from tickets during the last six years—

1859	...	...	...	...	...	£708
1860	...	...	...	...	...	504
1861	...	...	...	...	...	630
1862	No licences issued, in consequence of disease and scarcity of birds.					
1863	...	...	...	...	...	787
1864	...	...	...	...	...	800

The quarries are included in the valuation list, and rated to the relief of the poor, and so are the stints or pasture-gaits set out to freeholders; but the 361 stints awarded to the trustees do not appear to be included in the valuation list, or to be rated. The respondents, however, admit their rateability and that of the quarry herbage and cottage-garden rents, and agree that they may be included in the valuation list, and that the list may be amended accordingly.

Many of the owners of ancient lands entitled to participate in the income derived from the trusts occupy their own lands and stints; others let their lands to tenants, either together with, or separately from, the stints. But no sum is added, either in the rate or valuation list, to the ratable hereditaments of any owner or occupier in respect of such portion of the profits of the trust as arises from the licences to sport.

It was agreed that the act, 20 Vict. c. v., the Inclosure Act of 1766 and the General Inclosure Acts should be referred to and used so far as they related to the case.

The questions for the opinion of the Court were, whether the profits shewn by the annexed account to be received and distributable by the trustees under the trust (and not already included in the valuation list, or agreed so to be included as before stated,) were ratable to the relief of the poor; and, if so, whether the rate should be upon the trustees, or on all or any of the owners or others, in proportion to their respective interests or to the increased value

of their ratable hereditaments in the township, in consequence of such profits, or how otherwise; and the assessment committee of the Teesdale Union were to amend the valuation list of the ratable hereditaments in the said township of Bowes, or cause a supplemental or substituted valuation list of the rateable hereditaments in the said township to be made, in conformity with the decision of the Court.

Edward James, for the respondents.—Neither the trustees nor their *cestuis que trust* are liable to be rated in respect of the proceeds of licences to shoot on the moor. There is no tenement to which the privilege of shooting can be or is attached. The inclosure, under the 8 & 9 Vict. c. 118, vested the right to the surface of the moor in the different stint-owners. The right to the shooting was retained by the trustees as lords of the manor. This right is an incorporeal hereditament, and forms no part of the profits of the soil. The right is enjoyed by the trustees upon the soil of other persons: it is in the nature of an easement. Neither can it be contended that the right of shooting is attached to the land of any of the allottees of stinted pastures. These lands cannot be said to be enhanced in value by the right of shooting, because their occupiers have an interest in the proceeds of this right.

T. Jones appeared on behalf of the trustees of the manor of Bowes; but the Court decided against his right to be heard.

Manisty (G. Bruce with him), for the appellants.—The trustees ought to have been rated in respect of the rights of shooting annexed to their ownership of part of the moor. The effect of the order confirmed by the inclosure act was to vest the soil of the moor in a number of persons as tenants in common. The right of shooting upon each portion of the soil followed the ownership of it. The lord himself had no right to the game as a franchise; he enjoyed the right simply as owner of the waste. Now, the words of the reservation apply, and apply only, to a right of game as a franchise. In *Ewart v. Graham* (7 H.L. Cas. 331; s. c. 29 Law J. Rep. (N.S.) Exch. 88) it was held, that where the right of hunting, shooting, &c. had been reserved to the lord by a private inclosure act and award, that the proviso did not apply to mere manorial rights, but that the exclusive right of shooting was reserved to him. But there was proved to be no right of freewarren in the lord.

[BLACKBURN, J.—The stint-holders surely do not have the right to work the minerals in common with the lord?]

The right to lead, coal, &c. never passed to the trustees. In *Greathead v. Morley* (3 Man. & G. 139; s. c. 10 Law J. Rep. (N.S.) C.P. 246), the words by which minerals were reserved were nearly the same as in the present case. In *Bruce v. Helliwell* (5 Hurl. & N. 609; s. c. 29 Law J. Rep. (N.S.) Exch. 297) the right of fowling was reserved to the lord by an inclosure act, but it was held that this gave him no more than he had formerly enjoyed—a right in respect of the ownership of the soil. Moreover, it must be considered that on the plainest principles the proceeds of this right of shooting which belong to the present owners of the soil in undivided moieties, and so enhance the value of the land, ought to be rated. The Poor Law Assessment Act, 25 & 26 Vict. c. 103, has confirmed the principle that the enhanced value of premises should be rated—*The Overseers of Sunderland v. Sunderland Union* (18 Com. B. Rep. (N.S.) 531; s. c. 34 Law J. Rep. (N.S.) M.C. 121).

COCKBURN, C.J.—I am of opinion that this right of shooting is not a matter in respect of which the persons in whom the right has vested, the trustees of the manor, are ratable. By what has taken place under the inclosure act, the wastes of the manor, over which the lord had a right of shooting, have become vested in the commoners, and a certain portion of these wastes has been allotted to the lord in respect of his territorial rights. But all this was done with the express reservation that the right of game should not be affected. This reservation was, I consider, a parliamentary or statutory conveyance of the right of shooting to the lord of the manor. It has been contended that the

lord enjoys the right of shooting in common with the rest of the stint-owners. But it cannot have been intended that every one of these stint-owners should have the right of sporting over the moor, because this would nullify the reservation; which provides "that the right of all manner of game upon the said lands shall not be in any way affected or interfered with by this inclosure." For if, instead of confining the right to the trustees, the legislature were to extend it to each of the stint-owners, they would lessen the value of the right, and thereby invalidate the provisions of the trust deed. Mr. Manisty contended that the reservation was inserted in order to protect any right of freewarren or franchise which might have been enjoyed by the lord. But I do not think this was the case; the reservation is one which is almost always put into inclosure acts, by which rights of common are converted into rights of ownership, and a portion of the soil given to the lord of the manor. It is very common to reserve the right of shooting to the lord, and this is all I think was intended by the words relating to the right of game in the order. It is perfectly true that if the right of shooting belonged to the lord of the manor, and he exercised that right himself, or let it out to tenants, from whom he received rent, this would enlarge the rent and thereby indirectly increase the rate. But it is admitted that a right which is incorporeal or in gross is not assessable to the poor-rate. It might have been expected that a right which, when severed, diminishes the value of the soil, should have been made ratable by the legislature; but it is not for us to legislate. This, therefore, is the only question—Is the right of shooting an incorporeal hereditament? I think that the reservation leaves the right of shooting where it was before, and that it remains vested in the lord as it would in an ordinary freeholder who had conveyed away his land, reserving the right of shooting. It is therefore a right in the nature of an incorporeal hereditament, and not the subject of a rate.

BLACKBURN, J.—I am of the same opinion. It is necessary, in order to make the occupier of premises ratable to the poor-rate, that he should be rated in respect of a subject-matter which would by itself be ratable. The subject-matter may, however, be enhanced by matter in some way connected with the occupation of it. Now, the question is, whether this valuable right of shooting is so connected with the occupation of any ratable object that it would enhance the occupation and be taken into account in estimating its value. This raises the whole question, whether the right of shooting has been severed from the rest of the property and become a right in gross. If the facts were that the right of shooting was still attached to the land and an attempt was made to diminish the ratable value of the soil by letting out the shooting to others, this would give rise to some nice questions of law, of which I need only say, that they do not arise here; as I think that the inclosure act had the effect of severing the right of shooting from the rest of the property. By the 8 & 9 Vict. c. 118. s. 116, it is enacted, that "the right of soil of and in all land which shall be converted into regulated pastures shall, subject to the right of the lord of the manor to all or any of the mines, minerals, stones and other substrata, where the same shall be reserved to him under this act, and to the other rights given or reserved by this act and the award in the matter of such inclosure, be vested in the persons who under the directions and determinations of such award shall be the owners of the stints or rights of pasture therein, in proportion to the shares or aliquot parts which such stints shall be thereby declared liable to of any rate under this act, as tenants in common." Therefore as soon as the soil of the moor is converted into regulated stints it is vested in the stint-owners, and they as tenants in common would, under ordinary circumstances, have the right of shooting. But the act says that the soil is to vest subject to the rights given or reserved by the inclosure award, and we must look at the award in the case to see whether it has the effect of conveying the right of shooting to all the stint-owners. Now, I do not think that there is anything in the reservation to shew that it has this effect. The words are, "that the right and interest in all mines, &c. under the lands to be inclosed, and also the right of all manner of game upon the said lands, be not in any

way affected or interfered with by this inclosure." These words seem to me to express an intention that the right to the game and the right to the minerals should be in no respect affected by the inclosure, but that they should remain exactly as they were. It goes on further: "and that all persons entitled to such mines, &c. and game have the same rights as heretofore used and enjoyed." These few lines seem to shew that difficulties with regard to the existing rights of the land were contemplated. The reservation accordingly gives notice to the allottees that the right of shooting is preserved to those who formerly enjoyed it. Mr. Manisty has referred us to cases upon the construction of inclosure acts, where it was decided that a reservation to the lord of the right of sporting extended only to the right which he had previously enjoyed, and did not create a new one. None of these cases, however, lay down any particular rule; they all proceeded on the language of the special act or award. The words in the reservation were, I think, used in a popular sense, and meant that the right of shooting should belong to its former owner, but by a different title. As to the other point, I think that the fact that the stint-holder receives from the trust-fund part of the proceeds of the sporting licences, cannot be said to enhance the value of his occupation so as to make him liable to an increased rate.

LUSH, J.—I am of the same opinion. A right of shooting is not in itself the subject of a rate. It can only be brought into account when it improves and enhances the value of the land to which it belongs. The question arises, Is this right incident and appurtenant to the ownership of the soil? This must depend on the construction of the inclosure act. Before the inclosure the right of shooting was incident to the ownership of the soil by the lord; but if the order embodied in the act had the effect of severing that right from the soil, it created an incorporeal hereditament. What, then, is the true meaning of the words in the order? As to this, I cannot entertain the least doubt. There was a common over which a large number of persons had rights, in whom it was intended to vest the surface of the soil, preserving to the lord some of his manorial and territorial rights. I cannot doubt that this was the intention of the order, and have less doubt that the words of the order are capable of effectuating that intention. The words of the reservation, although they are not perhaps technically framed, indicate that the lord is to have the right of shooting, notwithstanding the surface of the soil has passed to others. That being so, the right of shooting is severed from the ownership of the land, and ought not to increase the amount of the rate.

Judgment for the respondents.

[IN THE COURT OF QUEEN'S BENCH.]

Jan. 20, 1866.

MORRIS, appellant, v. JEFFRIES, respondent.

35 L. J. M.C. 143; L. R. 1 Q.B. 261; 13 L. T. 629; 14 W. R. 310.

Adopted, *Lawrence v. King*, [1868] E. R. A.; 37 L. J. M.C. 78; 9 B. & S. 325; L. R. 3 Q.B. 345; 18 L. T. 356; 16 W. R. 966 (Q.B.).

Turnpike-Road Acts—"Horses tethered or wandering, straying or lying about a Turnpike-Road"—3 Geo. 4. c. 126, s. 123. and 4 Geo. 4. c. 95. s. 75.

HIGHWAYS.—By the 3 Geo. 4. c. 126. s. 123. any horse, &c. found "tethered or wandering, straying or lying about" any turnpike-road (except parts of it

leading through uninclosed common or waste ground) may be seized and impounded. Horses belonging to the respondent, whose carter was standing four or five yards from them, were seized, for the purpose of impounding them, while grazing on the side of a turnpike-road. The Justices found that the respondent's horses appeared to be under the control of his carter, who had charge of them:—Held, that these horses were not liable to be impounded within the meaning of the 4 Geo. 4. c. 95. s. 75.

CASE stated by Justices, under the 20 & 21 Vict. c. 43.

An information having been preferred by Charles Morris (the appellant) against William Jeffries, of Northleach, in Gloucester (the respondent), charging that the respondent did, on the 30th of July, 1865, at the tithing of Eastington, in the parish of Northleach, unlawfully release four horses, the property of the said William Jeffries, which said four horses were then on the way to the pound or place, to wit, the common pound of the tithing of Eastington, in the parish of Northleach, being the place then provided for that purpose by the trustees of a certain turnpike-road there situate, called the Stow and Cirencester turnpike-road, for the purpose of being impounded, before the said four horses had been discharged by the due course of law, the same having been before then lawfully seized by the appellant and so impounded, in consequence of the four horses having been found lying and straying on the turnpike-road there, not being such part of the road as did lead or pass through or over any common or waste or uninclosed ground, contrary to the form of the statute in such case made and provided.¹

The case came on for hearing before the Justices, at the Northleach petty sessions-house, at Hampnett, in Gloucester, when the following evidence was given:

By the appellant.—I am employed by the surveyor of the turnpike-road leading from Stow-on-the-Wold to Cirencester to impound any cattle that are grazing in the turnpike-roads. On the 30th of July, 1865, I saw four horses on the sides of the turnpike-road leading from Stow-on-the-Wold to Cirencester. They were grazing on the herbage there. There was a man in charge of them. I drove them along for the purpose of impounding them. I brought them down the road. I had asked whose horses they were. The man who had charge of them said they belonged to William Jeffries. I met Jeffries and his son. Jeffries and his son ordered the carter to take them home. I said to the carter who had them in charge, I was going to take them to the pound. The horses were taken away from me.

Cross-examined.—When I took the horses the man said he was attending to them by his master's orders. They were grazing on the sides of the road. When Jeffries ordered them to be driven on, I said, I have done with them. The policeman was present. It was about seven o'clock in the morning.

William Reed.—On Sunday morning, the 30th of July last, Morris called upon me at the station. There were four horses standing in a hollow by the side of the turnpike-road, as spoken to by the last witness, grazing. There was a man standing about four or five yards from the horses, minding them. Morris

(1) By 3 Geo. 4. c. 126. s. 123, any person or persons who shall release or attempt to release any cow, horse, ass, swine or other live stock or cattle, which shall be seized for the purpose of being impounded under the authority of this act, . . . or shall rescue or release, or attempt to rescue or release any distress or levy which shall be made under the authority of this act until or before such cow, horse, ass, swine or other live stock or cattle seized or so impounded, or such distress or levy so made shall be discharged by a due course of law, may be committed by a Justice for a period not exceeding three months.

By 4 Geo. 4. c. 95. s. 75, if any horse, ass, sheep, swine, or other beast or cattle of any kind shall at any time be found tethered or wandering, straying or lying about any turnpike-road, or any parts thereof (except on such parts of any road as lead or pass through or over any common or waste or uninclosed ground), it shall and may be lawful for any surveyor of the road where the same shall be found, or any other person or persons whomsoever, to seize and impound every such horse, &c. : provided always, that nothing in this clause shall be deemed, taken, or construed to extend to take away any right of pasturage which may exist on the sides of any turnpike-roads.

went between the horses and the man and drove them down the road towards the prison. The man and I followed behind. We met Mr. Jeffries and his son, &c. —(The rest of the evidence is omitted, as it related merely to the alleged rescue.)

The Justices thought that as the respondent's horses were with a keeper and appeared to be under the control of the respondent's carter, who had charge of them, they were not straying, and were, therefore, not liable to be seized by the appellant under 4 Geo. 4. c. 75. s. 95. They therefore dismissed the case, although they were of opinion that the practice of turning out loose horses on the sides of a turnpike-road for the purpose of grazing, though attended by a keeper, was an obstruction to the user of the road by the public, and that the herbage of the waste on the sides of the metalled road could not be lawfully grazed by the respondent's horses.

The questions for the opinion of the Court were, first, whether there was sufficient evidence given before the Magistrates to enable them in point of law to convict the respondent of releasing the horses, which had been seized for the purpose of impounding them; and, secondly, whether the respondent's horses, being with a keeper on the turnpike-road and grazing the herbage on the sides of it, were liable to be seized and impounded under 4 Geo. 4. c. 95. s. 75; and if so, whether the respondent was liable to be convicted under 3 Geo. 4. c. 126. s. 128. upon the information for releasing the horses so seized.

T. S. Pritchard, for the appellant.—The respondent ought to have been convicted. The horses which had been turned loose by him were an obstruction to the public way, so that it did not matter whether or not they were attended by a keeper.

[BLACKBURN, J.—The Magistrates must be taken to have found that the horses were under the control of the keeper; that is, that they were near enough to him, though loose, for the purpose of feeding.]

All the Justices have found is, that the horses had a keeper with them. In the 4 Geo. 4. c. 95. s. 75. the words are, "If any horse, &c., shall be found *tethered* or wandering, straying or lying about"; and the preceding section repeals the 3 Geo. 4. c. 126. s. 122, where the words are, "Any horse wandering, straying or lying about," omitting the word *tethered*. It is submitted that this shews that it was the intention of the legislature to compel horses and cattle to keep within certain limits, and not to be allowed to obstruct the highway.

[BLACKBURN, J.—The legislature do not appear to have said that cattle shall not be allowed to pasture on a turnpike-road.]

The Highway Act, 5 & 6 Will. 4. c. 50. s. 74, contains the words, "straying, &c. without a keeper"; but the amended act, 27 & 28 Vict. c. 101. s. 25, repeals that section, and omits the words "without a keeper."

No counsel appeared for the respondent.

COCKBURN, C.J.—I think that the Justices were right. They have found that the horses were under the control of the carter, and this fact takes the case out of the act.

BLACKBURN, J.—I am of the same opinion. Whether horses under the control of a keeper are within the act is a question of law. Whether these horses were under control is a question of fact, which has been decided by the Justices in the affirmative. It seems to me that all the act meant was, that horses should not be sent out on the highway without being properly guarded.

Judgment for the respondent.

[IN THE COURT OF QUEEN'S BENCH.]

Jan. 20, 1866.

WHITCHURCH, *appellant*, v. THE BOARD OF WORKS FOR THE FULHAM DISTRICT, *respondents*.35 L. J. M.C. 145; L. R. 1 Q.B. 233; 13 L. T. 631; 14 W. R. 277;
12 Jur. N.S. 353.Adopted, *R. v. Hutchins*, [1881] E. R. A.; 50 L. J. M.C. 35; 6 Q.B. D. 300;
44 L. T. 364; 29 W. R. 724 (C. A.).*Metropolis Local Management Act—Paving New Street—Apportionment of Expenses—Division of Street into Sections—18 & 19 Vict. c. 120. s. 105. and 25 & 26 Vict. c. 102. ss. 77, 110-112.*

LONDON.—By 18 & 19 Vict. c. 120. s. 105. and 25 & 26 Vict. c. 102. s. 77, the costs of paving a new street, under the compulsory powers of the former act, are payable by the owners of the land and houses abutting upon and forming the street, and are to be apportioned by the vestry or district board of works. By the interpretation clause of the latter act, the expression "new street" is to include a part of any such street. A district board of works, after passing a resolution that a street should be paved, apportioned the expenses of paving a portion of it among the owners of property constituting such portion:—Held, that the apportionment was void, as being unequal and not within the powers of the act.

On the 23rd of August, 1864, a complaint was preferred in the Hammersmith Police Court, by the board of works for the Fulham district (the respondents), against James Whitchurch (the appellant), for neglecting, as owner of houses or building land abutting on Latymer Road, Hammersmith, a new street about to be paved by the respondents, to pay the sum of 97l. 16s., his share of the estimated expenses of such paving. The Magistrate made an order for payment by the appellant of the amount claimed, but stated the following CASE for the opinion of the Court, under the 20 & 21 Vict. c. 43.—

At the hearing of the complaint it was proved, on the part of the respondents, and admitted, that, under the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), the Fulham district is composed of the parish of St. Peter and St. Paul, Hammersmith, and that the respondents have been and are duly constituted, under the Metropolis Local Management Acts, the board of works for the Fulham district.

At a special meeting of the respondents, held on the 25th of March, 1863, it was resolved, "That the roads in the parish of Hammersmith, known as St. George's Road, Clifton Street Road, and Latymer Road, be repaired under the 25 & 26 Vict. c. 102.¹ That the surveyor be and is hereby instructed to estimate

(1) By 18 & 19 Vict. c. 120. s. 105, "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate or made, be desirous of having the same paved as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriageway and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board)," &c.

By 25 & 26 Vict. c. 102. s. 77, "Where any vestry or district board shall, under the powers given by the 105th section of the firstly-recited act, have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners

the costs of such repairs of the same, and apportion it on the owners of each of the properties through which the roads go; and that it is referred to the general purposes committee to carry out this resolution under the advice of the solicitor, upon the condition that such costs be obtained from the owners of each property before the respective works are begun. But the committee is hereby empowered to repair either of such roads so soon as the estimated cost thereof shall have been received from the owner or owners."

Pursuant to this resolution, the surveyor made an estimate of the cost of the repairs of the whole of St. George's Road, Clifton Street Road, and Latymer Road, and also an apportionment of the same on the property to be charged therewith, together with apportionments on the owners of the property. This estimate and apportionment were submitted to the general purposes committee, and they resolved, on the 13th of October, 1863, that the board be recommended to have notice served on the owners of Latymer Road forthwith. Latymer Road lies between a piece of land belonging to the Latymer charity at one end, and Wormholt Scrubs at the other, and for the purposes of this case may be considered as divided into four sections, hereinafter referred to as sections 1, 2, 3. and 4. respectively.

Section 1. consists of that part of the road which lies between Clifton Street and the south side of the railway; Section 2. consists of that part of the road which lies between the railway and a public-house called The Latymer Arms. And the remaining portion of Latymer Road, namely, Section 3, consists of that part of the road which lies between the charity land and the point of junction by Clifton Street; and Section 4. consists of that part of the road which lies between the public-house called the Latymer Arms and Wormholt Scrubs.

Shortly after the passing of the last resolution, the surveyor of the respondents, made an apportionment of the costs of repairing a portion of the roads, which portion was called Section 1, amongst the owners of the property constituting such portion. This apportionment varied in some cases only in detail, according to correction of owners' names, but did not increase the assessment. At a meeting of the respondents, held on the 23rd of March, 1864, the surveyor attended, with his apportionment of the cost of repairing such portion called Section 2, of the Latymer Road, when it was resolved, "That the said apportionment be adopted, and that the clerk be and is hereby instructed to serve notices on the owners to pay their portion of the cost of paving such road, pursuant to such apportionment."

Pursuant to this last resolution, the clerk of the respondents caused notices to be served accordingly.

The appellant is one of these owners, and the following is a copy of the notice which was served upon him.

"Metropolis Local Management Act. To Mr. James Whitchurch, Lancaster Road, Kensington, owner of a plot of building land, situate southward of the Britannia public-house, on the west side of the Latymer Road, Hammersmith, and numbered 73. on the plan sent in. Whereas the street or way known as Latymer Road, Hammersmith, in the county of Middlesex, is not paved to the satisfaction of the board of works for the Fulham district, in the county aforesaid, and it appearing to the said board that the said street should be so paved, I hereby give you notice that the said board hereby require you, as such owner as aforesaid, to pay, within twenty-eight days from the day of the

of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses, including the cost of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or district board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion; . . . and any such amount shall be recoverable from the present or any future owner of the premises either by action at law or in a summary manner before a Justice of the Peace, at the option of the vestry or board."

By section 110, "The said recited acts (including the Metropolis Local Management Act, 1855) and this act shall be construed together as one act."

By section 112, "The expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street."

service of this notice, to me at the office (called Broadway House) of the said board, situate in the Broadway, Hammersmith, within the said district, the sum of 97l. 16s., being the amount of the estimated cost of and incident to such paving, payable by you as such owner; and further take notice, that if the said sum be not paid as aforesaid, proceedings will be taken for recovery thereof.

“ Dated this 2nd day of April, 1864.

“ The said plan is herewith produced, and may be seen at the office any day between the hours of ten and four o'clock.

(Signed) “ W. Lovely,

“ Clerk to the said Board.”

The appellant neglected to pay the sum demanded of him by the notice, or any part of it.

It was contended before the Magistrate that the appellant was not bound to pay the amount apportioned upon him, and for which he had been summoned, inasmuch as the resolution of the board of the 25th of March, 1863, authorized the repairing of the three roads therein mentioned, or either of them, as entire roads, and not in sections, and, therefore, that the expenses of paving the whole of the Latymer Road should have been estimated by the respondents' surveyor in one sum, and apportioned on all the owners of lands abutting on the road, and such apportionment should have been adopted by the board; whereas the surveyor had apportioned the respective amounts of his estimate by different apportionments, and upon the owners of property comprised respectively in separate sections of the road for which respectively the estimate was made, which partial apportionments were adopted by the board.

It was contended, on the part of the respondents, that they had, by their resolution of the 25th of March, 1863, determined on repairing the roads, or either of them, therein mentioned, and the Metropolis Local Management Acts had not prescribed any mode in which the estimate of the expenses of repairing roads and the apportionment of such expenses are to be made, or any period within which such repairs are to be completed; that the respondents or committees for general purposes, to whom the respondents had referred the carrying out of the repairs, had a general discretion vested in them to carry out the repairs as they considered best, either in sections, or as entire roads, and to adopt the apportionment by their surveyor either as a whole or separated, for the work determined to be done; and that the proceedings were regular, and that payment against the appellant ought to be enforced.

The Magistrate was of opinion that the respondents were right, and gave his determination against the appellant.

The question for the opinion of the Court is, whether it was necessary for the legal carrying out of the resolution of the respondents of the 25th of March, 1863, to repair the Latymer Road, that one estimate only of the expenses of paving the whole of the road should have been made by the respondents' surveyor, and that there should have been but one apportionment of those expenses among all the owners of property abutting on the whole of the road, or whether the respondents under the resolution were warranted in causing separate apportionments in respect of the separate and distinct sections of the road to be made from time to time.

If the Court should be of opinion that the resolution was duly carried out by the separate apportionments before mentioned, then the order upon the appellant for the payment of 97l. 16s. is to be confirmed; but if the Court should be of a contrary opinion, the order is to be quashed.

Keane (*L. Kelly* with him), for the respondents.—The order was good. The whole question turns on the meaning of the word “ apportion,” for by section 77. of 25 & 26 Vict. c. 102, the costs of repairs, such as those in the present case, “ shall be apportioned by the vestry or district board.” It is submitted that these words give to the district board a reasonable discretion in apportioning the expenses. There is no complaint of any positive inequality in

this rate of apportionment. What is really complained of is, that in exercising the discretion vested in them the respondents have come to a wrong decision.

[BLACKBURN, J.—What you have done is to apportion the expenses of paving among separate sections of the street instead of the whole of it. The two modes will probably work out a different result; but, whether they do or not, you have not followed the mode prescribed by the statute.]

The appellant is unable to shew that he has been prejudiced by the apportionment.

Karslake (*Haselfoot* with him) was not heard.

COCKBURN, C.J.—I think that the order is clearly bad. The Metropolis Local Management Acts empower a vestry or district board to make an order for paving or repairing any new street; and by the interpretation clause, the expression "new street" is to include any part of such street. The board may, therefore, make an order for paving an entire street or part of it; but when they come to apportion the expenses they must charge them upon the whole value of the land and houses comprised in the street. They cannot order a street to be paved, and then divide it into sections with the view of determining how the property in each section shall meet the expenses of paving in that particular section. To put a different construction on the act would be most unjust. Suppose that there were a street varying in character and in value throughout its entire length, would it not be unfair to take one portion and charge it with the expenses of its repairs? I cannot think that the legislature intended to place so grievous a burden upon the owners of property of inferior value. The order of the Magistrate must therefore be quashed.

BLACKBURN, J.—I am of the same opinion. When the district board have to consider whether or not a street ought to be paved, it is also their duty to consider how much of it requires paving. In this case the vestry came to the conclusion that the whole of Latymer Road should be paved as one street. Then the acts of parliament say, that when a street has been paved by the district board, the expenses of paving are to be apportioned among the owners of houses forming the street. But this does not mean that the board are to make their apportionment capriciously. What is meant is, that, having made an estimate, this estimate is to be equally divided among the owners of the whole property. The present case is very like that of a poor-rate on a parish where the rate would be bad, and not according to law if an equal portion of it were levied upon each hamlet in the parish. It would probably be found that the result of making this apportionment upon one particular section is different from what it would be if made upon the whole street; but whether this is the case or not, it is enough to say that the statutable authority has not been followed, and therefore the order must be quashed, but without costs (*Mellor, J.* was absent).

Order of Magistrate quashed.

[IN THE COURT OF QUEEN'S BENCH.]

Jan. 24, 1866.

THE QUEEN, *on the prosecution* OF THE GUARDIANS OF THE HAYFIELD UNION, *appellants*, v. THE GUARDIANS OF THE POOR OF THE GLOSSOP UNION, *respondents*.

35 L. J. M.C. 148; L. R. 1 Q.B. 227; 13 L. T. 672; 14 W. R. 329.

Distinguished, *R. v. Abingdon Union*, [1870] E. R. A.; 39 L. J. M.C. 153; L. R. 5 Q.B. 406; 22 L. T. 603; 18 W. R. 981 (Q.B.). See, *Knaresborough Union*

E. R. A. [1866]—VOL. 2

62

v. *Pateley Bridge Union*, 1871, 25 L. T. 590 (Q.B.); *Guildford Union v. St. Olave's Union*, 1872, 25 L. T. 808 (Q.B.). Explained, *R. v. St. Ives Guardians*, [1872] E. R. A.; 41 L. J. M.C. 94; L. R. 7 Q.B. 467; 26 L. T. 893; 20 W. R. 657 (Q.B.). Distinguished, *Holborn Guardians v. Chertsey Guardians*, 1884-85, 14 Q.B. D. 289 (Q.B. D. Div.): reversed, 15 Q.B. D. 76 (C. A.). Referred to, *R. v. Stepney Guardians*, [1885] E. R. A.; 54 L. J. M.C. 12; 52 L. T. 959 (C. A.). See, *Cambridge Union v. Edmonton Union*, [1900] E. R. A.; 69 L. J. Q.B. 584; [1900] 2 Q.B. 111; 82 L. T. 495; 48 W. R. 559 (Q.B. D. Div.).

Pauper Lunatic—Removability—Break in Residence—Domestic Service—Animus Revertendi.

POOR LAW.—*A pauper who had resided, sometimes with her mother and sometimes with her brother, in the parish of G, went to live out of the parish as a domestic servant for one month, on the terms that the service was to be continued at the end of that time if both mistress and servant agreed. She took her clothes with her, and left no property in G. She always intended to return to her mother's house in the event, which happened, of her mistress dismissing her at the end of the month, and did then return and resided in G. till she was removed to a lunatic asylum:—Held, that under 9 & 10 Vict. c. 66. s. 1. and 24 & 25 Vict. c. 55. s. 1, the residence in G. was broken by the month's absence, since while the pauper was so absent she had no residence in G. to which she could return.*

On an appeal to the Derbyshire Quarter Sessions, by the guardians of the Hayfield Union, against an order of Justices, of the 26th of November, 1864, adjudging the settlement of Elizabeth Gantcliffe, a pauper lunatic, confined in the Derbyshire County Lunatic Asylum, to be in the township of Hayfield, in the said union, and ordering the said guardians to pay to the guardians of the Glossop Union, from which last-mentioned union the pauper was conveyed to the asylum, the costs of the examination and of conveyance and the costs of maintenance, the Quarter Sessions quashed the order, subject to the opinion of this Court on the following

CASE.

The pauper is a single woman, thirty-two years of age, and for the purposes of this case is to be taken to be legally settled in the township of Hayfield, in the Hayfield union. Since her father died, eight years ago, she has occasionally been out as a domestic servant, residing when not in service sometimes with her mother and sometimes with her brother, both of whom have for some years lived in the township of Glossop, in the Glossop Union. In January, 1861, the pauper had resided within the township of Glossop for three years preceding and upwards, and was then residing there with her mother, and continued so to do until September, 1861, when she went to live out of the township of Glossop, as a domestic servant, with a Mrs. Arnold, of Tintwistle, a township in the county of Chester, and in the union of Ashton-under-Lyne. Her arrangement with Mrs. Arnold was, that she should serve her a month upon trial, and that at the end of that time, if both parties agreed, she should continue in the service upon the usual terms of quitting at the expiration of a month's notice. to be given by either of them to the other.

When she went to Tintwistle she took with her some clothes in a bundle, and had no other clothes or property. When she went into the service and during the whole time of her service she intended to return to her mother's house at Glossop in the event, which happened, of her receiving notice to leave the service within the month. When she had been there a fortnight her mistress told her she would not suit her, and must leave at the end of the month. This the pauper accordingly did, and returned to her mother at Glossop, with whom she continued to reside until the 25th of February, 1864, when she was removed to the Derbyshire County Lunatic Asylum under a Magistrate's

order, dated the day previous. The pauper lunatic was previously to and at the time of the making of the order of removal to the asylum chargeable to the township of Glossop, and remained in the asylum at the charge of the Glossop Union until after the making of the order of the 26th of November, 1864, and until the hearing of the appeal.

The Court of Quarter Sessions held (subject to the opinion of this Court) that the above circumstances did not constitute a break in the pauper's residence in the township of Glossop.

The question for the Court is, whether at the time of her being conveyed to the said asylum the pauper would have been exempt from removal to the parish, or township of her settlement, by reason of any provision in the 9 & 10 Vict. c. 66. and the 24 & 25 Vict. c. 55. If this Court shall be of opinion that she would have been so exempt, the order of Quarter Sessions quashing the order appealed against is to be affirmed. If the Court shall be of a contrary opinion the order of Quarter Sessions is to be quashed, and the order appealed against is to be affirmed.

Bristowe and *F. Stephen*, for the respondents, in support of the order of Sessions.—The pauper, though physically absent, was constructively resident in Glossop. A young unmarried woman has no residence but at her mother's, when not out at service.

[MELLOR, J.—But she resided also at her brother's.]

This residence was equivalent to a hired lodging. Her absence in Tintwistle was merely for a temporary purpose, and there was clearly an *animus revertendi*, though she intended to stay if both parties suited, yet the engagement was more temporary than an ordinary hiring, for it was at first only for a month, and both parties were at liberty to renew at the end of that. This case is within the principle of *The Queen v. Brighthelmstone* (4 El. & B. 236; s. c. 24 Law J. Rep. (N.S.) M.C. 41), *The Queen v. Tacolnstone* (12 Q.B. Rep. 157; s. c. 18 Law J. Rep. (N.S.) M.C. 44), *The Queen v. the Justices of Gloucestershire* (15 Law J. Rep. (N.S.) M.C. 48), and is distinguishable from *The Queen v. Stapleton* (3 El. & B. 766; s. c. 22 Law J. Rep. (N.S.) M.C. 102) and *The Queen v. Stourbridge* (34 Law J. Rep. (N.S.) M.C. 179).

Hayes, Serj., and *Cave*, contra, were not called upon.

BLACKBURN, J.—In these cases nice points sometimes arise as to whether a person who is physically away from his residence is still constructively resident there; but when he has gone elsewhere for a permanent purpose, there is a break in the residence. Whenever a home is kept up to which he may return, then the degree of intention to return to it becomes a material point to consider, but it is quite an abuse of language to say that where no residence is kept up to which the pauper can return, there is no break in the residence. It would be monstrous to say that a person was constructively resident if, though he intends to return at some future time, there is no place to which he can return to reside.

MELLOR, J. and LUSH, J. concurred.

Order of Sessions quashed.

[IN THE COURT OF COMMON PLEAS.]

Jan. 26, 1866.

HUMPHREY, *appellant*, v. BETHEL, *respondent*.

35 L. J. M.C. 150; 1 H. & R. 221; L. R. 1 C.P. 215; 13 L. T. 797; 14 W. R. 457; 12 Jur. N.S. 212.

Turnpike—Exemption from Toll—Yeomanry Cavalry—Volunteers—26 & 27 Vict. c. 65. s. 45.

ARMY AND NAVY. HIGHWAYS.—*The exemption of volunteers from toll contained in section 45. of the Volunteer Act, 26 & 27 Vict. c. 65, does not extend to members of the yeomanry cavalry, and therefore such members are not exempt if they drive instead of ride to the place of meeting of their corps.*

CASE stated, for the opinion of the Court of Common Pleas, by the Justices of the county of Somerset, under 20 & 21 Vict. c. 43.

The appellant was the keeper of a turnpike-gate in the parish of West Monkton, in the county of Somerset.

The respondent was a non-commissioned officer in the West Somerset regiment of Yeomanry Cavalry, which had been duly called up for eight days' permanent duty at Taunton. The respondent, on his way from his residence to Taunton, arrived at the said turnpike-gate in order to pass through the same, driving a gig drawn by one horse. The respondent was dressed in the uniform of the said regiment, and was accompanied only by another member of the same regiment also in uniform; the gig contained no other articles than their respective arms and accoutrements, and the respondent was then going on his direct road to the place appointed for, and on the day for, exercise of the said yeomanry cavalry corps; and the appellant did then and there demand and take toll, viz., the sum of 4½d. from the respondent in respect of the said gig and horse or one of them.

It was contended, on the part of the appellant, that the provisions of the Volunteer Act, 1863, did not apply to the yeomanry cavalry corps; and that the respondent was not a volunteer officer or soldier within the meaning of the said statute, and therefore not entitled to exemption from toll under its provisions.

The Justices, however, being of opinion that the respondent was entitled to exemption under the 45th section of the said Volunteer Act, 1863, convicted the appellant of unlawfully demanding and taking the said toll.

The question of law arising on the above statement for the opinion of the Court was, whether the respondent, as such non-commissioned officer of yeomanry cavalry as aforesaid, was a volunteer officer or soldier within the meaning of the Volunteer Act, 1863, and entitled, therefore, to claim the benefit of the exemption contained in the 45th section of the said act.

H. T. Cole, for the appellant.—It is submitted that a non-commissioned officer of the yeomanry cavalry is not within the exemption from toll contained in the 45th section of the Volunteer Act, 1863 (25 & 26 Vict. c. 65). That section, which frees from toll "any officer of the volunteer force, or any volunteer or any non-commissioned officer of the volunteer permanent staff," does not apply to the yeomanry cavalry corps. The act throughout keeps the two services—the yeomanry and the volunteer force—quite distinct. Thus, in section 5, the officers of the volunteer force are to rank with officers of Her Majesty's regular and militia forces as the youngest of their respective ranks, and to rank with officers of the yeomanry force according to the rank and date of their respective commissions; and in the schedule of repealed enactments several acts relating to the corps of yeomanry and volunteers are stated to be repealed, so far as they relate to volunteers only, leaving such acts unrepealed as to the yeomanry corps. It is admitted that if the respondent be considered

a volunteer, within the meaning of the act of the 26 & 27 Vict. c. 65, he would be exempt, though driving a gig; but if he be not such volunteer, then, as a member of the yeomanry cavalry, he would be only exempt from toll, under the General Turnpike Act, 3 Geo. 4. c. 126. s. 32, when riding his horse.

Raymond, for the respondent.—The respondent was entitled to exemption from toll. The 45th section of the act, 25 & 26 Vict. c. 65, applies to all volunteers, in the large sense of that word, that is to say, all those who give their services to the country for military purposes without pay, as distinguished from paid soldiers. That section makes no such distinction as has been contended for on the part of the appellant; but says generally that “any volunteer” when going to the place appointed for exercise is to be free from toll. It is not an uncommon thing to find a section in an act of parliament which goes beyond the purview of the statute. It was held in *Stephenson v. Taylor* (30 Law J. Rep. (N.S.) M.C. 145) that the exemption from toll contained in the General Turnpike Act, 3 Geo. 4. c. 126. s. 32, extends to a carriage used by any member of a corps of volunteer infantry for his own conveyance to or from the place of exercise. The statute of the 25 & 26 Vict. c. 65. was intended to remove all doubts on the subject; and for that purpose it gave the exemption in general terms, without any distinction between the different classes of volunteers, whether yeomanry or otherwise.

H. T. Cole, in reply.—If the legislature had intended to have given the yeomanry cavalry the exemption now claimed, it would have done so, by either extending the exemption in the General Turnpike Act to members of such corps when going to the place of exercise in gigs or other vehicles, or by inserting the word “yeomanry” in the 45th section. As it is, the word “volunteer” in that section must be confined to the force generally known as the volunteer force, as distinguished from the yeomanry, and for which alone the legislature was providing when it passed the Volunteer Act in question.

ERLE, C.J.—I am of opinion that the conviction in this case must be reversed. The question is, whether a non-commissioned officer of yeomanry cavalry in uniform driving to the place of meeting of his corps is exempt from toll. I am of opinion that he is not exempt, because he was driving. The General Turnpike Act, after a number of exemptions of officers and soldiers in the regular service and militia, deals with persons belonging to any corps of yeomanry or volunteer cavalry, and as to such exempts any horse used and rode by such person in the uniform of his corps and having his arms, if going to or returning from a place appointed for inspection or review. The exemption is therefore for any horse used by him and rode by him. Nothing can be clearer than that the General Turnpike Act gives an exemption from toll to the yeomanry cavalry provided the horse in respect of which the exemption is claimed be ridden by the officer, and that the exemption under that act cannot be claimed by an officer driving the horse in a carriage. Then comes the Volunteer Act, 26 & 27 Vict. c. 65, and in the 45th section of that act there is the most wide and absolute exemption from toll of horses and carriages employed in conveying any volunteer in uniform to any place of duty, and the respondent claimed the exemption given by that section as being a volunteer. In one sense a member of the yeomanry corps is a volunteer; but we have nothing to do with this, and have only to interpret the statute, and I am of opinion that all through the Volunteer Act the word “volunteer” is used in contradistinction to the yeomanry force. It seems to me, therefore, that the wide exemption for horses used for volunteers is not extended to yeomanry officers using their horses not by riding but by driving them. Consequently the toll-keeper was right in making the respondent pay toll.

WILLES, J.—I am of the same opinion. I will only add, that the 42 Geo. 3. c. 66. s. 9. contains an exemption from toll in favour of horses ridden by members of the yeomanry cavalry, but there is no exemption as to yeomanry

infantry conveyed in carriages, so that the legislature expected that the infantry would walk and the cavalry corps ride. As regards the last act, the word "volunteer" must be there construed with reference only to what that act was dealing with.

KEATING, J. concurred.

MONTAGUE SMITH, J.—I have no doubt that the statute 26 & 27 Vict. c. 65. did not intend to interfere with the regulations under which the yeomanry corps were previously exempt from toll. It seems to be admitted, on the part of the respondent, that the yeomanry corps are not included in any other part of this statute except the exempting clause; now although in some cases a clause in a statute may go beyond the general scope of the act, that is not so, I think, in this case.

Judgment for the appellant.

[IN THE COURT OF COMMON PLEAS.]

Feb. 9, 1866.

STINSON, *appellant*, v. BROWNING, *respondent*.

85 L. J. M.C. 152; 1 H. & R. 263; L. R. 1 C.P. 321; 13 L. T. 799;
14 W. R. 395; 12 Jur. N.S. 262.

Not applied, *Horner v. Cadman*, [1886] E. R. A.; 55 L. J. M.C. 110; 54 L. T. 421; 34 W. R. 413 (Q.B.D. Div.). Followed, *Hill v. Somerset*, 1887, 51 J.P. 742 (Q.B.D. Div.).

Highway—Nuisance—5 & 6 Will. 4. c. 50. s. 72.—Making Fire on the side of a Highway.

HIGHWAYS.—*Making a fire within fifty feet of the centre of a public carriage-way is not an offence within the 72nd section of the General Highway Act, 5 & 6 Will. 4. c. 50, unless it be done to the injury of the highway, or to the injury, interruption or personal danger of persons travelling thereon.*

CASE stated by Justices under 20 & 21 Vict. c. 43.

The appellant having appeared before two Justices for the county of Worcester to answer to an information, charging him with having unlawfully made a certain fire within fifty feet of the centre of a public carriageway or cartway, contrary to the form of the statute (5 & 6 Will. 4. c. 50), it was proved, on the part of the respondent, that on the 10th of November, 1865, and within fifty feet of the centre of a certain highway, in the parish of Alvechurch, in the county of Worcester, called Icknield Street, viz., about ten feet six inches from the centre of such highway, the said appellant did make a fire and afterwards throw an apronfull of wood thereon, the road at the point where the fire was made being only twenty-one feet wide. On cross-examination it was proved that the road was not much used by the public, and that the appellant when he made the fire opened a lid in the wall, and put the fire in the fire-hole and closed the lid, the fire-hole being attached to the appellant's premises. The business of a wheelwright, for which purpose the fire was used, had been carried on at the appellant's premises for twenty years or upwards.

It was contended by the appellant's attorney that the statute 5 & 6 Will. 4. c. 50. s. 72, under which the proceedings were taken, had reference only to fires made by hawkers, higgles, gipsies, or other persons travelling on the road, and not to the case of a fire made on the side of the highway by any

person for the purposes of his trade, as in the present case, in which it appeared from the evidence that the fire was made by the appellant for the purpose of carrying on the trade of a wheelwright, which he had followed at the same premises for many years.

The Justices adjudged that the appellant did on the day named in the information make a fire in a fire-hole attached to the outside of his premises for the purposes of his business of a wheelwright, within fifty feet of the centre of the said highway, called Icknield Street, and which fire was so exposed to the said highway as to be, in the opinion of the said Justices, a nuisance within the meaning of the said statute, and they convicted the appellant accordingly.

If the Court of Common Pleas should be of opinion that the making of the fire by the appellant was a nuisance within the statute, then the conviction was to be confirmed. But if the Court should be of a contrary opinion, then the information was to be quashed.

H. Matthews, for the appellant.—The question turns on the construction of the 72nd section of the Highway Act, the 5 & 6 Will. 4. c. 50. That section imposes a penalty, not exceeding 40s., for committing any of the various offences there specified. After describing those which relate to injuring the road, cutting down the banks, or defacing direction posts, &c., the section states the following offences: "or shall play at football or any other game on any part of the said highways to the annoyance of any passenger or passengers, or if any hawker, higgler, gipsy or other person travelling shall pitch any tent, booth, stall or stand, or encamp upon any part of any highway, or if any person shall make or assist in making any fire, or shall wantonly fire off any gun or pistol, or shall set fire to or wantonly let off or throw any squib, rocket, serpent, or other firework whatsoever within fifty feet of the centre of such carriageway or cartway, or bait or run for the purpose of baiting any bull upon or near any highway, or shall lay any timber, stone, hay, dung, manure, lime, soil, ashes, rubbish, or other matter or thing whatsoever upon such highway, to the injury of such highway, or to the injury, interruption or personal danger of any person travelling thereon." It is submitted that the act for doing which the appellant was convicted is not an offence within the meaning of the section, inasmuch as to constitute it such offence it must be done to the injury of the highway, or to the injury, interruption or danger of persons travelling thereon. These latter words of the section override that part which relates to the making fires, and therefore it is submitted that as it is not found by the Justices that the fire of the appellant caused any such injury to the highway or annoyance to the persons passing thereon, this conviction cannot be sustained. The Turnpike Act, 3 Geo. 4. c. 26. s. 121, expressly provides for the case of blacksmiths having windows fronting the road and not closing them in the evening so as to prevent the light shining on the road; but as section 72. of the 5 & 6 Will. 4. c. 50. omits this, though it retains the offences mentioned in the act of George the Fourth, of making fires and throwing squibs, it would rather seem that the omission was an intentional one on the part of the legislature, and that it was intended to allow such fires to be made unless they injured the highway or annoyed passengers.

No one appeared for the respondent.

WILLES, J.—I am of opinion that this conviction ought to be reversed. I must, however, say, that the point which has been now made for the appellant was not brought before the Magistrates; the point which was there made was, that it was not a nuisance to make a fire on the side of a highway if used as this had been for twenty years for the purpose of carrying on a business; but that that part of the section relating to making a fire was to be read with what is there previously stated as to hawkers and gipsies. I am clearly of opinion that the Magistrates were right as to the point which was

brought before them; but they were mistaken in assuming that because the offence of making a fire near a highway is not confined to a fire made by gipsies or other such persons, that therefore the appellant was guilty of the offence. The nuisance consists of making or assisting in making any fire within fifty feet of the centre of the carriageway; but I am satisfied that Mr. Matthews's construction is the true one, and that the nuisance is not such *per se*, but is a nuisance only if done to the injury of the highway or to the injury, interruption or personal danger of persons travelling thereon. There must be a fire made under such circumstances as to cause such injury or annoyance. It may be said that such reading of the section is to make it useless, and that it would equally be a nuisance not only to make a fire but to do any other thing, if it be done to the annoyance of persons passing on the highway; that may be true; but the answer is, we are dealing with a section which gives a summary mode of proceeding when certain circumstances occur, one of which is making a fire within fifty feet of the centre of a highway. I think this construction is the grammatical construction of the sentence; the section begins by dealing with direct injuries to the highway, such as cutting down the banks and destroying or defacing milestones, direction-posts or stones erected upon a highway, and it then proceeds, "or shall play at football or any other game on any part of the said highways, to the annoyance of any passenger." There evidently would be reason for not reading this part as to playing games with what has gone before. Then the section proceeds, "or if any hawker, higgler, gipsy or other person travelling shall pitch any tent," &c. "upon any part of any highway." That, I take it, is an absolute prohibition, because the next sentence which the qualifying words "to the injury or annoyance of any person travelling on the highway" override, introduces a new subject, for it says, "or if any person shall make," &c., and that is continued as one clause down to the qualifying words beginning "to the injury of such highway." Therefore, the Magistrates not having found according to such qualifying words that this fire was to the injury of the highway, or to the injury, interruption or danger of any person travelling thereon, their decision must be reversed, but without costs, as this point was not taken before them.

KEATING, J.—I am of the same opinion. The section prohibits making a fire, wherever it may be, if within fifty feet of the centre of the carriageway; and therefore if there were no qualifying words applicable to it, the effect would be what the legislature could not reasonably be supposed to have meant. My Brother Willes has pointed out that the construction contended for by Mr. Matthews is both the natural and grammatical one, and therefore I have no difficulty in saying that this conviction must be reversed.

Conviction reversed.

[IN THE COURT OF QUEEN'S BENCH.]

April 29, 1865; Jan. 24, 1866,

THE QUEEN, *on the prosecution of* THE MELTON MOWBRAY DISTRICT HIGHWAY BOARD, *v.* THE INHABITANTS OF THE PARISH OF ASHBY FOLVILLE, *in error.*

35 L. J. M.C. 154; L. R. 1 Q.B. 213; 12 Jur. N.S. 520.

Highway—Liability of Parish to repair Roads in another Parish—Prescription.

HIGHWAYS.—*To an indictment against the inhabitants of the parish of*

A. for the non-repair of a highway within the parish, the inhabitants pleaded that the inhabitants of the parish of G. from time immemorial, and in consideration of levying and receiving certain rates in respect of certain lands in the parish of A. adjacent to the highway, had repaired and ought to repair the highway so often as there should be occasion. Replication, that the said agreement in the plea mentioned was duly determined by notice in that behalf:—Held, on demurrer to the replication, that the plea was bad, since the alleged consideration was insufficient to support the liability of the parish of G, because it could not be enforced, and because it could not from its nature be immemorial, and the repairs must have been done by the parish of G. by virtue of some arrangement between the two parishes, which might be, and had been, put an end to.

Semble—that in point of law, a parish cannot be liable by prescription to repair a highway situate in another parish.

Writ of error directing the Justices of the Peace of the county of Leicester to send up a certain record.

The record set out an indictment preferred by the Melton Mowbray district highway board, at the Leicestershire Quarter Sessions, against the inhabitants of the parish of Ashby Folville, for the non-repair of a certain part of a certain ancient highway leading from Gaddesby to Rotherby, the said part being within the parish of Ashby Folville.

Plea—as to a certain portion of the said part of the said highway, that the inhabitants of the parish of Gaddesby, from time whereof the memory of man is not to the contrary, and by reason and in consideration of levying and receiving from time to time certain rates and charges on and in respect of certain lands in the parish of Ashby adjacent to the said highway, have repaired and ought to repair the said portion of the said highway when and so often as there should be occasion, as the said inhabitants of Gaddesby hitherto were used and accustomed and still of right ought to do.

Replication—that the said agreement in the plea mentioned was put an end to and duly determined by notice in that behalf.

Demurrer to the replication and joinder.

The Court of Quarter Sessions gave judgment for the defendants.

In Easter Term, 1865, April 29,

Sills and Inglesant argued for the plaintiffs in error.—The plea is bad. In *The King v. Ecclesfield* (1 B. & Ald. 348), a plea by a parish that the inhabitants of a certain district within a township were immemorially liable to repair and had always repaired certain highways within the parish, was held good, but there the district on which the burden was thrown was within the parish which was indicted. In the present case, the burden is sought to be thrown on a parish totally distinct from the parish in which the highways are. The plea sets up what is in effect an agreement, and in *1 Ventris*, 90, nota, it is said, “Every parish of common right ought to repair the highways, and no agreement with any person whatever can take off this charge which the law lays upon them.” See also *The King v. Stoughton* (2 Wms. Saund. 159, b, and notes). *The King v. Liverpool* (3 East, 86) is an authority that the parish which is bound to repair the highways cannot be discharged of their liability by any agreement with others. See also *The King v. St. George’s, Hanover Square* (3 Campb. 222). But even if such an agreement could discharge the parish, the consideration in the present plea is bad, for if Gaddesby refuses to repair, the surveyor has no means of compelling it. Gaddesby moreover has no means of compelling the payment of the rates. This plea is therefore within the principle of *The King v. St. Giles’s, Cambridge* (5 M. & S. 260), where the plea was held bad for want of a consideration. Lord Ellenborough there says, p. 265, “The principle of law I take to be clear, that the inhabitants of a parish are liable of common right to repair the highways lying within it, unless they can shew that this burden is cast upon

some other persons, under an obligation equally durable with that which would have bound the parish, which obligation must arise in respect of some consideration of a nature as durable as the burden cast upon them." It is obvious that the consideration here is not as durable as the burden. In *Dawson v. Willoughby* (34 Law J. Rep. (N.S.) M.C. 37) it was laid down, that "no such thing is known to the law as part of one parish being united to another parish for the repair of the highways," and that case is conclusive of the point in the present case.

[COCKBURN, C.J.—It was not intended to be so. We especially endeavoured to steer clear of it. The judgment goes on: "It may in some cases happen that a parish may be bound to repair the highways in a part of another parish, if a good and continuing consideration for such an obligation can be shewn."]

Here the consideration cannot continue for ever, because this agreement might be put an end to at any time. Moreover, such a custom as the plea alleges, to be good must be immemorial, but it cannot be immemorial, for the consideration is the levying of the rates, and the rates are levied by statute, passed long after the time of legal memory. The replication is a good answer to the plea, and the demurrer admits the truth of the fact that the agreement stated in the plea has been put an end to.

Merewether, for the defendants in error.—The plea is good. That an obligation may exist on one parish to repair the highways in another parish is expressly recognized in *Dawson v. Willoughby* (34 Law J. Rep. (N.S.) M.C. 37). In *The King v. St. Giles's, Cambridge* (5 M. & S. 260) it was not contested that such an obligation would be good if supported by a good consideration. That such a consideration as the plea alleges may be valid *The King v. Machynlleth* (2 B. & C. 166) is an authority, and this is assumed in *The King v. Ecclesfield* (1 B. & Ald. 348) and in *The King v. Eastrington* (5 Ad. & E. 765). An indictment would lie against Gaddesby for non-repair of this highway. The plea is a prescriptive averment, and must necessarily state the consideration, and hence the confusion arising from wrongly calling it an agreement. The replication admits that Gaddesby has from time immemorial repaired and ought to repair the highway, and contains no traverse of the allegation as to the levying of rates, and the replication is therefore no answer to the plea. The replication ought to have traversed the prescription, as was done in *The King v. Eastrington* (5 Ad. & E. 765).

Sills, in reply.—The plea sets up a custom, not a prescription—*The King v. Ecclesfield* (1 B. & Ald. 348).

[COCKBURN, C.J.—Some of the cases cited have been decided on the ground of the want of an adequate consideration; but with regard to the major proposition, that the liability can exist in law upon one parish to repair the highways in another parish for a good consideration, that has never been expressly decided, and we think we ought not to decide it without taking time for further consideration.]

Cur. adv. vult.

Jan. 24.—The judgment of the Court¹ was now read by—

COCKBURN, C.J.—This was a case arising on an indictment against the defendants, the parish of Ashby Folville, for non-repair of a highway. The defendants pleaded that, as to a portion of the highway in question, another parish, namely, the parish of Gaddesby, had from time immemorial "by reason and in consideration of levying and receiving from time to time certain rates and charges on and in respect of certain lands in the said parish of Ashby, adjacent to the said highway, repaired, and were bound to repair the

(1) Cockburn, C.J. and Shee, J.

said portion of the highway." To this plea there was a replication, that the agreement in the plea was put an end to and duly determined by notice in that behalf. To this replication there was a demurrer, and judgment having been given thereon for the defendants by the Court of Quarter Sessions, error was brought to this Court.

The case was argued before my Brother Shee and myself, and after argument we took time to consider, in order to look into the cases, with a view of satisfying ourselves whether there was any sufficient authority for holding that a parish could be liable by prescription to repair a highway situate in another parish.

The only positive authority for the affirmative that we have been able to discover is to be found in the case of *The King v. Ragley* (12 Mod. 409), in the course of which the following passage occurs, apparently as having fallen from Holt, C.J.: "The parish of common right ought to repair their highway; but by prescription one parish may be bound to repair the way in another parish." The case is, however, so loosely reported that it is difficult to see to what point in the case this dictum can have had reference. No question arose as to the liability of a foreign parish to repair. The case was one in error from a judgment on an indictment at the Quarter Sessions for non-repair of a highway "between A. and B. in the parish of Ragley," the exceptions being that it did not appear in what parish the way was, as B. alone might be in the parish of Ragley; secondly, that the judgment was "*extrahatur et levetur*" instead of "*levetur et extrahatur*." On this latter exception the judgment was reversed. The dictum in question, therefore, if it ever fell from the Chief Justice, which, looking to the looseness of the report may be thought doubtful, was altogether unnecessary to the decision of the case. We do not think that this is an authority (nor have we succeeded in finding any other) which, as it seems to us, would justify us in holding that such a liability can exist. In *The King v. Ecclesfield* (1 B. & Ald. 348) it was held that where there are several townships in one parish, a particular township may by immemorial usage be liable to repair its own roads, as distinct from the parish at large. But this is obviously a very different thing from holding that a parish can be bound by prescription to repair roads not within its own ambit. In *The King v. St. Giles's, Cambridge* (5 M. & S. 260), it was not necessary to decide the point, as it was there held that, at all events, such a liability could not exist, except on good and sufficient consideration; and in that case no consideration appeared.

Now, it being the general law that each parish shall maintain its own highways, except where, by reason of tenure, some particular individual is bound to repair; and as it is certainly more consistent with general convenience that each parish shall maintain its own roads than that the repairs of the highways in one parish shall be done by the inhabitants of another; more especially as the machinery established by statute for insuring the repair of parish highways, and finding funds for that purpose, would not be applicable to repairs to be done by a foreign parish; we are strongly disposed to think that, in the absence of a direct decision on the point, we should not be warranted in holding that such a liability can possibly exist in point of law.

Upon further consideration, however, we think it unnecessary to decide the case on this ground. The case of *The King v. St. Giles's, Cambridge* (5 M. & S. 260) clearly establishes that a prescriptive liability could not arise except on sufficient consideration; and it appears to us that the consideration set forth in the defendants' plea is altogether insufficient to support the alleged liability of the parish of Gaddesby. The consideration is stated to be the levying and receiving by the latter parish of the rates and charges on and in respect of the lands in the parish of Ashby Folville adjacent to the said highway. But it is obvious that no such right can in law exist. The right to levy rates is the creature of statutory legislation. The rates can be levied and taken only by those to whom the statutory power is given. If the

occupiers of this district were to refuse to pay the rates, it is plain that the parish of Gaddesby would have no power to compel payment. Neither would the parish of Ashby Folville be warranted in levying the rates with a view to handing them over to Gaddesby, inasmuch as the former parish would only be justified in making and levying highway rates in respect of such highways as it was bound to repair. We are of opinion, therefore, that the alleged consideration is illusory and bad, and that the liability of Gaddesby consequently fails.

Independently, however, of the objection arising on the insufficiency of the consideration, the nature of the consideration stated is of itself fatal to the case of the defendants. It is clear that if a parish can be liable to repair the roads in another parish, such liability must date beyond the time of legal memory. But the consideration must have been coeval with the liability, and must, therefore, also have existed from time immemorial. But here, the consideration being the right to levy rates and charges, inasmuch as the levying of highway rates arises from statutes passed long since the time of legal memory, it follows that the repair of this particular highway by the parish of Gaddesby must have been posterior to that time. And this, again, is fatal to the liability of Gaddesby, as relied on by the defendants.

The proper conclusion therefore is, we think, that the repair of this highway by the parish of Gaddesby resulted from some arrangement come to between these parishes from considerations of mutual convenience, and which, therefore, could at any time be put an end to by either; and it appears by the record that notice was given to put an end to it on the part of Gaddesby.

We are, therefore, of opinion that the plea is on the face of it bad, and that on the demurrer to the replication there should have been judgment for the Crown. The judgment of the Quarter Sessions must, therefore, be reversed.

Judgment reversed.

[IN THE COURT OF QUEEN'S BENCH.]

Jan. 30, 1866.

THE QUEEN v. RAND AND OTHERS.

35 L. J. M.C. 157; L. R. 1 Q.B. 230.

Referred to, *R. v. Manchester, Sheffield and Lincolnshire Railway*, [1867] E. R. A.; 36 L. J. Q.B. 171; L. R. 2 Q.B. 336; 16 L. T. 173; 15 W. R. 676 (Q.B.); *Hayman v. Governors of Rugby School*, [1874] E. R. A.; 43 L. J. Ch. 834; 30 L. T. 217; 22 W. R. 587 (V.C.); *R. v. Meyer*, 1875, 1 Q.B. D. 173; 34 L. T. 247; 24 W. R. 392 (Q.B. D.). Adopted, *R. v. Mayor of Deal*, 1881, 45 L. T. 439; 30 W. R. 154 (Q.B. D.). See, *R. v. Handsley*, [1882] E. R. A.; 51 L. J. M.C. 137; 8 Q.B. D. 383; 30 W. R. 368 (Q.B.D. Div.). Referred to, *R. v. Cumberland, JJ.*, 1888, 58 L. T. 491 (Q.B.D. Div.). Applied, *R. v. Farrant*, [1888] E. R. A.; 57 L. J. M.C. 17; 20 Q.B. D. 58; 57 L. T. 880; 36 W. R. 184 (Q.B.D. Div.); *R. v. London County Council*, 1894, 71 L. T. 638 (Q.B.D. Div.). Discussed, *R. v. Sunderland, JJ.*, [1901] E. R. A.; 70 L. J. K.B. 946; [1901] 2 K.B. 357; 85 L. T. 183 (C. A.).

Justice of the Peace—Disqualifying Interest—Possibility of Bias.

MAGISTERIAL LAW.—Any direct pecuniary interest, however small, in the subject-matter of inquiry, disqualifies a Justice from acting judicially in the

matter, but the mere possibility of bias in favour of one of the parties does not *ipso facto* avoid the Justice's decision.

The corporation of B. were the owners of waterworks, and were empowered by statute to take the water of certain streams without permission of the mill-owners on their obtaining a certificate of Justices that a certain reservoir was properly completed, of a given capacity, and filled with water. An application was made to Justices accordingly, which was opposed by the millowners; but, after due inquiry, the Justices granted the certificate. Two of the Justices were trustees of an hospital and friendly society respectively, each of which had lent money to the corporation on bonds charging the corporate fund. Neither of the Justices could by any possibility have any pecuniary interest in those bonds; but the security of their *cestuis que trust* would be improved by anything improving the borough fund, and the granting of the certificate would indirectly produce that effect, as increasing the value of the waterworks; there was no ground to doubt that the Justices had acted *bona fide*:—Held, that the Justices were not disqualified from acting in the granting of the certificate, and the Court refused a *certiorari* for the purpose of quashing it.

This was a rule calling on John Rand and four other Justices of the West Riding of Yorkshire, and the corporation of Bradford, to shew cause why a *certiorari* should not issue to bring up a certificate of the Justices, dated the 18th of April, 1865, certifying that a certain reservoir, authorized by the Bradford Waterworks Act, 1854, to be constructed near Doe Park, had been completed and filled with water, and was capable of containing 110,000,000 of gallons of water, for the purpose of quashing it, on the ground that the Justices or some of them were interested in the subject-matter.

The facts disclosed on the affidavits are sufficiently stated in the judgment.

Mellish and Kemplay (June 15, 1865,) shewed cause.

[*Cleasby*, contra, intimated that he admitted that section 46. of the 17 & 18 Vict. c. cxxix. cured all objection in point of interest in the Justices as ratepayers of the borough, but that he should rely on the one objection that two of the Justices were mortgagees of the borough fund, and that the security of the mortgagees would be improved by anything which tended to improve the corporation property, and that the granting the certificate would greatly increase the value of the waterworks.]

The Justices are only interested as bare trustees, and conceding that the certificate may have the effect suggested, such an interest will not *ipso facto* disqualify them as any direct pecuniary interest might—*The Queen v. the Dean of Rochester* (17 Q.B. Rep. 1; s. c. 20 Law J. Rep. (n.s.) Q.B. 467), *Ex parte Pettitmangin*, cited in *The Queen v. Allan* (4 Best & S. at p. 921; s. c. 33 Law J. Rep. (n.s.) M.C. at p. 99, n.).

Cleasby and *Maule*, in support of the rule.—Any interest or possibility of bias is sufficient to disqualify a Justice acting in a judicial inquiry—*The Queen v. Hertfordshire Justices* (6 Q.B. Rep. 753). It is impossible to say what influence their position as trustees may have had upon the Justices, without imputing to them any intention of acting otherwise than with strict impartiality.

Cur adv. vult.

The judgment of the Court¹ was now (Jan. 30) delivered by—

BLACKBURN, J.—In this case, by the Bradford Waterworks Act, 1854 (17 & 18 Vict. c. cxxiv. s. 51), the waterworks company were empowered to take the water of certain streams; but it was enacted that they should not take those flowing into the Harden Beck without the assent of the mill-owners on that beck, until it had been certified by Justices that a reservoir called Doe Park

(1) Cockburn, C.J., Blackburn, J. and Shee, J.

Reservoir had been completed and filled with water, the company being required to give ten days' notice to the mill-owners before applying for the certificate, to the intent that they might oppose the granting of it. By an act of the same session (17 & 18 Vict. c. cxxix. s. 12), the municipal corporation of Bradford were empowered to purchase the Bradford waterworks for the benefit of the borough, and they did so. Afterwards (in January, 1865) the municipal corporation duly gave notice of their intention to apply for the certificate of the Justices. It was opposed; but the Justices, after hearing evidence and making an elaborate inquiry, decided in favour of the corporation, and granted their certificate. A rule was obtained for a *certiorari* to bring up this certificate, to be quashed, on the ground that the Justices who granted it were interested. All the objections were disposed of during the argument except the following: On the affidavits on both sides it appeared that an hospital and a friendly society had invested part of their funds in bonds of the Bradford corporation, charging the borough fund,² and that those bonds were taken in the names of trustees, and that two of the Justices in question were—one of them amongst the trustees of the society, and the other amongst the trustees of the hospital. Neither of them had, nor by any possibility could have, any pecuniary beneficial interest in these bonds; but, no doubt, the security of their *cestuis que trust* would be improved by anything improving the borough fund, and anything improving the waterworks after they became the property of the corporation would produce that effect.

The question which we have to determine is, whether this disqualified the Justices from acting in what was certainly a judicial inquiry, and we think it does not. There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a Judge in the matter, and if by any possibility these gentlemen, though mere trustees, would have been liable to costs, or to other pecuniary loss or gain, in consequence of their being so, we should think the question different from what it is, for that might be held an interest. But the only way in which these facts could affect their impartiality would be that they might have a tendency to favour those for whom they were trustees, and that is an objection not in the nature of interest but of a challenge to the favour. Wherever there is a real likelihood that the Judge would from kindred or from any other cause have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say that where there is a real bias of this sort this Court would not interfere; but in the present case there is no ground for doubting that the Justices acted perfectly *bona fide*; and the only question is, whether in strict law, under such circumstances, the certificate of such Justices is void, as it would be if they had a pecuniary interest; and we think that *The Queen v. the Dean of Rochester* (17 Q.B. Rep. 1; s. c. 20 Law J. Rep. (N.S.) Q.B. 467) is an authority that circumstances from which a suspicion of favour may arise do not produce the same effect as a pecuniary interest. And as the decision in that case was on demurrer to a plea, and might have been taken into error, the authority is one on which we ought to act.

We think, therefore, that the rule should be discharged.

Rule discharged.

(2) See the 17 & 18 Vict. c. cxxix. s. 8, and 18 & 19 Vict. c. clii. ss. 2, 4.

[IN THE COURT OF QUEEN'S BENCH.]

Feb. 10, 1866.

ASH, *appellant*, v. LYNN, *respondent*.

35 L. J. M.C. 159; 7 B. & S. 255; L. R. 1 Q.B. 270; 14 L. T. 224; 14 W. R. 583;
12 Jur. N.S. 485.

Beer Licences—Sale of Beer at Public Regatta—35 Geo. 3. c. 113, ss. 1, 17.
—6 Geo. 4. c. 81. s. 11.

INTOXICATING LIQUORS.—*The exemption in 6 Geo. 4. c. 81. s. 11. in favour of persons duly licensed to sell beer, &c., and carrying on their trade in booths, tents, or other places, within the limits of any lawful fair or public races, relates only to the excisable penalties imposed by the act, and does not protect any person so selling beer, &c., from his liabilities under 35 Geo. 3. c. 113. s. 1. for selling without a Magistrates' licence.*

CASE stated by Justices of the borough of Devonport, under the 20 & 21 Vict. c. 43.

At a petty sessions before the Justices, the defendant (the now appellant) was convicted under the 35 Geo. 3. c. 113. of having, on the 2nd of August, 1865, sold beer at a place called Richmond Walk, in the borough of Devonport, without being duly licensed; and was adjudged to pay the mitigated penalty of 10*l.*, with 12*s.* for costs.

At the hearing before the Justices the following were found to be the facts of the case: The defendant sold beer in a booth or tent at a place called Richmond Walk, in the borough of Devonport. He was a licensed victualler of the borough of Plymouth (a borough adjoining Devonport), having the usual Excise and Magistrates' licences to sell beer at his victualling-house, under the General Licensing Act, 9 Geo. 4. c. 61. He held no other licence. The sale of beer was on the occasion of a public regatta for boats in the harbour of Hamoaze, which is an estuary of the river Tamar, and took place in a booth or tent in the courtyard of a dwelling-house abutting on the harbour, in which harbour the public regatta was held. By the 35 Geo. 3. c. 113. s. 1. a penalty of 20*l.* is imposed upon any person who shall "sell by retail, or permit ale, beer, or other excisable liquor to be sold by retail in his house, outhouse, yard, garden, orchard, or other places, without being duly licensed so to do." By section 17. nothing in the act shall extend to prohibit any person from selling ale or beer in booths or other places at the time and place of holding any lawful and accustomed fair.

By the 6 Geo. 4. c. 81. s. 1. a duty is imposed on every person who shall be duly authorized by Justices to keep a common inn, alehouse, or victualling-house, and who "shall sell beer, cider or perry by retail to be drunk in his house or premises." By section 11. nothing in the act is to extend to prohibit any person or persons duly licensed to sell beer, cider or perry by retail to be drunk or consumed in his, her, or their house or premises, . . . to carry on his or her trade or business, for which he or she respectively shall be so licensed as aforesaid, in booths, tents or other places at the time and place, and within the limits of holding any lawful and accustomed fair, by virtue of any law or statute in that behalf, or any public races.

The appellant claimed to be exempt from the penalty referred to in the 35 Geo. 3. c. 113, on the ground that he came within the exemption of the 6 Geo. 4. c. 81, the sale having taken place in a booth and at a place, as he contended, within the limits of public races, or where a public race was being held.

The Justices were of opinion that the 6 Geo. 4. c. 81. was an Excise Act of which section 11. did not apply to the offence in question, such offence not being specified in the section; but being an offence under a separate and indepen-

dent and subsisting statute, namely, 35 Geo. 3. c. 113, which was not an Excise Act, but a statute for police purposes, as appeared to be illustrated in the cases of *The King v. Hanson* (4 B. & Ald. 519), *the King v. Drake* (6 M. & S. 116), and *Buckle v. Wrightson* (34 Law J. Rep. (n.s.) M.C. 43). Further, that should the 6 Geo. 4. c. 81. apply to the offence laid under the 35 Geo. 3. c. 113, the appellant was still not within the exemption of the 6 Geo. 4. c. 81. s. 11. on two grounds: first, because "a regatta" was not a public race within the meaning of the 6 Geo. 4. c. 81, and, secondly, because the place of sale being on the land, although abutting on the water where the regatta was held, was not "within the limits of the place" where such regatta was held.

The questions for the opinion of the Court were, first, whether s. 11. of 6 Geo. 4. c. 81, an act which, upon the authority of the cases referred to, the Justices thought might be termed an Excise Act, had any operation or force, except in relation to the offences referred to and contained in that statute. Secondly, whether the 35 Geo. 3. c. 113 (which the Justices, upon the authority before stated, considered an act for police purposes) was not independent of the 6 Geo. 4. c. 81. and still in force, and, therefore, whether the exemption from penalties under it was not confined, as stated in the 35 Geo. 3. c. 113. s. 17, to fairs only. Thirdly, if 35 Geo. 3. c. 113. were inoperative and controlled by the 6 Geo. 4. c. 81. s. 11, then whether a regatta could be legally deemed to be a "public race," within the meaning of the 6 Geo. 4. c. 81; and if so, fourthly, whether the sale of beer having taken place at a booth in the courtyard of a dwelling-house abutting on the harbour of Hamoaze, where the boats raced, such sale could be said to have been made at a place within the limits of the so-called race.

T. J. Clark, for the respondent.—The conviction was right. The liability of the appellant must depend on the provisions of the 35 Geo. 3. c. 113, and the exemption which it confers (by section 17.) on sales at fairs does not apply to the present case. In *The King v. Hanson* (4 B. & Ald. 519) it was held that this statute imposes no duty and is not an Excise Act. Now the 6 Geo. 4. c. 81, the 11th section of which is relied upon by the appellants, is, as the preamble clearly shews, an act for regulating Excise licences. The case of *The King v. Drake* (6 M. & S. 116) shews that, in order to satisfy the words "duly licensed" in the 35 Geo. 3. c. 113, the licensee must be provided with two licences, first, a licence from the Magistrates to keep an alehouse or place of public resort, and, secondly, an Excise licence or authority for the sale of excisable articles. It is therefore submitted that the Excise licence will not excuse the appellant from obtaining a licence under the General Licensing Acts. In the next place, a regatta does not come under the term public races as employed in the 6 Geo. 4. c. 81. The word "race" applies to something which takes place within a moderate space.

Lopes, for the appellant.—The conviction was wrong. The expression "duly licensed" in 35 Geo. 3. c. 113. and the later act, 26 & 27 Vict. c. 33. means duly licensed according to the Excise Acts. The exemption as to races in section 11. of 6 Geo. 4. c. 81, although repealed by 25 & 26 Vict. c. 22. s. 12. is expressly re-enacted by 26 & 27 Vict. c. 33. s. 21. The case of *The King v. Hanson* (4 B. & Ald. 519) has no application here, as it related merely to a question as to the right of appeal from a penal statute.

BLACKBURN, J.—Without deciding any other point, I am of opinion that the Magistrates were right, and that the conviction ought to be affirmed. The act 35 Geo. 3. c. 113. imposed a penalty on persons selling excisable liquors without being duly licensed; and it was decided by *The King v. Hanson* (4 B. & Ald. 519) that this act did not impose any duty, and is not an Excise law, and distinct from 48 Geo. 3. c. 143, the then existing act imposing a penalty on selling without an Excise licence. If, therefore, any person sells ale without a Magistrates' licence he is subject to a penalty. On the other hand, the 6 Geo. 4. c. 81. is an act passed solely for the purpose of placing duties upon

the sale of excisable liquors. By section 10. of this act penalties are referred to which mean, as I take it, excisable penalties; and by section 11. nothing therein contained shall prohibit any person duly licensed for that purpose from carrying on his trade in booths or tents, or within the limits of any public fair. This means, that where anybody is provided with a Magistrates' licence the penalties just mentioned shall not prohibit him from carrying on his trade under certain conditions; and there is nothing in the section to enable him to dispense with such a licence, but only an exemption from additional penalties. Now, the appellant had a Magistrates' licence for Plymouth, but not for Devonport. The conviction must be affirmed.

MELLOR, J. concurred.

Conviction affirmed.

[IN THE EXCHEQUER CHAMBER.]

(*Error from the Court of Queen's Bench.*)

May, 4, 5, 7, 1866.

CHARLOTTE WINSOR, *plaintiff in error*, v. THE QUEEN,
*defendant in error.**

35 L. J. M.C. 121; 7 B. & S. 490; L. R. 1 Q.B. 390; 14 L. T. 567; 14 W. R. 695; 10 Cox. C.C. 227; 12 Jur. N.S. 561: affirming, [1866] E. R. A. 2452; 6 B. & S. 143; L. R. 1 Q.B. 289; 14 L. T. 195; 14 W. R. 423; 10 Cox. C.C. 276; 12 Jur. N.S. 91 (Q.B.).

Referred to, *Droege v. Stuart*; *The Karnak*, [1869] E. R. A.; 38 L. J. Adm. 57; L. R. 2 P.C. 505; 21 L. T. 159; 17 W. R. 1028 (P.C.). Adopted, *R. v. Murphy*, [1869] E. R. A.; 38 L. J. P.C. 53; L. R. 2 P.C. 535; 21 L. T. 598; 17 W. R. 1047 (P.C.). Observations not applied, *R. v. Bradlaugh*, 1883, 15 Cox. C.C. 217 (Q.B. D.). Followed, *R. v. Lewis*, [1909] E. R. A.; 78 L. J. 77 B. 722; 100 L. T. 976 (C.C.A.).

Indictment for Murder—Discharge of Jury without Verdict—Judge's Discretionary Power—Discretion not reviewable—Discharge of Jury no Bar to subsequent Trial—Evidence—Admissibility of Prisoner jointly indicted—Court of Error—Refreshment to Jury after Retirement—Sunday Dies Juridicus.

CRIMINAL LAW.—A jury sworn and charged with a prisoner may be discharged without giving a verdict by the presiding Judge, if a "necessity," that is, a high degree of need, for such discharge is made evident to the mind of the Judge. He alone is to decide when the "necessity" for such discharge is made evident to his mind, and his decision is not subject to review by any legal tribunal. The statement upon the record by the Judge of the result of such a decision is sufficient to establish the lawfulness of the discharge. Such a discharge, even if it be an improper exercise of discretion on the part of the Judge, is not a legal bar to a subsequent trial of the prisoner for the same offence, either upon the same or upon a fresh indictment.

If two prisoners be jointly indicted, and one alone be given in charge to the jury, the other is an admissible witness (though neither acquitted nor convicted, and though a *nolle prosequi* is not entered) upon the trial of the prisoner with whom the jury are charged.

A record shewed that on the trial of W. and H., who were jointly indicted

* *Coram*, Erle, C.J., Pollock, C.B., Martin, B., Bramwell, B., Byles, J., Pigott, B. and Montague Smith, J.

for murder, the jury, after five hours' deliberation, at five minutes before midnight on Saturday night, were discharged by the Judge without giving a verdict, and without the consent of the prisoner or of the prosecution, on the ground that he, the Judge, for certain reasons, which he stated, "decided that it was necessary to discharge the jury." W. was afterwards given in charge to another jury, and tried alone upon the same indictment, when a verdict of guilty was returned, and judgment of death recorded; H. being admitted as a witness against her without having been either acquitted or convicted upon the indictment, and a nolle prosequi not having been entered:—Held,—affirming the judgment of the Court below (35 L. J. M.C. 121),—on a writ of error, that there was no error on the record. Conway and Lynch v. the Queen (7 Ir. Law Rep. 149) overruled.

Held, also, that the question of the admissibility of H. did not arise upon the record; but that if it had arisen, and if the question of her admissibility could have been inquired into, she was admissible.

Semble, per Pollock, C.B. and Martin, B., that a Judge has the power, in his discretion, to give refreshments to a jury, either before or after they have retired to consider their verdict.

This case came before the Court on a writ of error directed to the Lord Chief Justice of the Court of Queen's Bench.

The record set forth a writ of error directing the Justices of oyer and terminer for the county of Devon, and Justices assigned to deliver the gaol of that county, to send up a certain record, and the return to that writ, and then stated that at the general session of oyer and terminer held at Exeter for the county of Devon on the 13th of March, 1865, before Crompton, J., and Channell, B., the grand jury presented that Charlotte Winsor and Mary Ann Harris, on the 14th of February, 1865, at the parish of St. Mary Church in Devon, feloniously, wilfully, and of their malice aforethought, did kill and murder Thomas Edwin Gibson Harris, against the peace, &c., and afterwards, at the same general session of gaol delivery, on the 17th of March ensuing, Winsor and Harris severally pleaded not guilty to that indictment, and a jury were impanelled and sworn to speak the truth concerning the premises in the indictment specified. That after the trial had proceeded for some hours, at a late hour on Friday the Court adjourned till the next day; and that on that day, the 18th of March, the trial proceeded, and the case on the part of the Crown and of the prisoners respectively having been concluded, the Justices charged the jury, who, after the conclusion of the charge, having been then kept together for the space of thirty-two hours or thereabouts during the trial, retired from the bar to consult upon their verdict, and after the further space of five hours, that is to say, at five minutes before midnight in the night of Saturday the 18th of March, the jury returned to the bar and (in the words of the record),

"Being asked by the Court here whether they have agreed upon their verdict, they say that they have not agreed, and unanimously declare that, after full consideration, they are wholly unable to agree, and cannot agree, upon any verdict to be given by them on the premises aforesaid; and therefore, because it manifestly appears to the Court here that the said jurors, after five hours' deliberation and such consideration amongst themselves, have not agreed upon any verdict, and declare that they have not agreed and are unable to agree upon any verdict to be given upon the premises aforesaid, and because all other the business of the said session of gaol delivery is finished and completed, and because the Lord's Day is immediately at hand, and because the said Justices of our said Lady the Queen are required by her letters patent to proceed to and be in Her county of Cornwall on Monday now next ensuing, in the execution of the said letters patent, and because it manifestly appears to the Justices here that, for the reasons and causes

aforesaid, it is necessary to discharge the said jury, and the said Justices do decide and adjudge that it is necessary to discharge the said jury, and they do on the ground of such necessity as aforesaid altogether discharge the said jury from giving any verdict upon the premises, and they are accordingly discharged from giving their verdict upon the premises aforesaid. And the said C. Winsor and M. A. Harris are by the Justices here forthwith committed to the custody of the sheriff of the county of Devon, in the common gaol of the county safely to be kept until they shall be thence delivered in due course of law; and thereupon the sheriff is commanded that he have the bodies of the said C. Winsor and M. A. Harris at the next general session of general gaol delivery to be holden for the county of Devon, to answer the premises in the said indictment above specified and charged on them."

The record then stated that at the said next gaol delivery for Devon, held at Exeter on the 26th of July, and duly adjourned till the 28th of July, before Willes, J., and Keating, J. (the commission being set out at length), "come as well the said C. Winsor and M. A. Harris, under the custody of the said sheriff, as the said clerk of assize; and the said clerk of assize, who prosecutes for the Queen, prays of the Court that the said C. Winsor may be tried upon the said indictment separate and apart from the said M. A. Harris, and that the said M. A. Harris may be examined and give evidence on behalf of the Queen upon the trial of the said C. Winsor for the felony and murder aforesaid. And the Court doth allow the said prayer of the said clerk of assize. Therefore let the jury thereupon here immediately come," &c.

The record then stated that Winsor's counsel then and there objected, that in consequence of the proceedings on the said indictment above set forth, Winsor could not be legally tried, and must be discharged from the indictment and inquisition; that the Justices overruled the objection and ordered Winsor's trial to proceed; that the jury were duly impanelled and sworn "to speak the truth concerning the premises in the said indictment specified"; that Winsor's trial was adjourned to the next day, the 29th of July, on which day it proceeded, and the jury returned a verdict of guilty against Winsor, who was thereupon sentenced to be hanged.

The record then set out the assignment of errors by Winsor on the 24th of November, 1865, the joinder in error, and that the Court of Queen's Bench, on the 24th of January, 1866, held that there was no error on the record, and affirmed the judgment of the Court below.

Error was, on the 24th of April, 1866, assigned by Winsor on thirty grounds, which were in substance: that on the first trial the jury were discharged without having agreed to a verdict; and this without the consent of Winsor or of the prosecutor; without any fatality or illness or misconduct having occurred in Winsor, in the jury, or the Justices; without the jury being in any way incapacitated from giving a verdict; without any sufficient legal cause: and that the jury ought to have been directed to return a verdict of not guilty, or judgment should have been pronounced for Winsor, or Winsor should have been discharged from further prosecution on the indictment: that Winsor was wrongly deprived of her right to a verdict or a termination of the first trial: that there was time to conclude the first trial before the Justices were required to be in Bodmin: that the trial might have been concluded though all the other business was finished, and the Lord's Day was immediately at hand: that the first trial was wrongly adjourned to the next gaol delivery: that there was a discontinuance: that the second trial and the verdict, judgment, and all the proceedings were illegal and void because of the above facts, and because the first trial was discontinued and the prosecutor and witnesses were discharged of their recognizances and not bound over to give evidence at the next or any other gaol delivery, and because the jury were not sworn "to well and truly try, and true deliverance make, and true verdict give according to the evidence;" and because Winsor's life was in peril on the first trial for the same murder as that for which she

was tried on the second; and because Harris was admitted as approver and gave evidence on the second trial, she having been jointly indicted with Winsor, and given in charge to the jury on the first trial, and neither acquitted nor convicted, and a *nolle prosequi* not having been entered. Joinder in error.

Folkard (Collins with him) (May 4, 5) travelled through the same authorities as those cited in the Court below, and followed the same line of argument, which are set out fully at p. 123, 35 L. J. M.C. He also said—In the expression in *Co. Litt.* 227, b, "a jury sworn and charged in case of life or member cannot be discharged by the Court or any other, but they ought to give a verdict," "charged" means, "charged by the summing up of the Judge," and when this is done, the Judge has no power to discharge the jury—*Kelham's Trans. of Britton*, p. 41, chap. 4. sect. 15.

[*Per Curiam*.—"Charged" means, "given in charge to the jury."]

There can be no new trial in cases of felony—1 *Chit. Cr. L.* 630, 653. A verdict, to be good, must be that of all the twelve, and therefore, if one dissents, a verdict of not guilty ought to be recorded—*Hale, Hist. C.L.*, 6th edit., by Runnington, p. 348. King Alfred hanged Cadwine, a Judge, because when three of the jury would not find Hackwy guilty, he changed those three for three others, who joined with the nine to condemn him—*Pettingal's Inquiry into the Use of Juries*, p. 166; *Ælfredi Magni Vita, a Spelman*, lib. 2. p. 83. Freberne, a Judge, was also hanged because he condemned Harpin to death when the jurors doubted—*Pettingal*, 167; *Horne's Mirrour of Justices*, p. 239.

[BYLES, J.—Not only those; he hanged forty-four Justices in one year for their false judgment.]

It is not necessary to have unanimity in order to take a verdict of not guilty—*Hobart*, p. 262. The verdict in *Rudd's case* (1 Leach, C.C. 133) is quoted as the model of a verdict, "according to the evidence before us, not guilty"; see also 2 *Reeve's Hist.*, p. 270, *Kelham's Britton*, p. 44, citing *Fletu*, p. 53, f. 41.¹ The verdict in Winsor's first trial might have been taken in another county—*Magna Charta*, 9 *Hen. 3. c. 12. s. 2*; 2 *Vin. Abr.* pp. 123, 124, citing 2 *Inst.* 26; 3 *Vin.* 192.

[POLLOCK, C.B.—It is only by statute that commissions can be opened on the day after the appointed day—3 *Geo. 4. c. 10*. This was passed in consequence of Mr. Baron Garrow arriving late at Gloucester, and opening the commission after midnight. The 13 & 14 *Vict. c. 25.* enables Queen's counsel and others to act as Judges of assize.]

It was contended below, by the Crown, that the Judge had no power to give the jury refreshment after retirement, but there are numerous authorities that it may be done—2 *Hale, P.C.* 306. The only restriction is, that they may not eat without the licence of the Court, or at the expense of one of the parties—*Doct. and Stud. c. 52*, *Mounson v. West* (Leon. 1st part, p. 133). *Duncombe's Trials per Pais*, 251, 3 *Burn's Just.* 971, edit. 1845, 1 *Chit. Cr. L.* 632, *Jenkyns's Rep.* 187.

[POLLOCK, C.B.—Whatever is necessary to restore a jurymen to health can be given,—food, physic or an operation; whatever medical assistance is necessary, of course, ought to be given,—brandy-and-water or anything else.]

In 3 *Car. & K.* 90, it is said, that in *Morris v. Davies*, Mr. Justice Gaselee gave a jury, after eight hours' retirement, sandwiches and wine.

[MARTIN, B.—I do not suppose the Solicitor General would dispute the power of the Judge to give refreshment. It is simply a matter of common sense.]

There is no reason or authority to prevent a Judge from sitting on Sunday and taking a verdict.

[MARTIN, B.—7 *Comyns's Dig. tit. 'Temps.'* (B.) 3, says, "The entry of

(1) We have given these authorities, as they were referred to in argument, but they seem to have no immediate bearing upon the case.

any judgment upon record on Sunday is void²”; and, “before stat. 29 Car. 2. c. 7. all ministerial acts upon a Sunday were lawful, though not judicial.” I remember very well Mr. Justice Littledale taking a verdict on Sunday at York. I forget whether it was by consent or not, but he was very decided on the point.]

Comyn adds, that judgment given on Sunday in an *inferior* Court is void, implying that in a superior it is good. The Exchequer used to sit on Sunday—2 *Mad. Hist. Exch.* (2nd edit.), 5. Parliament has constantly sat on Sunday, and did so on the 18th of February in this session, to pass the Habeas Corpus Suspension Act for Ireland, 29 Vict. c. 1. In *Morris v. Davies* (3 Car. & P. 429) Mr. Justice Gaselee heard counsel argue and discharged the jury on Sunday; and in *Newton's case* (3 Car. & K. 91) Mr. Baron Rolfe and Mr. Justice Erle received the evidence of a medical man and discharged the jury on Sunday.

[ERLE, C.J.—I am decidedly of opinion that the acts we did in that case, whether right or wrong, were judicial, not ministerial. MARTIN, B.—The record here does not say that the Judges thought they could not take a verdict on the Sunday.]

The exercise of a Judge's discretion can be reviewed—*The King v. Fowler* (4 B. & Ald. 273), *Shea v. the Queen* (12 Ir. Law Rep. 153), *Powell v. Sonnet* (3 Bing. 381; s. c. 1 Bligh. N.S. 545), and *Tinkler v. Rowland* (4 Ad. & E. 868; s. c. 6 Law J. Rep. (n.s.) K.B. 269). But the Judge has no discretionary power to discharge the jury at all—*Hardy's case* (24 How. St. Tr. 199), *The King v. Woolf* (1 Chit. Rep. 401). If the jury are discharged, the prisoner cannot be tried again. At the Spring Assize of this year, on the Western Circuit, Mr. Justice Byles discharged a jury who could not agree, and also discharged the prisoner.

[BYLES, J.—I had great doubts whether the case ought to have gone to the jury at all, but I expressly said to the prisoner, “You are liable to be indicted again.”]

No one can be twice in peril for the same offence, and twice in “peril” means twice in peril of a verdict—*Bird's case* (2 Den. C.C. 124, 216). The admission of Harris's evidence is a ground of error.

[MARTIN, B.—After the decision of the Court below, the fifteen Judges met, and were unanimously of opinion that her evidence was legally admissible. ERLE, C.J.—We all think that the point you are now arguing is not raised on this record, for it is not there stated as a fact that Harris was examined as a witness. Our judgment on that point would therefore be extra-judicial and inoperative.]

Then I allege diminution of the record, and move for a *certiorari* to amend the record and state that fact, and I have affidavits that Harris was in fact examined as a witness for the Crown, without having been either acquitted or convicted, or a *nolle prosequi* entered. I move on the authority of 9 *Vin. Abr.* 553.

[ERLE, C.J.—(After consultation with the rest of the Bench)—Whatever point you argued in the Court below we will allow you to argue here, but the record will not be amended.]

Harris was an approver, and her evidence was inadmissible, and error lies for it—9 *Vin. Abr.* 474, 10 *Ibid.* 30. s. 24. *Rudd's case* (1 Leach, C.C. 133) 3 *Inst.* 129, defines an approver as one “not disabled to accuse.” Harris was disabled, because the indictment was not disposed of as regards her—1 *Bac. Abr.* tit. ‘Approver,’ p. 262, 4 *Com. Dig.* tit. ‘Justices,’ (v. 1.) p. 637, *Kelham's Britton*, pp. 39, 161, 2 *Hale*, P.C. 228, 229, 3 *Russell on Crimes*,

(2) Comyns quotes, as authority for this, 1 Sir W. Jones's Rep. 156, *Bedoe v. Alpe*, where it appears that the proposition is only a dictum. Error being assigned “en scaccario que un information en le Court de Exchequer fuit exhibit en Court 13 Octobris, et ceo fuit Sunday et nemy dies juridicus,” the decision of Hulton and Jones was, “Que fuit bon, car coment il ne fuit dies juridicus pur agarde aucun judicial process, ou pur faire entree de aucun judgment de recorde, tamen il fuit bon pur accepter de information sur special ley.”

4th edit. p. 626. In *The Queen v. Lyons* (9 Car. & P. 555) and *The Queen v. Jackson* (6 Cox. C.C. 525), and *The Queen v. O'Donnell* (7 Ibid. 337), in Ireland, and *The King v. Rowland* (Ry. & M. 401), the Judges all condemned the practice of calling such a witness without first taking an acquittal or conviction.

The Solicitor General (Sir R. P. Collier) (*Hannen* with him) appeared for the Crown.

[ERLE, C.J.—If we wish to hear the Solicitor General, we will do so on Monday. At present we expect at that time to give judgment.]

ERLE, C.J.— (May 7), now read the judgment of the Court.—In this case it has been contended on behalf of the prisoner, the plaintiff in error, that the conviction appearing on the record is erroneous, because it appears thereon that the prisoner had been given in charge to another jury at a former assize, who had come to no verdict, and had been discharged by order of the Judge, for reasons which were alleged to be insufficient in law. But we are of opinion that there is no error apparent on this record, and we have come to this conclusion notwithstanding the arguments and authorities adduced by the learned counsel for the prisoner, because we find that the power of a Judge to discharge a jury before verdict has been the subject of numerous adjudications, and that all the important arguments and authorities to which our attention has been now directed have been frequently collected and carefully discussed in those cases, and we consider that the strength of reasoning and the weight of authority lead us clearly to the conclusion above stated; and we refer to the cases of *The King v. Kinlock* (Foster, C.C. 25), and *Conway and Lynch v. the Queen* (7 Ir. Law Rep. 149), and *Newton's case* (13 Q.B. Rep. 716; s. c. 18 Law J. Rep. (N.S.) M.C. 201), and *The Queen v. Davison* (2 Fost. & F. 250), and *The Queen v. Charlesworth* (1 Best & S. 460; s. c. 31 Law J. Rep. (N.S.) M.C. 25), and *Winsor v. the Queen* (6 B. & S. 143; s. c. 35 L. J. M.C. 121) in the Court below, as containing all that can be said on either side. We think it unnecessary again to go through an examination of these authorities and arguments, upon which the judgment in the cases referred to were rested, all, with one exception, leading to the conclusion above stated. The exception is the decision in the case of *Conway and Lynch* (7 Ir. Law Rep. 149), where the judgment of the majority was adverse to that conclusion. But Mr. Justice Crampton dissented from the rest of the Court, and gave a judgment³ remarkable for sound reasoning and deep research, by which the propositions of law, on which he relied, appear to us to be clearly established. We consider that the doubts which have caused this repeated litigation originate in the unlimited terms used by Sir Edward Coke in stating what he considered to be the rule of the common law relating to the discharge of juries before verdict, viz., "A jury sworn and charged in case of life or member cannot be discharged by the Court or any other, but they ought to give their verdict." This rule, if taken literally, seems to command the confinement of the jury till death if they do not agree, and to avoid any such consequence an exception was introduced in practice, which *Blackstone* (4 Bl. Com. 360) has described by the words, "except in cases of evident necessity."

But the exception so expressed has given rise to further doubts, because "necessity" is an equivocal word, meaning either irresistible compulsion or a high degree of need. Those who have been interested in objecting to a discharge of a jury before verdict, have disputed whether the discharge was necessary in the stricter sense of the word. The same dispute about the meaning of the word "necessity" in the exception to this rule is the source of the main questions raised upon this writ of error, and they are in substance answered when we decide on the meaning of that word in the exception to the rule, and apply that meaning to the facts appearing on this record.

(3) See the judgment reported in note to *The Queen v. Charlesworth*, 31 Law J. Rep. (N.S.) M.C. 46.

We may assume it to be clear that the discharge of the jury before verdict may be lawful at some times and under some circumstances. Then, with reference to the facts on this record, we hold that the Judge at the first trial had by law power to discharge the jury before verdict, when a high degree of need for such discharge was made evident to his mind from the facts which he had ascertained. We cannot define the degree of need without some standard for comparison; we cannot approach nearer to precision than by describing the degree as a high degree, such as in the wider sense of the word might be denoted by necessity.

We hold, further, that the Judge alone had to decide when the "necessity," in this senses of the word, for the discharge of the jury was made evident to him, and his decision thereon is not made subject to review by any legal tribunal. It was his duty to exercise his discretion both in ascertaining the relevant facts and in determining their effect in making the necessity for the discharge evident to himself. The lawfulness of the discharge depended upon the result of this exercise of his discretion, and the statement of that result upon the record is, in our judgment, sufficient to establish that the order for the discharge in question was lawfully made, and that the subsequent proceedings to trial and conviction are not rendered erroneous thereby.

If the discharge of the jury was lawful all the grounds of error founded on the assumption that it was unlawful fail. The contention that the prisoner has a right after a trial has begun and he has been given in charge to the jury to demand that the trial should be continued till a verdict should be given, or, if that cannot be done, that he should be acquitted and discharged, cannot be maintained. There is no reason or authority for supporting such a contention; the failure of some of the jury to agree with the rest is distinct from a doubt entertained by the whole jury. If the notion could prevail that the failure of the jury to agree entitled the prisoner to an acquittal, it, of course, follows that any single jurymen by refusing to agree could insure an acquittal. Even if it was assumed, for the sake of argument, that the statement on the record led the Judges of the Court of error to the opinion that the order for the discharge in question was an improper exercise of discretion on the part of the Judge who tried the case, still we should hold that such a discharge was no legal bar to a second trial either on the same or on a fresh indictment. The only pleas known to the law founded upon a former trial are pleas of a former conviction, or a former acquittal, for the same offence; but if the former trial has been abortive without a verdict, there has been neither a conviction nor an acquittal, and the plea could not be proved. That which would be matter of plea to a fresh indictment would be ground of error upon a second trial on the same indictment. As far as relates to the former abortive trial, nothing which then took place could be ground of error on the second trial on the same indictment, unless it would have been a bar by way of plea to a new indictment for the same offence. All the authorities are concurrent to this effect, with the single exception of the case of *Conway and Lynch v. the Queen* (7 Ir. Law Rep. 149), and we have before given our opinion on that case. On these grounds we decide that there is no error apparent on this record, and the judgment of the Court below is affirmed.

The learned counsel contended, further, that there was error in admitting Mary Harris as a witness on the second trial, in which the prisoner Winsor was alone given in charge to the jury. To this it was answered that it did not appear on the record that Mary Harris was examined as a witness on the trial. The learned counsel then proposed to move for a *certiorari*, in order that a statement of this fact might be added to the record, but we refused to grant the application, being of opinion that Mary Harris was an admissible witness under the circumstances here stated; so that if the fact were added to the record, and if the admissibility of the witness could be inquired into in this Court of error, the alleged ground of error could not be sustained.

ERLE, C.J. then said—Our judgment is, that the judgment of the Court

below be affirmed, and that the keeper of Newgate gaol do re-deliver the plaintiff in error, Charlotte Winsor, to the custody of the sheriff of the county of Devon, and keeper of Her Majesty's gaol for the said county.*

Judgment affirmed.

[CROWN CASE RESERVED.]

April 28, 1866.

THE QUEEN v. PARSONS.*

35 L. J. M.C. 167; L. R. 1 C.C. 24; 14 L. T. 450; 14 W. R. 662;
10 Cox. C.C. 248; 12 Jur. N.S. 486.

Evidence—Certificate of Conviction—Signature—Deputy Clerk of the Peace for a Borough—“Officer having the Custody of the Records of the Court”—5 Geo. 4. c. 84. s. 24.—8 & 9 Vict. c. 113. s. 1.

CRIMINAL LAW. MUNICIPAL CORPORATION.—*A certificate of a conviction, made at the Quarter Sessions for a borough, within the Municipal Corporations Act, purporting to be signed by a person described thereon as deputy clerk of the peace of the said borough, and having the custody of the records of the said Quarter Sessions, is admissible in evidence, under the 8 & 9 Vict. c. 113. s. 1, as purporting to be made by an officer having the custody of the records of the Court where the conviction was made, within the 5 Geo. 4. c. 84. s. 24, although the Municipal Corporations Act (5 & 6 Will. 4. c. 76.) gave no power to appoint a deputy clerk of the peace for a borough within that act.*

Per Bramwell, B.—A person de facto filling an office, carrying with it the custody of the records of the court, may lawfully give such a certificate, although he may not hold such office de jure.

The prisoner was tried, before Pigott, B., at Worcester, and convicted for being at large at St. Helen's, in Worcester, without lawful excuse, before the expiration of the term of fifteen years, for which term he had been transported, at the Birmingham Quarter Sessions, on the 24th of October, 1854. The learned Judge respited judgment, and reserved the following

CASE.

The certificate of conviction was produced, signed by T. R. T. Hodgson, and with the following statement appended to the signature: “Deputy clerk of the peace for the said borough of Birmingham, and having the custody of the records of the said Quarter Sessions.” The witness who produced the certificate proved “that one Edmunds is the clerk of the peace, but that he does not usually act, and that Mr. Hodgson is the person who acts as clerk of the Court in court.” It was further proved by John Suckling, who is a member of the town council of Birmingham, that he was present at a meeting of the town council for the borough of Birmingham when Mr. Hodgson was elected deputy clerk of the peace of the borough; that he believed Mr. Edmunds sanctioned that election, and that Birmingham is a borough under the Municipal Corporations Act. (A copy of the certificate is appended hereto.) Mr. Griffiths, on behalf of the prisoner, objected to the certificate on two

(4) The sentence of death was afterwards commuted by Her Majesty to a sentence of penal servitude for life.

* *Coram*, Pollock, C.B., Bramwell, B., Byles, J., Pigott, B. and Lush, J.

grounds: first, that it was not signed by the proper officer (under 5 Geo. 4. c. 84. s. 24); and, secondly, that it ought to shew on the face of it that there were Justices of the Peace present at the Quarter Sessions where the conviction took place. If the Court should be of opinion that either of these objections are valid, then a verdict of acquittal is to be entered; if the Court think that neither objection is good the conviction is to stand.

(Copy conviction referred to.)

“ Borough of Birmingham,
county of Warwick.

“ These are to certify that at the General Quarter Sessions of the Peace of our Lady the Queen, holden at Birmingham, in and for the borough of Birmingham, on Friday the 20th day of October, in the year of our Lord 1854, John Parsons, late of the borough aforesaid, was in due form of law tried and convicted on a certain indictment against him, for that he, on the 11th day of December, A.D. 1853, the dwelling-house of Benjamin Woodhouse feloniously did break and enter, and two dresses, two shawls, one yard of silk, ten handkerchiefs, four waistcoats, one pair of trowsers, ten shirts, one scarf and one top coat, of the goods and chattels of the said Benjamin Woodhouse, then and there feloniously did steal, and was thereupon ordered by the Court to be transported for the term of fifteen years. Given under my hand, this 6th day of March, 1866.

“ T. R. T. Hodgson,

Deputy clerk of the peace for the said borough of
Birmingham and having the custody of the
records of the said Quarter Sessions.”

Harington, for the prisoner.—The certificate of this conviction is made evidence by the 5 Geo. 4. c. 84. s. 24, which enacts, “ that the clerk of the Court or other officer having the custody of the records of the Court, where such sentence or order of transportation or banishment shall have been passed or made, shall, at the request of any person on His Majesty’s behalf, make out and give a certificate in writing signed by him containing the effect and substance only (omitting the formal part of every indictment and conviction of such offender, and of the sentence or order for his or her transportation, &c.), . . . which certificate shall be sufficient evidence of the conviction and sentence or order for transportation, &c. of such offender. And every such certificate, if made by the clerk or officer of any court in Great Britain, shall be received in evidence upon proof of the signature and official character of the person signing the same.” But the deputy clerk of the peace of the borough of Birmingham is not the clerk or officer of the Court of the Quarter Sessions for the borough. The clerk of the peace for the Quarter Sessions for the borough is appointed under the 103rd section of the Municipal Corporation Act (5 & 6 Will. 4. c. 76), which enacts, among other things, that “ the council of every such borough shall appoint a fit person to be clerk of the peace during his good behaviour.” This statute gives no power to appoint a deputy, whilst it is only by express enactment that a deputy can be appointed by a judicial officer (*Com. Dig.* tit. ‘ Officer,’ 2). Thus the clerk of the peace in counties only appoints his deputy by virtue of the express enactment of 37 Hen. 8. c. 1. s. 3. Then, not being deputy clerk of the peace, there is no evidence that there is any other office of the Court which he can hold so as to give him the custody of the records of the Court.

[*Underdown* referred to the 8 & 9 Vict. c. 113. s. 1, which enacts, “ That whenever, by any act now in force, or hereafter to be in force, any certificate, official or public document, . . . or any certified copy of any document, . . . or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, . . . or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp

and signed as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any proof thereof, in every case in which the original record could have been received in evidence."']

The person affixing his signature must, however, appear to bear a lawful official character; but there cannot lawfully be a deputy clerk of the peace for the borough, nor does there appear to be any office giving the custody of the records of the Court, other than the clerk of the peace.

[POLLOCK, C.B.—There is sufficient *prima facie* evidence that the person signing had the custody of the records. BYLES, J.—If the clerk of the peace be ill, or become lunatic, and unable to take the custody of the records for a time, what is to be done in the interim? BRAMWELL, B.—The records must be proved after the common law by production of the records themselves, &c.]

Secondly. There ought to have been evidence that there were Justices present at the Quarter Sessions when the conviction took place; it might have been, for aught that appears, a Court held by the Mayor, in the absence of the Recorder, under the 106th section of the Municipal Corporations Act.¹

[PIGOTT, B.—The words of that section give no power to the Mayor to hold any Court; he is, in the contingency there provided for, to "open the said Court, and to adjourn over the holding of the same." And in the proviso he is expressly prohibited from sitting as a Judge to try prisoners, &c.]

Underdown, for the prosecution, was not called upon.

POLLOCK, C.B.—We are of opinion, that if the person signing a certificate of conviction, under the 5 Geo. 4. c. 84. s. 24, has the custody of the records of the Court lawfully he is the proper person to give such certificate, and by the 8 & 9 Vict. c. 113. s. 1, if such purports to be signed by such a person, it is made evidence without more. There is nothing in the other point.

BRAMWELL, B.—I only wish to add, on the first point, that it is proved here that there is a *de facto* officer of the Court, who is called the deputy clerk of the peace for the borough. Therefore, without saying that any person who merely gets possession of the records of the Court could sign such a certificate as this, so as to give it validity, yet I think that here the person signing has a sufficient official character within the meaning of the later act cited. I think that when there is a *de facto* office, and, by virtue of that office, the person filling it has the custody of the records, he may give the certificate without holding the office also *de jure*.

Conviction affirmed.

(1) Sect. 106 : "In the absence of the recorder and deputy recorder the mayor shall be authorized and required, at the proper times appointed for the holding of such Court of Quarter Sessions of the Peace in and for such borough, to open the said Court, and to adjourn over the holding of the same, and to respite all recognizances conditioned for appearing at the same, until such further day as such mayor then and there, and so from time to time, shall cause to be proclaimed: provided, nevertheless, that nothing in this act contained shall authorize or require any such mayor to sit as a Judge of the said Court for the trial of offenders, or to do any other act in the character of a Judge of such Court, save only in opening and adjourning the same, and respiting the said recognizances in manner aforesaid."

[CROWN CASE RESERVED.]

April 28, 1866.

THE QUEEN v. CARPENTER.*

35 L. J. M.C. 169; L. R. 1 C.C. 29; 14 L. T. 572; 14 W. R. 773;
10 Cox C.C. 246; 12 Jur. N.S. 380.

Referred to, *R. v. Smallman*, [1897] E. R. A.; 66 L. J. Q.B. 82; [1897]
1 Q.B. 4; 75 L. T. 394; 45 W. R. 249 (C.C.R.).

"*Embezzlement*"—*Assistant Overseer—Clerk or Servant—Indictment.*

CRIMINAL LAW. POOR LAW.—*An assistant overseer of a parish, elected by the parishioners in vestry under the 59 Geo. 3. c. 12. s. 7, who fix his duties and salary, is to be deemed the servant of the inhabitants of the parish, and to receive money collected by him for the poor-rate levied upon the parish as such servant, and may be so described in an indictment for embezzling such money so received.*

The prisoner, Robert Edward Carpenter, was indicted, before Montague Smith, J., at Gloucester, for embezzlement, and found guilty, his Lordship reserving the following

CASE.

The prisoner had been assistant overseer of the poor of the parish of Oddington. He was charged in one count of the indictment as servant of John Sedgely, Henry Collett, George Foden and Henry Lyne. These persons were the churchwardens and overseers of the said parish. In another count he was alleged to be the servant of the churchwardens and overseers of the said parish. In another count he was alleged to be the servant of the inhabitants of the said parish.

The prisoner was nominated and elected assistant overseer by the inhabitants in vestry, who determined that the duties to be executed and performed by him should be "all such duties as appertain to and are incident to the office of an overseer," and fixed the yearly salary of 3*l.* 10*s.* for the execution of the office.

On the 30th of March, 1865, an order of two Justices, reciting the election of the vestry, appointed the prisoner to the said office. The original order, which contains a schedule of instructions, will be in court, and may be referred to.¹ The prisoner, in point of fact, performed all the duties of overseer of the poor of the parish, and the churchwardens and overseers did not interfere with him. It was proved that the prisoner fraudulently appropriated to his own use monies which he had received for poor-rate, by virtue of his office as assistant overseer, under certain rates made for the relief of the poor of the said parish.

The question reserved was, whether the prisoner was clerk or servant to any of the persons mentioned in the indictment, and received and took into his possession the monies embezzled as such clerk or servant, within the meaning of the statute 24 & 25 Vict. c. 96. s. 67.

Harington, for the prosecution.—The assistant overseer is the servant of the inhabitants of the parish. He is appointed by the vestry, and the vestry represents the whole body of the inhabitants for that purpose—*The Queen v. Watts* (7 Ad. & E. 469; s. c. 7 Law J. Rep. (N.S.) M.C. 72),—and for that reason is not the servant of the churchwardens and overseers—*Points, appellant, v. Attwood, respondent* (6 Com. B. Rep. 38, 49; s. c. 18 Law J. Rep. (N.S.)

* *Coram*, Pollock, C.B., Bramwell, B., Byles, J., Pigott, B. and Lush, J.

(1) See 59 Geo. 3. c. 12. s. 7; Chitty's Statutes, vol. 3. p. 1136, 3rd edit.; and 12 & 13 Vict. c. 103. s. 15; but no point arose upon the order.

C.P. 19). By the 12 & 13 Vict. c. 103. s. 15, after reciting that in cases of embezzlement or larceny by assistant overseers appointed by the guardians of certain unions and parishes under the authority of the orders of the Poor Law Commissioners and of the Poor Law Board for some one or more of the parishes comprised within their union, or for their parish, as the case may be, it is enacted that, "in respect of any indictment or other criminal proceeding, every collector or assistant overseer appointed under the authority of any order of the Poor Law Commissioners or the Poor Law Board, shall be deemed and taken to be the servant of the inhabitants of the parish whose money or other property he shall be charged to have embezzled or stolen, and shall be so described; and it shall be sufficient to state such money or property to belong to the inhabitants of such parish, without the names of any such inhabitants being specified." The same rule may satisfactorily be adopted in the case of the prisoner, who was appointed under the 59 Geo. 3. c. 12. s. 7. All the requisites combine in this case to make him the servant of the inhabitants. He is appointed by the inhabitants in vestry assembled; his salary is fixed by the inhabitants; his duties are settled by them; and in them lies the power of his removal. He may give relief, and his office is independent of the churchwardens and overseers.

No counsel appeared for the prisoner.

POLLOCK, C.B.—We think that the case is sufficiently within the statute.

Conviction affirmed.

[CROWN CASE RESERVED.]

April 28, 1866.

THE QUEEN v. PAYNE.

35 L. J. M.C. 170; L. R. 1 C.C. 27; 14 L. T. 416; 14 W. R. 661;
10 Cox. C.C. 231; 12 Jur. N.S. 476.

Prisons Act, 1865—"Article or Thing"—Crowbar.

CRIMINAL LAW.—A crowbar is an "article or thing" within the meaning of the 37th section of the Prisons Act, 1865, and therefore any person who, with intent to facilitate the escape of any prisoner, conveys such an instrument into any prison is guilty of felony under that section.

The prisoner, Elizabeth Payne, was tried and convicted at the General Quarter Sessions of the Peace for the county of Surrey, on an indictment which charged her with conveying into the common gaol at Newington, in and for the said county, a crowbar, with intent to facilitate the escape of a prisoner therein being; but the Chairman reserved the following

CASE.

The indictment was framed under section 37. of the Prisons Act, 1865, which is as follows: "Every person who aids any prisoner in escaping, or attempting to escape, from any prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison any mask, dress or other disguise, or any letter, or any other article or thing, shall be guilty of felony, and on conviction be sentenced to imprisonment with hard labour for a term not exceeding two years."

The counsel for the prisoner objected that a crowbar did not come within

such section, and the Court reserved such point for the decision of the Court for the consideration of Crown Cases Reserved.

J. Thompson, for the prisoner.—The words “other article or thing” must be confined to articles and things *ejusdem generis* with the previously enumerated articles and things—*Kitchin v. Shaw*.¹

[*BYLES, J.*—But the articles enumerated are of different natures. Your argument would point to articles or things *ejusdem generis* with that comprehensive class consisting of mask, dress, disguise or letter. How do you denominate that class?]

A class of the fraudulent kind. The rule that where particular words follow general ones they are to be construed as applicable to things *ejusdem generis* is laid down in *Sandiman v. Breach* (7 B. & C. 96; s. c. 5 Law J. Rep. K.B. 298). The repealed act, 4 Geo. 4. c. 64. s. 43. contained the further prohibitory words “instrument or arms.” Their omission in the present act withdraws the prohibition.

Straight, for the prosecution, was not heard.

POLLOCK, C.B.—The words “any other article or thing” mean any other article or thing of any other kind, sort or description whatever. All the prior statutes on the subject since the 16 Geo. 2. c. 31. s. 2. included such an instrument as a crowbar.

Conviction affirmed.

[CROWN CASE RESERVED.]

April 28, 1866.

THE QUEEN v. REARDON AND BLOOR.*

35 L. J. M.C. 171; 10 Cox. C.C. 241; L. R. 1 C.C. 31; 14 L. T. 449;
14 W. R. 663; 12 Jur. N.S. 476.

Receiving Stolen Property knowing it to have been Stolen—Indictment—Joint Receipt—24 & 25 Vict. c. 96. s. 94.

CRIMINAL LAW.—Two or more persons may be indicted jointly for receiving stolen property knowing it to have been stolen, though each successively received the whole of the same at different times; and it makes no difference whether the receipt was direct from the felon or from an intermediate person.

The prisoners, Emma Reardon and Joseph Bloor, were jointly indicted before Lush, J., at Manchester, for receiving stolen goods knowing them to have been stolen, when the learned Judge reserved the following

CASE.

There was no evidence of a joint receipt, but Reardon, who kept a house of her own, was in the practice of receiving stolen property from the thief or his accomplice, and of selling it to Bloor, who also had a place of business of his own.

The jury found each guilty, and the learned Judge sentenced Bloor; but an objection having been taken that upon the indictment a conviction of both could not stand, he respited the sentence against Reardon and reserved the question whether the conviction against her was sustainable upon the above indictment.

(1) 6 Ad. & E. 729; 734, per Lord Denman; s. c. 7 Law J. Rep. (N.S.) M.C. 14.

* *Coram*, Pollock, C.B., Bramwell, B., Byles, J., Pigott, B. and Lush, J.

Cottingham, for the prisoner.—The question turns upon the construction to be put upon the 24 & 25 Vict. c. 96. s. 94, which enacts, "If upon the trial of any two or more persons indicted for jointly receiving any property it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part or parts of such property." It is submitted that this section contemplates a different case from the present. It is intended to apply to the receipt by two or more persons from the thief of the stolen property, the one taking a part and the other or others taking another part, and not to two receipts, as here, of the whole independent of each other—the one being at one time from the thief, and the other at another time by the second receiver from the first receiver. The words are "separately received any part or parts of such property"; but to have comprehended the present case, they should have been "received the same or any part or parts thereof."

[POLLOCK, C.B.—But the whole is equal to all its parts, and if each could be jointly convicted of receiving all the parts separately, so may each be convicted of receiving the whole.]

This section must be construed with reference to the 93rd section, which enacts that, "Whenever any property whatsoever shall have been stolen, taken, extorted, obtained, embezzled or otherwise disposed of in such a manner as to amount to a felony either at common law or by virtue of this act, any number of receivers at different times of such property or of any part or parts thereof may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding that the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice." Under this section, therefore, upon an indictment charging them in separate counts with separate felonies, the prisoners might have been tried together and convicted, but not upon a joint indictment. The words "different times" apply to this case, but they are omitted in the 94th section. This latter section is a re-enactment of the 14 & 15 Vict. c. 100. s. 14, and the question whether that section applied to a case where two distinct acts of receiving the whole of the stolen goods was shewn was raised but not decided in *The Queen v. Dring* (1 Dears. & B. 329). Before the statutory enactments (the 13 & 14 Vict. c. 100. and the 24 & 25 Vict. c. 96), the prisoners could not have been convicted, unless a joint receipt were proved—*Messingham's case* (1 Moo. 257); but the prosecutor would have been put to his election, and one might have been convicted, but not both—*Matthews's case* (1 Den. C.C. 596) and *Gray's case* (2 Ibid. 86; s. c. 20 Law J. Rep. (N.s.) M.C. 105).

Sowler, for the prosecution, was not called upon.

POLLOCK, C.B.—The object of the statutes appears to have been to get rid of certain technical objections to indictments which had apparently prevailed aforesaid. The 94th section says that one or more persons separately receiving stolen property may be indicted together, though there be no joint receipt, provided some have received one part and others other part. A man who meets with stolen property in the highway that has been dropped by the felon and found disposing of it at a smaller price than its proper value shortly after, may be found guilty either of stealing or of receiving it knowing it to have been stolen, according to the circumstances. And the statute then provides that all the persons concerned in the receiving may be indicted together. For this purpose there is no distinction as to time of receipt, nor is there any between receiving from the original felon and other intermediate persons. The 93rd section may be used to throw light upon the meaning of the 94th section as to the immateriality of difference of time. The 94th section uses the words "part or parts," so as to give some colour to the objection taken, yet looking logically at the matter, the whole is the same thing as all the parts. Take the case put by me on the argument, of the theft of a silver waiter and

a tea-pot, where the one is received at one time and the other at another. There can be no distinction between that case and the receipt of both waiter and tea-pot together at different times.

Conviction affirmed.

[CROWN CASE RESERVED.]

May 7, 1866.

THE QUEEN v. FLETCHER.*

35 L. J. M.C. 172; 10 Cox. C.C. 248; L. R. 1 C.C. 39; 14 L. T. 573;
14 W. R. 774; 12 Jur. N.S. 505.

Rape—Idiot Girl—Consent—Want of Evidence of Connexion “against her Will.”

CRIMINAL LAW.—*The mere fact of connexion with an idiot girl capable of recognizing and describing the prisoner, but incapable, so far as her idiotcy rendered her so, of expressing dissent or consent, and therefore without her consent, is not sufficient evidence of a rape to be left to a jury.*

Quære—The Queen v. Fletcher (Bell, C.C. 63; s. c. 28 Law J. Rep. (N.S.) M.C. 85) overruled.

Charles Fletcher was tried, before Mr. Justice Keating, at the last Warwick Assizes, for a rape upon Fanny Elizabeth Churchill and convicted, when the learned Judge reserved the following

CASE.

The prosecutrix was an idiot girl, with one side and a foot paralyzed; she was seen going with the prisoner towards the inn where he was ostler, and afterwards coming from thence, with her hair down and the hair-net in her hand, but, as her mother said, “not different from her ordinary manner”; she had three cakes in her hand and was eating one of them. There was no evidence of the circumstances under which the connexion had taken place, but the prisoner admitted the fact, alleging consent, and that he had had connexion with her before, also with her consent. In answer to his question, whether she knew him, she said, “Yes, the man at Richards’.” Although only sixteen years old the medical man stated she was a fully developed woman, and that strong animal instincts might exist notwithstanding her imbecile condition. Appearances on examination were not inconsistent with connexion having previously taken place, and he rather inclined to that opinion, but they were also consistent with the connexion in question being a first connexion. I left the case to the jury, in terms reported to have been used by Mr. Justice Willes in the case of *The Queen v. Fletcher* (Bell, C.C. 63; s. c. 28 Law J. Rep. (N.S.) M.C. 85), viz., that if they were satisfied that the girl was incapable of expressing consent or dissent, and that the prisoner had connexion with her without her consent, they should find him guilty; but that a consent produced by mere animal instinct would be sufficient to prevent the act from constituting a rape.

The jury found the prisoner guilty.

I desire the opinion of the Court of Criminal Appeal as to whether I ought to have left the case to the jury at all, there being no evidence against the prisoner except the fact of connexion and the imbecile state of the girl.

No counsel appeared on either side, and the case was not argued.

* *Coram*, Pollock, C.B., Martin, B., Bramwell, B., Pigott, B. and Montague Smith, J.

POLLOCK, C.B. (May 7) delivered the judgment of the Court.—In this case the prisoner was tried, before my Brother Keating, for a rape upon an idiot girl, and the question reserved for us was, whether the case ought to have gone to the jury, there being no evidence except the fact of connexion and the imbecile state of the girl. Of the mere fact of connexion there was the clearest proof, for it was admitted by the prisoner. The Crown, however, offered no evidence that the connexion was had against her will. The indictment charged the prisoner with having committed the offence against her will and without her consent; and we are all of opinion that some evidence of that as a fact ought to be given before a conviction can be obtained, and there is not in this case that sort of testimony on which a Judge would be justified in leaving it to a jury to find a verdict. We are unanimously of opinion that there is here no evidence to establish either that it was against her will or without her consent. I wish to add for myself, and this is only my own remark, that I think the acts of parliament which made the offence of mere connexion a criminal offence in this case of young children under a certain age, have a tendency to throw light upon the case before us. Here the contention on the part of the Crown would have been that an idiot is incapable of consent; but it may be said in answer, that the same cause which required an act of parliament to make a simple fact of connexion a criminal offence in the case of children, would require an act of parliament in the case also of idiots. We think therefore that the conviction should be quashed.

Conviction quashed.

[IN THE COURT OF QUEEN'S BENCH.]

May 8, 1866.

THE WEARDALE DISTRICT HIGHWAY BOARD, *appellants*, v. THE TRUSTEES OF THE ALSTON TURNPIKE TRUST, *respondents*.

35 L. J. M.C. 173; L. R. 1 Q.B. 396; 14 L. T. 546; 14 W. R. 968;
12 Jur. N.S. 563.

Turnpike—Deficiency of Trust Fund—Highway Rates—4 & 5 Vict. c. 59. s. 1.

HIGHWAYS.—By a local act regulating certain turnpike-roads the monies coming to the hands of the trustees were to be expended in defraying the expenses of management, not exceeding in any one year 300*l.*, and next in maintaining and repairing the roads, but so that the amount expended for these purposes should not exceed 1,600*l.* in any one year, and then in paying off the debt owing by the trustees.

The revenue of the trustees exceeded 1,900*l.*, and therefore there was a surplus over and above the amount authorized to be expended in the management, maintenance and repairs. 1,900*l.* was sufficient to defray all such expenses. The trustees, wishing to pay off their debt, obtained an order under 4 & 5 Vict. c. 59. s. 1. for payment of a portion of the highway rates towards the expense of repairing the turnpike-roads:—Held, distinguishing *The Queen v. White* (4 Q.B. Rep. 101; s. c. 12 Law J. Rep. (N.S.) M.C. 31), that as the revenue exceeded 1,900*l.*, there was no power to make such order.

This was an appeal against an order of Justices under the 20 & 21 Vict. c. 43. The CASE stated substantially as follows:

At a Petty Sessions holden for the Petty Sessional Division of Darlington Ward, in the county of Durham, an information came on for hearing, upon

the complaint of the respondent, who was the clerk to the trustees of a certain turnpike trust called "The Alston Roads Trust," in which it was alleged that the funds of the said turnpike trust were insufficient for the repairs of the turnpike-roads, and in which an order was applied for to appropriate such portion of the highway-rate as the Justices should think necessary for and towards the repairs of that part of the said turnpike-roads which lay in the township of Forest.

The Justices made an order upon the appellants, the Weardale District Highway Board, for the payment of the sum of 10*l*.

Upon the hearing of the said information it was proved, on the part of the respondent, and admitted and found as facts, that by "The Alston Roads Act, 1853," after repealing a former local act, it is enacted, section 22, that as arrears of interest due on the principal sum, or debts owing on the said turnpike trust should be and the same were thereby wholly extinguished, and that no interest should thenceforth be paid or payable upon the said principal sums or any of them; and by section 24, that all monies which should come to the hands of the trustees by virtue of the said act should be applied as follows, that is to say,

1. In paying and discharging the expenses of obtaining and passing the said act or incident thereto.

2. In defraying the expenses of erecting, altering and repairing toll-gates and toll-houses, and of the management of the said roads, and the salaries of officers and other incidental expenses, but not exceeding in any one year the sum of 300*l*., exclusive of payments to toll-collectors, and of the costs of prosecuting or defending any claims or suits.

3. In maintaining and repairing the roads and bridges and putting the said act in execution with reference thereto, but so that the amount expended for these purposes shall not exceed 1,600*l*. in any one year.

That the expenses of obtaining and passing the said act had also been paid and discharged. That the annual revenue from tolls and incidental receipts of the said Alston Roads Trust for the current year will amount to 2,208*l*. That the salaries of the officers employed by the said trustees, and the other expenses of and incident to the management of the said trust roads will amount for the current year to 272*l*. That the expenses of maintaining and repairing the said trust roads and bridges and putting the act into execution in reference thereto during the present year are estimated by the surveyor to amount to 1,596*l*., of which sum it is estimated 57*l*. will be expended within the township of Forest, the estimate being provided upon the actual expenditure within each parish during the past year. The 4 & 5 Vict. c. 59, an act to authorize for one year the application of a portion of the highway-rates to turnpike-roads, continued by subsequent acts to the present time, after reciting the General Highway Act of 5 & 6 Will. 4. c. 50, whereby divers statutes passed in the reign of His late Majesty King George the Third, relating to the performance of statute duty, were repealed, and statute duty was thereby altogether abolished, and that the revenues of some turnpike-roads are so unequal to the charge and maintenance of such roads after paying the interest and principal of the sums due upon mortgage of the tolls thereof, when deprived of the aid heretofore derived from the statute duty, that it is necessary that some additional provision should be made for such roads for a limited period, section 1. enacts, that Justices, upon information exhibited before them by the clerk or treasurer of any turnpike trust that the funds of the said trust are insufficient for the repairs of the turnpike-roads within any parish, &c., may examine the state of the revenues and debts of such turnpike trusts, and inquire into the state and condition of the repairs of the roads within the same, &c., and if after such examination it shall appear to the said Justices necessary or expedient for the purpose of any turnpike-road so to do, then they may adjudge and order what portion (if any) of the highway-rates, &c. shall be paid by the parish surveyor, &c. to the said trustees, such money to be wholly laid out in the actual repairs of such part of such turnpike-road

as lies within the parish from which it was received. By the 26 & 27 Vict. c. 94. s. 1. the highway board is substituted for the parish surveyor.

It was contended, on behalf of the appellants, that the act 4 & 5 Vict. c. 59. only applies to cases where "the funds of the turnpike trust are insufficient for the repairs of the turnpike-roads in any parish," and that as the trustees of the said Alston roads are directed by the said Alston Roads Act to expend not exceeding 1,600*l.* in maintaining and repairing the said trust roads and bridges, and the estimated expenditure for those purposes for the current year only amounts to 1,596*l.*, the funds are not insufficient for the repairs of the said roads; that the said respondents are not entitled to an order for parish composition, unless their estimated expenditure for repairs, &c. exceeds 1,600*l.*, the amount directed by their local act to be so expended; that section 26. of the said Alston Roads Act only contemplates a sum of 200*l.* as applicable at any one time for payment of debts, whereas for the present year there is a surplus of 340*l.* applicable for that purpose; that if, as they contend, the said respondents are justified in stopping short at 1,200*l.* in repairs of their roads, they would be equally justified in stopping short at 800*l.*, or even a less sum than that, and asking for parish composition to double or triple the sum applied for at present; and the appellants contended that the respondents cannot stop short at 1,600*l.* in repairs of their roads, and that, therefore, the order now applied for could not be made.

The respondent contended that in judging of the sufficiency or insufficiency of the funds for this purpose, the whole state and circumstances of the trust must be taken into consideration by the Justices, and that if there is a debt due upon the trust (as in the present case), the Justices are to consider that it is a duty incumbent upon the trustees of the turnpike trust to have a due regard to the discharge of such debt concurrently with keeping the trust roads in repair.

The judgment of the Justices was in favour of the respondent, and they made an order on the appellants for payment to the said trustees of 10*l.*, being part of the rate or assessment levied or to be levied for the repair of the highways in and for the said township of Forest.

The question for the opinion of the Court was, whether the judgment was in point of law correct, and whether the trustees of the said roads could call upon the said highway board, under the circumstances of this case, to pay to them a portion of the highway rate levied in the said township of Forest. If the Court should be of opinion that the said order was legally and properly made, then the said order was to stand; but if the Court should be of opinion otherwise, then the said information was to be dismissed.

C. Russell, for the respondents (May 2).—The question before the Court is not, whether the Justices have acted wisely in making the order complained of; but whether they had jurisdiction to make it. It is submitted that they had. By the 1st section of 4 & 5 Vict. c. 59, they may make the order, if they think it necessary or "expedient for the purposes" of the road. Now here the trustees wished to get rid of some part of their debt, and the Justices have thought it expedient that they should have the means of doing so.

[BLACKBURN, J.—But unless the trust funds are insufficient for the repairs, the Justices have no power to inquire about it. The trustees have got 1,900*l.*, which they may expend in the repairs, and which is sufficient for that purpose.]

But the question is, whether they may not pay off the debt with some of the money, if they think it is expedient to do so. The question seems to be decided by *The Queen v. White* (4 Q.B. Rep. 101; s. c. 12 Law J. Rep. (N.S.) M.C. 31), where the local act was almost exactly the same as the one now before the Court. It was decided that the order might be made.—He also referred to *The Queen v. the Trustees of the South Shields Turnpike Roads* (3 El. & B. 599; s. c. 23 Law J. Rep. (N.S.) M.C. 134), *The Queen v. Hutchinson* (4 El. & B. 200; s. c. 24 Law J. Rep. (N.S.) M.C. 25), and to *Mawby v. Hopkinson* (10 Law Times, N.S. 27).

Besley, for the appellants.—*The Queen v. the Trustees of the South*

Shields Turnpike Roads (3 El. & B. 599; s. c. 23 Law J. Rep. (N.S.) M.C. 134) shews that the order of payments provided for by the local act is to be strictly followed.

[BLACKBURN, J.—But can you distinguish *The Queen v. White* (4 Q.B. Rep. 101; s. c. 12 Law J. Rep. (N.S.) M.C. 31)?]

It may be difficult to do so, but it was before the Court both in *The Queen v. the Trustees of the South Shields Turnpike Roads* (3 El. & B. 599; s. c. 23 Law J. Rep. (N.S.) M.C. 134) and *The Queen v. Hutchinson* (4 El. & B. 200; s. c. 24 Law J. Rep. (N.S.) M.C. 25); and in *The Local Board of Health of Chatham v. the Rochester Commissioners* (35 Law J. Rep. (N.S.) M.C. 81), where Blackburn, J. said, "Turnpike-roads are all public highways, and as such, if the turnpike trustees are able to keep them in repair, they are bound to do so, and if they are not, the parish is to contribute, and the consequence of causing a sinking fund to be taken out of the tolls before the payment of the expenses of repairing the roads would be to accelerate the time when the parish will become liable."

[BLACKBURN, J.—And so I thought when this argument began; but *The Queen v. White* (4 Q.B. Rep. 101; s. c. 12 Law J. Rep. (N.S.) M.C. 31) seems to decide that the trustees are to have a discretion as to how the funds are to be expended. We must consider that case.]

He also referred to *Brown v. Evans* (34 Law J. Rep. (N.S.) M.C. 101).

Cur. adv. vult.

BLACKBURN, J. delivered the judgment of the Court.—In this case, which was argued before my Brother Shee and myself, the question was, whether the Justices were right, under the circumstances stated in the case, in making an order, under the 4 & 5 Vict. c. 59, on the appellants, to pay the trustees of the Alston Roads a portion of the highway rates. By the local act regulating the Alston Roads (the 16 & 17 Vict. c. cxii.), section 24, it is enacted, that all the monies coming to the hands of the trustees by virtue of the act shall be applied, first, in paying the expenses of obtaining the act (which have been discharged), secondly, in defraying the expenses of management, not exceeding in any one year 300*l.*; thirdly, in maintaining and repairing the roads, &c., but so that the amount expended for these purposes shall not exceed 1,600*l.* in any one year, and then in paying off a large debt owing by the trustees; so that it is clear that the legislature intended that, to the extent of 1,900*l.*, the management and repairs should be a charge on the trust funds prior to the debt. The facts are, that the revenue of the trustees exceeds 1,900*l.*, and the expenses of management and maintaining the roads fall short of that sum, so that there is a surplus, though a small one, applicable to the reduction of the debt; but the trustees think it proper to apply a larger sum to reducing the debt, and they have obtained an order from the Justices to require the appellants, amongst other parishes, to defray part of the expenses of the maintenance of the road, on the ground that the funds of the turnpike trust, which are sufficient to repair the road if the trustees obey the act of parliament and apply their funds primarily to those purposes (to the extent of 1,900*l.*), will not be sufficient if they disobey that act, as they propose to do, and apply the funds to reduce the debt. *The Queen v. White* (4 Q.B. Rep. 101; s. c. 12 Law J. Rep. (N.S.) M.C. 31) was very properly relied upon by the counsel for the respondents. If the present case was not distinguishable from that case, we should probably have required the case to be re-argued before the Court when more full, before dissenting from a decision in point. But we think that the case is very different from the present. The terms of the local act were hardly so express as those of the present act; and it might be thought that the subsequent general act repealed or at least overrode the prior local act. But in the present case the legislature have by an enactment subsequent to the general act, and therefore not repealed by it, in express terms provided

in what order the funds of the trust shall be applied and we think it impossible to hold that the Justices or the trustees can have any power to alter that arrangement. For this reason we give judgment for the appellants.

Judgment for the appellants.

[IN THE COURT OF QUEEN'S BENCH.]

April 25, 1886.

JOSEPH LEONARD HADLEY, JONAH HADLEY AND JAMES EBDEN,
appellants, v. JOHN BROWNJOHN PERKS AND THOMAS HOLWAY
PERKS, respondents.

35 L. J. M.C. 177; L. R. 1 Q.B. 444; 14 L. T. 325; 14 W. R. 730;
12 Jur. N.S. 662.

The Metropolitan Police Acts, 2 & 3 Vict. c. 47. s. 66. and 2 & 3 Vict. c. 71. ss. 24-26.—Having or Conveying Property suspected to be Stolen—Arrest by Constable—Magistrates—Summary Jurisdiction.

LONDON POLICE.—*The summary powers conferred by section 24. of the 2 & 3 Vict. c. 71. upon the Metropolitan Magistrates, of dealing with a "person brought before any of the said Magistrates charged with having in his possession or conveying in any manner any thing which may be reasonably suspected of being stolen, or unlawfully obtained," do not apply to a case where the only possession of the property is a possession inside a warehouse, but are confined to the class of offences contemplated by section 66. of the 2 & 3 Vict. c. 47. To bring a case within section 24, the "having in his possession" must be ejusdem generis with "conveying."*

The power given to a constable by section 66. to "stop, search and detain any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained," is confined to cases where a person has or conveys the property in the street or other open place; and section 24. of the 2 & 3 Vict. c. 71. is supplementary to section 66. of the 2 & 3 Vict. c. 47, and gives the Magistrate power to convict summarily persons who, under section 66, are liable to be arrested by a constable in the open.

Semble, per Blackburn, J., that section 24. gives the Magistrate the same power with regard to persons arrested under section 66. for offering for sale or pawn property suspected to have been stolen.

A person is sufficiently "brought" before a Magistrate within the meaning of section 24. if he appear in answer to a summons; and it is not necessary that he should have been actually arrested and brought in custody.

CASE stated under the 20 & 21 Vict. c. 43. by the Lord Mayor of London.

The following are the material parts of the case: The respondents, who are millers at Shad Thames, preferred three several informations against the appellants jointly, charging that each of the appellants on three several days unlawfully had in their possession in Upper Thames Street, contrary to the statute, &c., certain sacks, the property of the respondents, which goods were then and there and were still reasonably suspected of having been stolen and unlawfully obtained. The informations were laid under the Metropolitan Police Courts Act, 2 & 3 Vict. c. 71. s. 24, the powers of which

are given by the 3 & 4 Vict. c. 84. s. 6. to two City Justices, and by the 11 & 12 Vict. c. 43. s. 34. to one such Justice.

Upon the informations being laid, the Lord Mayor issued summonses to the appellants to appear at the Mansion House, and they accordingly appeared. The respondents called several witnesses, one of whom, a constable of the Metropolitan Police Force, and appointed for special duty as officer of the "Sack-Protection Society," proved that he found the sacks in question on the days named at the Steam Flour Mills, in Upper Thames Street, belonging to the appellants J. L. and J. Hadley, of whom the appellant Ebdon is the foreman, and that the sacks were marked with the names of the respondents and belonged to them. The appellants' counsel contended that the Lord Mayor had no jurisdiction, for the reason set out in the argument below, and also because the appellants had not been "brought" before the Lord Mayor in custody by a constable, as required by section 24. of the 2 & 3 Vict. c. 71, and referred to 2 & 3 Vict. c. 47. s. 69, for the meaning of the word "brought." The Lord Mayor, after hearing the respondents' counsel, contra, decided that he had jurisdiction, and the appellants then called many witnesses to prove that the sacks were brought in to their mills unknown to the appellants; that bakers, their customers, constantly sent back other sacks in return for the appellants' sacks; and that the orders given to the appellants' men were not to send out sacks belonging to other millers.

The Lord Mayor thought that the appellants were properly "brought" before him; secondly, that section 24. of the 2 & 3 Vict. c. 71. created a new offence, and was specially intended to provide a summary remedy for protecting property in cases where an indictment could not be sustained or was inexpedient; and that therefore it was not necessary to prove larceny or fraud, but that reasonable suspicion was sufficient, which was to be gathered from all the circumstances of the case; thirdly, that the appellants had brought themselves within section 24, inasmuch as they had possession of the sacks in question, which were reasonably suspected of being stolen or unlawfully obtained; fourthly, that the appellants did not give the Lord Mayor a satisfactory account as required by section 24. of how they came by the sacks in question. The Lord Mayor therefore convicted the appellants of the offences, and adjudged J. L. and J. Hadley to pay 15*l.* each, being 5*l.* each for each offence, and Ebdon to pay 15*s.*, being 5*s.* for each offence.

The question of law for the opinion of the Court is, whether the Lord Mayor was right in point of law in convicting the appellants.¹

Hardinge Giffard (Poland with him), for the respondents, argued at length upon the details of the evidence to shew that the account given by the appellants of their possession of the sacks was not such as to give reasonable satisfaction to the Lord Mayor, under section 24. of the 2 & 3 Vict. c. 71. The argument is omitted, because, from the view taken by the Court, this part of the case is immaterial.

Parry, Serj. (Waddy with him), for the appellant.—The Lord Mayor had no jurisdiction over this case. I quite admit that the appellants, if liable to be brought at all, were properly "brought" before him by summons, within section 24. of 2 & 3 Vict. c. 71, and that it was not necessary that they should be brought in custody; but my point is, that that section only applies to cases within section 66. of the 2 & 3 Vict. c. 47.,² which section

(1) The evidence for the respondents and the appellants was set out at great length in two appendices, and the Court said, during the argument, that an appendix, as well as the case, ought to be divided into numbered paragraphs, otherwise the costs would not be allowed.

(2) Section 66. of the 2 & 3 Vict. c. 47. enacts that "any person found committing any offence punishable either upon indictment or as a misdemeanor upon summary conviction, by virtue of this act, may be taken into custody without a warrant by any constable, or may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant or any person authorized by him, and may be detained until he can be delivered into the custody of a constable to be dealt with according to law; and every such constable may also stop, search and detain any vessel, boat, cart, or carriage in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be

would not apply to the present case. Section 66. is directed against offences which may be described as locomotive, erratic or vagrant. This is clear from the words "found committing," "stop, search and detain." By section 55. of the 2 & 3 Vict. c. 71. that act is to be construed together with the 2 & 3 Vict. c. 47; therefore section 66. of the latter act is to be taken with section 24. of the 2 & 3 Vict. c. 71, which only applies to persons arrested for the erratic offences comprised under section 66. of the 2 & 3 Vict. c. 47. If this were not so, section 24. would create a new offence, and give a Magistrate most arbitrary powers in cases where no indictable offence has been committed. Section 25. of the 2 & 3 Vict. c. 71. shews what course should be adopted where there is reason to suspect that stolen goods are concealed in a house.

[BLACKBURN, J.—The words of that section seem to require, before a search-warrant could be granted, *proof on oath* that goods had been stolen, and reasonable suspicion that they were concealed in the house.]

Section 24. does not include cases comprised under section 25.

[BLACKBURN, J.—The fact that section 25. follows instead of precedes section 24. is not conclusive of that proposition, but is an argument in its favour.]

Section 26. also confirms my contention; and unless section 24. applies to cases under section 66. of 2 & 3 Vict. c. 47, there is no section which does.

[BLACKBURN, J.—It seems strange that section 24. renders persons taken red-handed liable only to two months' imprisonment, but section 26. renders persons not taken red-handed liable to three months' imprisonment. It may be because proof on oath that the goods are stolen is required by section 26, but only reasonable suspicion by section 24. If so, it is very awkwardly expressed.]

Poland, in reply (who was directed to answer the contention that the Magistrate had no jurisdiction).—Section 24. of 2 & 3 Vict. c. 71. creates a new offence, and is not confined to cases under section 66. of the 2 & 3 Vict. c. 47. There is a distinction between "having in his possession" and "conveying," and "having" is not limited to cases *ejusdem generis* with "conveying." It can hardly be contended that a person shewing in the street a diamond suspected to be stolen is liable under section 24, but not a person shewing it inside the threshold of a shop. If the appellants are right, there is no provision for the case of a person putting a diamond down upon the counter, because he cannot be arrested under section 66. of the 2 & 3 Vict. c. 47, and there cannot be a search-warrant under section 25. of the 2 & 3 Vict. c. 71. Section 24. is designed for the case where no owner can be found, and where there may not be sufficient evidence to justify a remand. If section 25. is construed to require proof on oath that the goods are stolen, section 66, which uses the same words, would also require the proof on oath; and this shews that section 24. is not merely supplementary to section 66.

[BLACKBURN, J.—The reason for giving the power under section 66. is, that it is essential to make an instant arrest; and the constable has no time to do more than suspect; he has no time to make an oath. LUSH, J.—If

found, and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed with respect to such property, or that the same or any part thereof has been stolen or otherwise unlawfully obtained, is hereby authorized, and if in his power is required, to apprehend and detain, and as soon as may be to deliver such offender into the custody of a constable, together with such property, to be dealt with according to law."

Section 24. of 2 & 3 Vict. c. 71. enacts, "That every person who shall be brought before any of the said Magistrates charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such Magistrates how he came by the same, shall be deemed guilty of a misdemeanor, and shall be liable to a penalty of not more than 5l. or, in the discretion of the Magistrate, may be imprisoned in any gaol or house of correction within the Metropolitan Police district, with or without hard labour, for any time not exceeding two calendar months."

your argument is right, you may, under section 24, convict a man merely for having in his warehouse property which is only *suspected* to be stolen, while you cannot, under section 25, even search the house except on *oath* that the goods are stolen.]

But if the construction which the Court proposes to put on section 25, namely, that proof on oath of the stealing is thereby required, be correct, then similar proof is equally required by section 66; but it is admitted that such proof is impossible under section 66. Therefore, I say it is not required under section 25, and section 24. includes cases under section 25. The powers contended for are very salutary, and the Court will not be astute to defeat the obvious intention of the statute.

BLACKBURN, J.—We are all agreed that the convictions should be quashed on the ground on which my Brother Parry puts it, viz., that the 24th section of 2 & 3 Vict. c. 71, under which only the appellants could be convicted, does not apply to the present case. The 24th section by itself is this: that “every person who shall be brought before any of the said Magistrates” (and the Lord Mayor has the power of two Justices) “charged with having in his possession, or conveying in any manner, anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such Magistrate how he came by the same, shall be guilty of a misdemeanour,” and liable to a penalty, or in the discretion of the Magistrate, to imprisonment. Now, this is a very extensive, very arbitrary, and summary power. The words “having in his possession” taken by themselves would include the idea “at any time, in any place, in any manner”; but they must be taken with and construed with the words “or conveying in any manner.”

At common law it is no offence, nor is it any offence by statute, except by virtue of section 66. of 2 & 3 Vict. c. 47, to have in one's possession goods suspected to have been stolen. The offence at common law is to have, with a guilty knowledge, things actually stolen. What cases, then, does this 24th section of the 2 & 3 Vict. c. 71. embrace? The 2 & 3 Vict. c. 47. was passed in the same session with, and so is contemporary with the later act. It is act to regulate the Constables of the Metropolis, and by section 55. of 2 & 3 Vict. c. 71, the two acts are to be construed together as one act. Now section 66. of the earlier act provides that any person “found committing” offences punishable by virtue of that act, may be taken into custody; and then it enacts that every constable “may also stop, search and detain any vessel, boat, cart, or carriage, in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may be *reasonably suspected* of having or conveying, in any manner, anything stolen or unlawfully obtained.” Such a power of arrest does not exist at common law. At common law a private person may arrest without warrant where a felony has actually been committed, and he has reasonable cause for suspecting that the person arrested has committed it. A constable may go further, and may arrest without warrant when he has reasonable cause for suspecting that a felony has been committed by the person arrested, though no felony has in fact been committed. But neither a constable nor any one else can, by common law, arrest a person on reasonable suspicion of having anything “unlawfully obtained”; but this a constable may do by force of section 66. Now, the expressions in that section, “Stop, search, or detain any vessel,” &c., and “conveying,” both point to the case of goods in transit, and there is, obviously, very good reason for giving a constable power to arrest summarily persons suspected of conveying goods stolen or unlawfully obtained, because such persons will take care to get quickly out of the way; but it may not be expedient to give such a power of arrest when the goods are found inside a house. The section also gives a further power to a person to whom property is offered for sale or pawn to arrest the persons offering it if he has reasonable cause to suspect that it has

been stolen or otherwise unlawfully obtained; and since a thief tendering stolen goods to a pawnbroker will probably disappear as quickly as possible, there is the same reason for giving the power of arrest in that case. But the power is confined to the cases of persons having or conveying the goods, or tendering them for sale or pawn.

This, then, throws light on section 24. of 2 & 3 Vict. c. 71; and I think that the power given by section 66. to arrest summarily persons suspected of having or conveying stolen goods is confined to persons moving or being in the street; that the offence aimed at is, in fact, as it has been called in argument, a locomotive, erratic offence, and that section 24. of 2 & 3 Vict. c. 71. is aimed at the same class of offences. I am inclined to think it also extends to the case of persons offering suspected goods for sale or pawn, who may be arrested by virtue of the latter part of section 66; but what we now decide is that it applies to persons charged with having or conveying goods along the street.

I may here observe that in the later act the words are varied in section 26. from the words in section 24, in that section 24. speaks of "anything which may be reasonably suspected of being stolen," but section 26. speaks of "anything stolen." The general rule, which we learned in a conveyancer's chambers, was never to change the words unless you intend to change the meaning. I wish that those persons who are intrusted with the duty of drawing acts of parliament would follow this rule. They seem to think that they ought to vary the graces and expressions of their style so as not to become monotonous.

Looking at the words of section 24. I think that the expression "having in his possession" being coupled with "or conveying," must be limited to cases of "having" *ejusdem generis* with "conveying." Next comes the 25th section, and if the intention had been to make section 24. apply to cases under section 25, the proper arrangement would have been to put section 24. after section 25. I do not mean to say that this is conclusive on the point, but it is a reason in favour of holding that section 24. does not apply to cases under section 25. Now section 25. empowers a Magistrate to grant a warrant to search any house in which there is reasonable ground for suspecting that anything stolen or unlawfully obtained is concealed. But this warrant can only be granted on oath, and the information must be not merely that the goods are suspected to have been stolen, but it must be sworn that they have been actually stolen. There is an arbitrary power at the end of the section to take into custody every person found in the house who shall appear to have been privy to the deposit of the goods, knowing or having reasonable cause to suspect that they have been stolen. The whole of this section is confined to cases where there is an information on oath. But the mischief meant to be remedied by section 66. of the 2 & 3 Vict. c. 47, is where property is being carried along the street, and there is every reason to suppose that it has been stolen from a warehouse, for instance, or a ship. There would not be time in such a case to lay an information on oath; but in order to seize goods in a house under a search-warrant, you must go further and make oath.

Then comes section 26, and that enacts, not if the person does "not give an account to the satisfaction" of the Magistrate how he came by the goods (as in section 24), but "if it shall appear to such Magistrate that any person shall have had possession of such thing, and had reasonable cause to believe the same to have been stolen or unlawfully obtained," then the person may be imprisoned for three months; that is, one month longer than the person offending under section 24. Section 26. seems, by the change of words of which I have spoken above, to be confined to cases where the goods are *actually* stolen; but this point is not before us, and we need not decide it.

For these reasons, I think that the summary power conferred by section 24. is intended to apply only to persons "having or conveying" property so as to be liable to be arrested under section 66, and probably also to persons

liable to be arrested under section 66. for offering goods for sale or pawn. The Lord Mayor, therefore, exceeded his jurisdiction. There can be no doubt whatever that, provided the facts would have justified a summary arrest, it would have been no defence to say that the defendant had been brought before the Magistrate by a summons in lieu of having been arrested, and that the words of section 24. did not apply to persons "brought" by virtue of a summons. They clearly do so apply.

SHEE, J.—I am of the same opinion. I think section 24. of the 2 & 3 Vict. c. 71. is supplementary to section 66. of the 2 & 3 Vict. c. 47, and that it only applies to cases of having or conveying in the street.

LUSH, J.—I am of the same opinion. I also think that section 24. is merely supplementary to section 66, and that for two reasons. First, because some such provision as that contained in section 24. is necessary in order to carry out the provisions of section 66. In section 66. a power is given to a constable to stop persons merely on suspicion. It is useless to do that unless there is some provision made for bringing such persons before a Magistrate. Section 66. would therefore be inoperative without section 24, and section 24. does exactly adapt itself to the state of things contemplated by section 66. The second reason is derived from the structure of section 24. It does not say, as if it were creating a new offence, "any person having in his possession or conveying" property, but any "person who shall be brought before any of the said Magistrates charged with having," &c. That, I think, shews that it refers back to some other provision which enables him to be brought before the Magistrates, and that provision is contained in section 66.

Judgment for the appellants, without costs.

[IN THE COURT OF COMMON PLEAS.]

April 27, 1866.

STANHOPE, *appellant*, v. THORSBY, *respondent*.

35 L. J. M.C. 182; 1 H. & R. 459; L. R. 1 C.P. 423; 14 L. T. 382;
14 W. R. 651; 12 Jur. N.S. 374.

See, *R. v. Kettle*, [1905] E. R. A.; 74 L. J. K.B. 254; [1905] 1 K.B. 212;
92 L. T. 59; 53 W. R. 364 (K.B.D. Div.).

Time for entering into Recognizance under 20 & 21 Vict. c. 43. ss. 2, 3.—Cattle Plague—Licence for removal of Cattle—Evidence.

MAGISTERIAL LAW.—On an appeal from the decision of Justices, under the 20 & 21 Vict. c. 43. ss. 2, 3, the appellant enters into the required recognizance within sufficient time, if he does so before the case is stated and delivered, although after the expiration of the three days allowed for applying for the case.

ANIMALS.—By an order, made by the local authority appointed by order of the Privy Council, under the 11 & 12 Vict. c. 107. s. 4, the removal of cattle was prohibited, except fat cattle removed for slaughter with the licence of a Justice, in which such Justice shall state, *inter alia*, that he has been satisfied by the evidence of an inspector, or otherwise, that no case of cattle plague has occurred within one mile from the premises from which such removal is to take place:—Held, that where such licence has been granted without fraud on the part of the person applying for it, the Sessions cannot

inquire into the evidence on which the Justice acted who granted it, and though granted without any evidence, it protects the person who removes his cattle under it.

CASE for the opinion of the Court, stated by the Justices in Petty Sessions, at Horncastle, in the parts of Lindsey, in the county of Lincoln.

An information was preferred by the respondent against the appellant for removing two cows and sixteen bullocks along a public highway without the licence of a Justice of the Peace, contrary to an order of the 16th of January, 1866, made by the Justices for the parts of Lindsey in Quarter Sessions assembled, being the local authority appointed by an Order of the Privy Council, dated the 16th of December, 1865, under the 11 & 12 Vict. c. 107. s. 4, and the material parts of such order of Sessions necessary for this case are as follows:

"The Justices present declare that, with a view to prevent the spreading of the said disorder (the cattle plague) it is expedient, and they do accordingly declare and give notice as follows, that is to say, first, that between the 19th day of January instant and the 1st day of March next, no cow, heifer, bull, bullock, ox, calf, sheep, lamb, goat or swine, shall be brought or sent to any public fair, market or place within the said parts of Lindsey for the purpose of exhibition or sale. Thirdly, that it shall not be lawful between the dates aforesaid to remove any cow, heifer, bull, bullock, ox or calf from place to place within the said parts of Lindsey over, along or across any highway or public road (not being a railroad), except fat cattle for the purpose of slaughter, which fat cattle may be removed for that purpose with the licence of a Justice of the Peace of the said parts, and shall before removal be marked by part of the hair being conspicuously clipped off in the form of a cross from one of the hind quarters; and in the said licence the Justice shall state the name and residence of the seller, that he has been satisfied by the evidence of an inspector or otherwise of the healthiness of the animal, that the animal has been in the seller's possession thirty days at least immediately previously to such removal, and that no case of cattle plague has occurred within one mile from the premises from which such removal is to take place during six weeks immediately preceding such removal, and that the licence shall be in force forty-eight hours from its date and issue, and no longer; and also except any other cattle which may be removed from one part of a farm to any other part of the same farm contiguous thereto and in the occupation of the same person with a licence of a Justice of the Peace of the said parts. Lastly, notice is hereby given that every person offending against the orders and regulations hereinbefore contained will be liable to forfeit for such offence a sum not exceeding 20l."

From the evidence adduced at the hearing of the information it appeared that the appellant, being in possession of a quantity of fat cattle, sent, on the 28th day of January, 1866, to Moses Elmhirst, Esq., a Justice of the Peace for the parts of Lindsey, a letter, of which the following is a copy:

"Revesby Abbey, Sunday, January, 28, /66.

"Dear Elmhirst,—Mr. Bell has become rather frightened at the plague being at Mareham-le-Fen (two miles from my farm) and my feeding beasts being pretty fat, he wishes to send them at once to Tattershall to Great Northern station, to be sent to London to-day, and sold and killed there to-morrow morning. There are ten short-horn steers, two cows and seven Scotch steers. Mr. Bell sends a note to the Horncastle inspector to give a warrant of their health, without which it must be understood that your order is not to be used. I also want a certificate for the removal of my animals across the road with the inspector's permission. Yours, sincerely,

"J. Banks Stanhope.

"Moses Elmhirst, Esq."

With this letter was inclosed a memorandum from Mr. Bell (Mr. Stanhope's

steward), from which the following, being the part relating to the animals in question is an extract :

" Mem. for Moses Elmhirst, Esquire."

" List of beasts belonging to James Banks Stanhope, Esquire, intended to be forwarded by railway from Tattershall Station to Manchester.

" Ten short-horned bullocks

" (5 White and 5 roan).

" Two short-horned cows

" (1 white and 1 roan).

" Six Scotch bullocks

" (4 dun and 2 red).

" Geo. Bell."

" Revesby, 28th January, 1866.

" I certify that the above stated beasts are all healthy so far as I know, but they will only be forwarded by the order of an inspector, which is applied for.—G. B."

Mr. Elmhirst on this application granted a licence, in the form settled by the Quarter Sessions at which the above-mentioned order was made and supplied under the direction of a Court to the Justices for the parts of Lindsey, of which licence the following is a copy :

" Lincolnshire. Lindsey.

" Licence to remove cattle.

" I hereby permit the removal of

" 2 cows short-horned, 1 roan, 1 white,

" Sixteen bullocks, { 10 short-horned,
5 roan, 5 white,
6 Scotch,
4 dun, 2 red,

the property of James Banks Stanhope, Esquire, M.P., of Revesby, to London or Manchester, to be removed from Revesby to London or Manchester, *via* Tattershall Station, being for immediate slaughter, it appearing to me that the disease has not appeared within one mile of the premises from which the cattle are to be removed within six weeks from this date, the same are not infected by the disorder generally designated 'the Cattle Plague,' and have been thirty days at least in the possession of the applicant for this licence.

" This licence shall remain in force until 2.15 o'clock in the afternoon of Tuesday next, the 30th day of January, 1866.

" Given under my hand this 28th day of January, 1866.

" Mos. Elmhirst,

" a Justice of the Peace acting in and

" for the parts of Lindsey."

Notes on the back of the licence.

" None of the animals named within may be removed between an hour after sunset and an hour before sunrise. The holder of this licence must produce and shew it to any person requiring him so to do. Within two days after the expiration of the time for which this licence is granted it must be sent (if by post prepaid) to the Justice of the Peace who granted it. Animals before removal to be marked by part of the hair being conspicuously clipped off in the form of a cross from one of the hind quarters. Penalty, 20l."

A certificate of the inspector that the appellant's cattle were healthy having been obtained, the cattle named in the information were, on the 29th of January, 1866, removed under this licence along the highway from Revesby to Tattershall Railway Station, *en route* for Manchester, and there sold.

It was contended, on the part of the appellant, that the cattle were

proved to be fat cattle removed under the authority of a licence duly granted in compliance with the terms of the order, and that the information ought therefore to be dismissed. On the part of the respondent it was contended that the licence granted by Mr. Elmhirst was invalid and did not authorize the removal. Mr. Elmhirst was called as a witness by the respondent, and such parts of his evidence as bear upon the point in question are here given. He said, "I am a Justice for the parts of Lindsey, and act at the Horncastle Petty Sessions. On the 28th of January I received the letter produced (being the above-mentioned letter from Mr. Stanhope). I have the licence in my possession which I granted upon that letter. I produce it. The letter was brought by Mr. Stanhope's servant. I saw him, and sent back the order with the letter by him. I gave the letter back and sent a letter to Mr. Stanhope, stating that I had had very little time to make the order, and had sent his letter; in case any mistake should have been made in the numbers he would see it had not originated with me. I received a communication from Mr. Bell inclosed in Mr. Stanhope's letter. I also sent that letter back. I have no doubt this is the letter (the memorandum from Mr. Bell above set forth). I had no other evidence when I granted the certificate than the letter from Mr. Stanhope and the letter from Mr. Bell. I had no other evidence that there was no cattle plague within one mile of Mr. Stanhope's premises than the statement in his letter about Mareham-le-Fen. I was aware that there was cattle plague at Mareham, but I was not aware that it was nearer. I had no evidence that it was nearer. . . . I read the letter as if it contained a statement that there was no cattle plague within a mile."

The case stated the evidence of another witness called on behalf of the respondent, who proved that on Saturday, the 27th of January last, he had the cattle plague at his farm, which was within a mile from the appellant's; but that neither he nor the appellant had then any suspicion it was the cattle plague, but only that the cattle were not well. The Justices found that there was no fraud on the part of the appellant in obtaining the licence, but they ruled that in point of law it was the duty of a person applying for a licence to shew affirmatively to the Justice to whom the application was made that there was no cattle plague within one mile of the farm from which the removal was to take place; that the appellant ought to have shewn this, which his letter of the 28th of January did not do. And therefore the licence granted by Mr. Elmhirst was a void licence, and did not authorize the removal. And they convicted the appellant in a penalty of 20*l.* and costs.

The point for the decision of the Court was, whether the ruling of the Justices as to the invalidity of the licence on the ground stated above was correct.

On the case being called on,

Manisty (*Stephens* with him), for the respondent, took a preliminary objection to the hearing of the case, on the ground that the recognizances had not been entered into within the time limited by 20 & 21 Vict. c. 43. ss. 2. and 3. The conviction was on the 3rd of March last; the appellant applied for a case on the 6th of March, and the case was stated and delivered to him on the 24th of March. The appellant entered into the required recognizance on the 10th of March. The question is, what construction the Court will put on the 2nd and 3rd sections of 20 & 21 Vict. c. 43. The 2nd section says that either party, if dissatisfied with the determination of the Justices, may apply in writing, within three days after the same, to the Justices, to state and sign a case; and the 3rd section enacts, that "the appellant at the time of making such application, and before a case shall be stated and delivered to him by the Justices, shall in every instance enter into a recognizance," &c., "and the appellant shall at the same time, and before he shall be entitled to have the case delivered to him, pay to the clerk to the said Justices his fees for and in respect of the case and recognizances, and any other fees to which such clerk shall be entitled." It is submitted that the recognizances must be entered into within the time limited for applying for a case—namely, three

days after the decision; but that if the case is stated and delivered before the expiration of such three days, then the recognizance must be entered into before the delivery of such case. There has, it is believed, been only one decision on the construction of the section—*Chapman v. Robinson* (28 Law J. Rep. (N.S.) M.C. 30), where the Court of Queen's Bench held that the appellant may enter into the required recognizance at any time during the three days allowed for applying for a case, and that he need not enter into it simultaneously with making the application.

[BYLES, J. referred to *Morgan v. Edwards* (5 Hurl. & N. 458; s. c. 29 Law J. Rep. (N.S.) M.C. 108).]

That case decides that the provision in section 2. of the act, that the appellant must within three days after receiving the case transmit it to the Court, is a condition precedent to the jurisdiction of the Court to hear, and cannot be waived.

Bovill (*Hannen* and *Stanhope* with him), for the appellant.—It is manifest from sections 2. and 3. of 20 & 21 Vict. c. 43, that the appellant must enter into the recognizance before the case is delivered to him, and that really is the only limitation of the time within which the recognizance is to be entered. *Chapman v. Robinson* (28 Law J. Rep. (N.S.) M.C. 30) decides that it is not necessary to enter into the recognizance at the time of applying for the case. If not at that time, there is no other limit in the 3rd section, except "before a case shall be stated and delivered." Moreover, that section says that "at the same time, and before he shall be entitled to have the case delivered to him," the appellant is to pay the fees to the Justice's clerk. These fees must depend on the case being granted, and on the length of the case, and they are to be paid at the same time the recognizance is entered into. Manifestly, it cannot always be all done within three days. By section 4. the Justices may refuse a case if they think the application frivolous. Then by section 5, where they so refuse, there is power to apply to the Court of Queen's Bench for a mandamus to the Justices to state a case, and where the Justices are then ordered to state a case, they are to do so, "upon the appellant entering into such recognizance as is hereinbefore provided." So the whole scope of the act is that the recognizance is to be entered into before the case is delivered out, and that it is not a condition precedent that it should be entered within three days after the decision.

[BYLES, J.—If the word "and" in the 3rd section were read "or" there would be no difficulty; it would then be "at the time of making such application, or before a case shall be stated." KEATING, J.—At all events there is the authority of *Chapman v. Robinson* (28 Law J. Rep. (N.S.) M.C. 30) that "shall in every instance enter into a recognizance" does not apply to "the time of making such application." MONTAGUE SMITH, J.—The schedule of the fees to be taken by clerks to Justices helps you. The appellant is to pay these at the time of making the application, and as these depend on the number of folios, they are uncertain, and cannot be known until the case is stated. ERLE, C.J.—The section points to a space of time within which the recognizance is to be entered into, and the two termini of such space are at the time of making the application, and before the case is granted.]

Manisty in reply.—In *Chapman v. Robinson* (28 Law J. Rep. (N.S.) M.C. 30) Lord Campbell said, "We think the recognizance was in time; it was entered into within the time limited for making the application for the case." The practice has always been to give the recognizance within the three days, and it is submitted that that is in accordance with the true meaning of the statute. The construction contended for on behalf of the appellant will give great facilities to paupers, who, by claiming a case, may put the Justices' clerks to the cost of preparing it without giving any security for their payment.

[ERLE, C.J.—We still think the statute is what we are to be guided by,

and that the appellant has here entered into the recognizance within the period which the statute allows.]

Bovill, in support of the appeal.—The cattle of the appellant were removed under a licence. The Justices convicted on the ground of such licence being void because the Justice granted it without having, as they say, proper evidence before him. The licence is good on the face of it, and granted by a Justice having jurisdiction to grant it, and that is all that is required.

[*BYLES, J.*—Is it necessary that the Justice should have witnesses before him when he grants his licence?]

No. There is no power to examine witnesses. He must satisfy himself in the best way he can and if he be satisfied, which he may be from his own knowledge, that the cattle plague has not existed within a mile, he grants his licence. There is no suggestion of any fraud; indeed that is negatived by the finding in the case. Then how can the appellant be properly convicted when he acted under the authority of a licence, licensing him to remove his cattle?

Manisty, for the respondent.—The Justice who granted the licence has stated that he had no evidence before him when he gave the licence; that he had nothing but the appellant's letter, which was founded on a mistake. Then the Justices in Sessions have before them, as a fact, that no evidence was given at all; not that the Magistrate had evidence with which he might or might not have been satisfied, but that he had no evidence at all. It is a condition precedent that the Magistrate be satisfied by the evidence of the inspector, or otherwise, that no case of cattle plague has occurred within one mile of the premises. The Magistrate having in fact acted only on the letter of the appellant without any evidence before him, the Justices in Sessions think the licence so given is void, and it is upon that the opinion of the Court is asked.

[*BYLES, J.*—You interpret the word "evidence" to mean legal evidence?]

It need not be on oath. The mere incidental statement that the plague is at a place two miles off is no statement that it is not within a mile. There was here a total absence of knowledge in the mind of the Magistrate that it was not within a mile.

ERLE, C.J.—I am of opinion that the conviction is wrong. The power to convict is given if cattle are removed without the licence of a Magistrate. Here the cattle were removed with the licence of a Magistrate, and therefore the conviction for removing without a licence is in point of law a wrong conviction. The appellant applied for a licence, and it is found by the convicting Justices that there was nothing like an intentional deception or violation of the law on his part; but the Justices considered that they had a right to inquire into the quantity of evidence on which the Magistrate acted who granted the licence. I think they had no power to do so, and the conviction must be quashed. At the same time I must say that I think the Justices, in convicting, appear to me to have acted under a painful sense of duty, and with a determination resolutely to do their duty in a time of danger, and when the necessity for prompt action was of the highest importance to the public.

BYLES, J., KEATING, J. and MONTAGUE SMITH, J. concurred.

Conviction quashed.

[CROWN CASE RESERVED.]

May 5, 1866.

THE QUEEN v. WHITEHEAD.*

35 L. J. M.C. 186; 10 Cox. C.C. 234; L. R. 1 C.C. 33; 14 L. T. 489;
14 W. R. 677.

Evidence—Competency of Witness—Judge may withdraw from the Jury the Evidence of an Incompetent Witness at any Stage of the Trial.

CRIMINAL LAW. EVIDENCE.—*It is the duty of the Judge presiding at a trial to decide as to the competency of a witness; and if he has admitted a witness to give evidence, but, upon proof of subsequent facts affecting the capacity of the witness and upon observation of his subsequent demeanour, the Judge changes his opinion as to his competency, the Judge may stop the examination of the witness, strike his evidence out of his notes, and direct the jury to consider the case exclusively with reference to the evidence of the other witnesses.*

The prisoner was indicted for an assault with intent to commit a rape.

The following CASE was reserved by the Chairman of the Quarter Sessions for Lancaster, holden at Salford.

Hollinrake Whitehead was tried before me and others, my fellow Justices, in and for the said county, at Salford aforesaid, upon the 27th day of October, 1865, upon an indictment charging him with an assault upon one Harriet Pugh, at Todmorden, in the county aforesaid, with the intent the said Harriet Pugh then and there to ravish and carnally know. There were two other counts in the indictment, one of them charging an indecent assault and the other a common assault. The said Harriet Pugh is about seventeen years old, and has always been deaf and dumb. At the trial, it was proposed by the counsel for the prosecution to examine her through the medium of her father. It was stated that he and her sister could hold communication with her by means of arbitrary signs and motions, but that she had not been instructed in the "deaf and dumb alphabet," or in any institution or by any person skilled in communicating with persons labouring under the deprivation with which she is afflicted. The father was sworn truly to interpret in the case, and was requested by the counsel for the prosecution to explain to her the oath about to be administered to her. He then stated that he believed she was unaware of the nature and obligation of an oath, and that, although she had attended Sunday school for some years, he was not prepared to say that she believed in a future state or a condition of future rewards and punishments. Upon this it was objected by the counsel for the defendant that she could not be sworn, and the learned counsel for the prosecution proposed to give evidence independent of the prosecutrix in proof of the offence charged. It was objected that such evidence, in the absence of the direct testimony of the prosecutrix herself, could not be received on such a charge. I did not at the time decide upon this objection, but I caused a person named Beahan, an expert in regard to the education of and communication with deaf and dumb persons, to be summoned to the court for the assistance of myself and the jury in the case. The expert attended forthwith, and before being sworn to interpret, I requested him to endeavour to communicate with the prosecutrix, and particularly to ascertain the extent of her intelligence as to the nature and obligation of an oath. He did so, and intimated his belief that he was able to understand her signs and gestures, and to make himself understood by her, and that she comprehended him when he conversed by signs with her as to heaven and hell. He was then sworn to interpret, and

* *Coram* Pollock, C.B., Martin, B., Bramwell, B., Pigott, B. and Montague Smith.

she through him was sworn in the ordinary form. The examination through him then proceeded some way, and among other replies so obtained from the prosecutrix was one that she had consented to what the defendant did to her; she answered "Yes" to almost every question put to her. She was asked, "Did she know the counsel who was examining her?" To this she answered "Yes." The expert at this point informed the Court that he was satisfied he had been mistaken; that the prosecutrix was not able to understand him; and that the means of communication were, from want of training and otherwise, so defective that he felt it would be unsafe in the extreme to proceed with the examination through him or otherwise. Before coming to this conclusion, he again tested her in various ways, and the Court and jury were of opinion that any further examination of the girl under the circumstances would be most unsatisfactory. The counsel for the prosecution then applied that the jury should be discharged from returning a verdict, and that the trial should be adjourned to a further session, in order that in the interval the girl might be sent to a deaf and dumb school and properly instructed. Feeling myself bound by the authority of *The King v. Wade* (1 Moo. C.C. 86), I refused the application. The counsel for the prosecution then proposed to enter into the evidence of other witnesses in support of the charge, when the objection before mentioned was revived. After argument, I overruled the objection and admitted the evidence, which was in substance as follows:

About 8.30 p.m., on the night in question, two girls, one the sister of the prosecutrix, and a young man who had been walking on a foot-road to a place called Car Laithe, in the outskirts of Todmorden, were returning homewards in the direction of Todmorden, when they heard a noise which caused them to stand and listen; it was repeated. The sister recognized it as the cry of the prosecutrix, and at her request the others accompanied her, all three running in the direction whence the noise proceeded. It was repeated several times as they approached. After running about 100 yards they found the prosecutrix on the ground across the foot-road, with her clothes thrown upwards over her knees and the defendant on his knees in the act of rising from her. The male witness seized him by the collar and pulled him off the prosecutrix; his trousers also were down. He was seized by the male witness, who (having recognized him and spoken to him by his nickname, "Darling") ultimately released him, and left him on the spot seeking his cap. Meanwhile the prosecutrix rose up; her bonnet was crushed; her dress soiled with sand; her hair dishevelled. She was in tears and put her hand several times to her chest. The footpath on which she was found is on the edge of a valley, and a witness resident on the opposite bank of the valley heard screams from the direction of this road about the time spoken to by the other witnesses. The road for a considerable length is skirted on each side by a wood, after emerging from which, as it approaches the place where the prosecutrix was found with the defendant as aforesaid, it is separated from the fields for a certain length by a hurdle fence on one side of the road only, after which there ceases to be any fence, and access to the fields and the wood is very easy from the road. It was on the part of the road above the hurdle fence that the prosecutrix was found. The foot-road in question is a public foot-road, and is distant nearly half a mile from the residence of the prosecutrix, and is known by the name of the "Lovers' Walk," and the evidence did not shew for what purpose the prosecutrix had gone thither, but it was proved that she had previously gone the same walk with her sister. All the witnesses (except the resident of the other side of the valley) had known the defendant for many years. He worked at the same mill as they did. He had never visited at the house of the prosecutrix or paid his addresses to her, nor, as far as the evidence went, had there been any association between him and her. On cross-examination of the prosecutrix's sister, she admitted that a man had been charged with an assault with intent, &c., upon her sister, the prosecutrix, four to five years ago, but that the case was dismissed by the Magistrates. At the close of the case for the prosecution, the counsel for the defendant called my attention to the fact that the prosecutrix had

been duly sworn, and then withdrawn, as above stated, and then submitted there was no case to go to the jury in the absence of her testimony, denying that what was spoken to by the witnesses was done with her consent. I overruled the objection and held that the evidence given was such as was sufficient to go to the jury in support of the charge; but at counsel's request I reserved the point for the opinion of the Court. The defendant called witnesses to prove an *alibi*; but the jury found him guilty of an assault with intent to ravish. I allowed him to be discharged upon adequate bail to appear for judgment at the next Sessions.

I therefore respectfully desire the opinion of this Court upon the following points, 1. Was it competent for and obligatory for me to discharge the jury under the circumstances, in order that an opportunity might be afforded for the instruction of the prosecutrix? 2. Was it competent for me to leave the case to the jury upon the evidence above appearing, disregarding the doubtful evidence of the prosecutrix herself, and confining their attention entirely to the testimony of the other witnesses?

The case was partly heard on the 28th of April, when it was sent back to the Chairman, in order that the second question might be stated more clearly. In reply, the Chairman stated that the question to which he requested an answer was, "Whether my totally withdrawing the evidence of the prosecutrix from the jury after she was once sworn invalidates the verdict?"

Torr (May 5), for the prisoner.—The simple question is, whether the Judge, having decided that the prosecutrix was competent, could withdraw her evidence from the jury. I say he could not. The prisoner was entitled to the benefit of her evidence. In *The Queen v. Hill* (2 Den. C.C. 254; s. c. 20 Law J. Rep. (N.S.) M.C. 222) the evidence of a lunatic was admitted, and it was held that he was a competent witness. Lord Campbell, C.J., said, p. 262, "The jury are to decide on the credibility of his evidence." In *Jacobs v. Layborn* (11 Mee. & W. 685) it was held, that the evidence of a witness whose incompetency was not discovered till he had given part of his evidence, was improperly received; but the distinction between that case and the present is that there it came out as a new fact; here the state of the witness's mind was known from the first, and it is not fair that the prosecuting counsel should call a witness whose competency he knows to be doubtful, and reject her testimony as soon as it makes against the prosecution.

[*POLLOCK, C.B.*—The difficulty I have is, that the witness, having been admitted, and her demeanour being visible to the jury, her manner and the direction of her eyes towards the prisoner, perhaps, might have thrown light on the case. If she had shewn that there was any understanding between her and the prisoner, so as to shew she was not an unwilling performer in the subject-matter of the charge, I think the jury ought to have been told, "If from what has passed during the imperfect examination of the witness you can derive any light, you may do so."]

Hopwood, for the prosecution.—The question is, not whether the prosecutrix was sufficiently competent to give evidence, but whether a Judge has power to change his opinion as to a fact.

[*POLLOCK, C.B.*—The Judge is the only judge of every fact necessary to determine the question of the admissibility of a witness.]

Certainly, and it follows as a matter of course that he may reject evidence when he finds out that it is not, what he at first thought it, admissible. The question of the competency of the prosecutrix was entirely for the Judge, who was the only judge of the fact necessary to determine it, namely, the amount of intelligence of the witness.

[*MARTIN, B.*—I once received the evidence of a man, who on examination appeared to be perfectly sane, and no one could have discovered any delusion. The moment he was asked, on cross-examination, what he had been doing the night before, he shewed that he was quite mad. He said he had been flying in the air, that he had seen the devil, and many other absurd things. With great doubt, I left his evidence to the jury.]

The Queen v. Hill (2 Den. C.C. 254; s. c. 20 Law J. Rep. (N.S.) M.C. 222) raised quite a different question—namely, the competency of a particular witness. *Jacobs v. Layborn* (11 Mee. & W. 685) is a decision directly in my favour, if any were needed. Mr. Baron Rolfe there says, p. 688, "If you once admit the principle that the objection may be taken at any other time than on the *voir dire*, I do not see how you can object to its being taken at any time," and Lord Abinger's judgment disposes of the question. The point was also so decided in *The Queen v. Garner* (2 Car. & K. 920) by five Judges. See also Lord Eldon's remarks in *Vaughan v. Dorral* (2 Swanst. 400) and *Needham v. Smith* (2 Vern. 464).

[He was then stopped on that point, Pollock, C.B. saying also, as to the first question, it is one we ought not to answer. The question, in fact, is, What course ought the Judge to take on another occasion, if a similar point arises? not Were the proceedings correct on this occasion?]

Torr, in reply.—In *Yardley v. Arnold* (10 Mee. & W. 145; s. c. 11 Law J. Rep. (N.S.) Exch. 413), Mr. Baron Parke expressed himself strongly against raising objections to the competency of a witness after he has once been sworn. If a Judge decides first one way and then another, which is to be taken to be right?

[POLLOCK, C.B.—The last decision is of course the binding one.]
There is no safety in allowing such a practice.

POLLOCK, C.B.—We are all of opinion that the first question is not one for us to answer, since it is in a hypothetical form; it is not a practical question asking whether what was done here was correct, but seeks to know what course should be taken in future should a similar question arise. The question for us to decide is, was it competent for the Judge to leave the case to the jury on the evidence of the other witnesses alone, striking out the evidence of the prosecutrix? We are all of opinion that the answer should be in the affirmative, and that it was competent for the Judge to withdraw the evidence of the prosecutrix from the jury. For that I have the authority of my learned Brethren to say that we are unanimous; but I desire to say—and I am alone responsible for this—that I was at first struck with the consideration that it was possible that the conduct of the prosecutrix in the witness-box might have led the jury to return a verdict of not guilty. I am now convinced, though I at first put that forward on the strength of what I understood to be Mr. Torr's argument, that I was not correct in that. Taking the answer of the Chairman of Quarter Sessions to what we requested him to answer, his decision on the facts is clear, and we ought to be satisfied with the result. It appears that a witness of doubtful admissibility was produced. The interpreter at first thought that she understood him, and that he had the means of putting himself in communication with her mind. He was soon disabused of that error, for error it certainly was. Her answers were vague, and not germane to the matter in hand: her examination was in fact a perfect farce; no truth could be got at. Thereupon the Judge did what he was perfectly competent to do. He said, "I received the testimony of this witness at first as competent, thinking her to be so. I now reject her as incompetent." I desired to put the point in favour of the prisoner as strongly as possible; but I think the Chairman was quite right in striking out the evidence of the prosecutrix, resting the case merely on the testimony of the other witnesses. That course would not prevent the jury, if they had observed anything in the conduct of the prosecutrix favourable to the defence of the prisoner, from taking that into their consideration. The position of the Chairman seems to be this: "Was I right," he says, "in directing the attention of the jury exclusively to what was evidence, and withdrawing from them what was not?" The whole Court think he was quite right, and that the conviction must be supported. I desired that no point in the case should go uninvestigated or undiscussed, but there is no ground for coming to any other conclusion.

MARTIN, B., BRAMWELL, B., PIGOTT, B., and MONTAGUE SMITH, J. concurred.

Conviction affirmed.

BAIL COURT.

May 7, 1866.

WATTS v. THE JUSTICES OF KENT.
PEARCH v. THE JUSTICES OF KENT.*35 L. J. M.C. 190; sub nom *Reg. v. Lambard*, L. R. 1 Q.B. 388; 14 W. R. 680.Overruled, *Callaghan v. Dollwen*, [1869] E. R. A.; 38 L. J. M.C. 110; L. R. 4 C.P. 288, 21 L. T. 827; 17 W. R. 733 (C.P.).*Friendly Society—Rules—Reference of Disputes to Justices—Case stated*—21 & 22 Vict. c. 101. s. 5.—20 & 21 Vict. c. 43. s. 2.

FRIENDLY SOCIETY.—Where by the rules of a friendly society disputes between the society and a member are to be referred to Justices pursuant to the 21 & 22 Vict. c. 101. s. 5, such Justices may be compelled to state and sign a case for the opinion of the superior Court, under the 20 & 21 Vict. c. 43.

Where the secretary of such a society is summoned as such secretary before Justices to answer a complaint against the society, and an order is thereupon made against the society, the society is substantially the appellant for the purpose of procuring a case to be stated under the 20 & 21 Vict. c. 43; and therefore when, after the application for the case, the secretary has resigned his post and given the Justice notice of withdrawal of the application, the society may nevertheless continue the proceedings, and obtain a rule ordering the case to be stated, in case of a refusal by the Justices.

It appeared that the Sunbridge Benefit Society was established in 1837, and the rules of the said society were duly certified by the Registrar of Friendly Societies on the 1st of February, 1862, under the Friendly Societies Act. By the 2nd rule of the society, "No person belonging to any other benefit society shall be admitted a member of this; and should any member of this society enter any other benefit society he shall be immediately expelled from and forfeit all claims on this."

By the 24th rule, "Should any member be charged with a breach of these rules for which the penalty is exclusion, and he be not present, he shall be summoned to attend the committee to hear and to answer such charges, and any accused member neglecting or refusing to attend after being summoned by the secretary (without assigning a satisfactory cause for his absence) shall be adjudged guilty and dealt with accordingly." By the 32nd rule, "In case of a dispute between this society and any member or person claiming on account of a member or under the rules, reference shall be made to Justices, pursuant to the 21 & 22 Vict. c. 101. s. 5." In the year 1864, at the suggestion of one William Wadmore, who was then president of the society, a special meeting of the society was held to consider a proposal to amalgamate with another benefit society, namely, a branch lodge, No. 5256, Tonbridge District of the Manchester Unity of Odd Fellows, and at such meeting a resolution was carried in favour of the proposed amalgamation. On the 6th of October, 1864, a second meeting was held, when the votes in favour of and against the amalgamation were equal, and Wadmore not having previously voted gave his vote as chairman in favour of the amalgamation, and on the same evening William Wadmore, Robert Palmer, James Jones, and many other members of the society joined the Branch Lodge of the Odd Fellows. The legality of this meeting was questioned by other members of the Sunbridge Benefit Society who were opposed to the amalgamation, and its trustees refused to sell out or transfer its funds. The society continued to exist, and treated Wadmore, Palmer, Jones, and others as persons

* *Coram*, Shee, J.

who had voluntarily withdrawn from it, and declined to receive further subscriptions from them. In December, 1864, the Branch Lodge of Odd Fellows was broken up, and their effects, &c. handed over to the Tonbridge District of the Society of Odd Fellows. Disputes arose between the above-named persons and the Sunbridge Benefit Society as to the right of the former to be still considered as members of the latter, and in the end they were recognized again as members of the Sunbridge Benefit Society, and their subscriptions received. But in March, 1865, Wadmore and Palmer were served with a notice, under the 24th rule, to attend the committee to answer a charge, under the 2nd rule, of having become members of the (Tonbridge District) Sunbridge Branch of Odd Fellows.

On the day appointed (March 15) they attended; but as the committee decided that they would hear the cases separately, and would only admit one at a time to the room, they went away, and the committee investigated the charge in their absence, and expelled them from the society. Jones received a similar summons for the 27th of March, and attended before the committee, and made a statement in answer to the charge, but was, nevertheless, expelled.

In April, 1865, Wadmore, Palmer and Jones laid complaints before the Justices sitting in petty sessions at Sevenoaks, to the effect that a dispute had arisen between them and the Sunbridge Benefit Society respecting their right to continue members, and that they had been illegally expelled from the society; and Watts, the then secretary of the society, was summoned, as such secretary, to answer the complaints. The complaints were heard, and the Justices, thinking that the subsequent recognition of them by the society and receipt of their subscriptions waived the previous wrongful acts, determined that Wadmore and Palmer had not been legally expelled from the society, and ordered that Wadmore should be reinstated as a member, or the society should pay him the sum of 50*l.*; and that Palmer should be reinstated, or the society should pay him the sum of 25*l.*

Application was then made by Watts to the Justices to state a case for the opinion of the Court, and recognizances were entered into for that purpose, and other summonses were adjourned to await the decision of this Court.

Watts shortly afterwards resigned his office of secretary, and Peach was appointed secretary in his stead.

In December, 1865, Jones summoned Peach before the Justices at the same petty sessions to recover the sum of 18*s.* for the allowance during sickness payable to him as a member of the Sunbridge Benefit Society, under the rules of the said society. The hearing of that summons was adjourned from time to time, and was ultimately heard before the said Justices, on the 23rd of February, 1866, when it appeared by the minute-book of the society that Jones was expelled, under the 2nd and 24th rules, on the 27th of March, 1865, and no subscriptions had been since received from him; and it was then contended by the society that the Justices had no jurisdiction in the matter, as the complainant was not a member of the society; but the Justices heard and adjudicated on the said complaint, and ordered the society to pay Jones 18*s.* for sick allowance, and 10*s.* for costs. Peach then duly demanded a case, and tendered recognizances; but the Justices refused, and a distress was afterwards levied upon the goods of Peach for the said sums.

The Justices stated at the time of adjudication on Jones's case that they had received a notice from Watts, the late secretary, to say that he did not wish to proceed further with the cases of Wadmore and Palmer; and that, therefore, they should decline to state any case for the opinion of this Court.

A rule had been obtained, by *Besley*, calling upon the said Justices to shew cause why they should not state and sign a case, pursuant to the 20 & 21 Vict. c. 43, setting forth the facts and grounds of their judgment or determination upon the hearing of certain complaints preferred by the said W. Wadmore and R. Palmer against J. Watts, as the secretary representing the Sunbridge Benefit Society, that they had been unjustly and illegally expelled from the said society contrary to the rules thereof.

F. M. White now shewed cause.—The application is made under the 20 & 21

Vict. c. 43. s. 5, which gives this Court power to compel Justices to state a case who have refused to do so after being applied to under the 2nd section of that act. Section 2. enacts, "that after the hearing and determination by a Justice or Justices of the Peace of any information or complaint which he or they have power to determine in a summary way, either party to the proceeding may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing . . . to the said Justice or Justices to state and sign a case setting forth the facts and grounds of such determination, for the opinion thereon of one of the superior Courts of law, to be named by the party applying."

By section 3. the appellant must enter into a recognizance before such Justice or Justices, or any other Justice exercising the same jurisdiction, conditioned to prosecute without delay such appeal, and to submit to the judgment of the superior Court. This statute only contemplates a proceeding where Justices are acting in the execution of their office as Justices; but it is submitted that in the present case they are appointed by virtue of the rules and statute merely to be arbitrators, and that the proceeding before them is merely an arbitration, and not a magisterial proceeding, in the proper meaning of the term.

The 32nd rule, above set out, provides that disputes between members shall be referred to Justices, pursuant to the 21 & 22 Vict. c. 101. s. 5. That section enacts, "that where the rules of any society established under the said act (18 & 19 Vict. c. 63), or any of the acts thereby repealed, shall direct disputes to be referred to Justices, then any Justice of the Peace acting in the county or borough in which the place of business of such society shall be situated, upon complaint made by any member, his executors, administrators, nominees or assigns, or by any person claiming under the rules of the society, of any matter in dispute between him or them and the society, to summon the person against whom such complaint is made, to appear at a time and place to be named in such summons, and any two Justices present at the time and place mentioned in such summons shall proceed to hear and determine the said complaint, which complaint shall be heard and determined in England, in manner directed by the act, 11 & 12 Vict. c. 43, and in Ireland in manner directed by the act, 14 & 15 Vict. c. 93; and such Justices may make such order thereupon, either for the payment of money or otherwise, together with costs, not exceeding 10s., as they shall think fit; and where the order shall be for the doing of some act other than the payment of money, the said Justices may order the payment of a sum of money in default of the doing of such act; and any monies which shall be paid by any officer of the society, so levied on his property under any order or warrant, the Justices shall be repaid with all damages accruing to him by the society."

Harington, in support of the rule, was not heard on the above point.

SHEE, J.—The rule must be made absolute. The case is clearly within the statute.

Rule absolute.

[IN THE COURT OF QUEEN'S BENCH.]

April 28, 1866.

UNWIN AND ANOTHER, *appellants*, v. CLARKE, *respondent*.

35 L. J. M.C. 193; L. R. 1 Q.B. 417; 14 L. T. 356; 14 W. R. 688;
12 Jur. N.S. 429.

Followed, *Smart v. Pessol*, 1874, 30 L. T. 692 (Q.B.).

Master and Servant—4 Geo. 4. c. 34. s. 3.—*Second Imprisonment of Workman for Renewed Breach of the same Contract of Service—Rescission of Contract.*

MASTER AND SERVANT.—Under 4 Geo. c. 34. s. 3. (*which enables Magis-*

trates to punish with imprisonment certain classes of workmen who are guilty of breaches of their contracts of service, or to abate the whole or part of their wages, or to discharge them from their employment) a workman may be convicted a second time for persisting, on his return from imprisonment, in absenting himself from the service of his employer, as the contract is not rescinded by the mere fact of imprisonment. And although the offender bona fide believes that a conviction will dissolve his contract, and opinions of Judges can be cited in support of such a belief, this is no lawful excuse, but only matter for the discretion of the Magistrates in imposing punishment.

CASE stated by Justices under 20 & 21 Vict. c. 43.

On the 15th of November, 1865, the respondent, who is a cutler at Sheffield, appeared before one of the Justices for the West Riding of Yorkshire, acting for the borough of Sheffield, in answer to a summons issued at the instance of the appellants (who are cutlery manufacturers at Sheffield), under 4 Geo. 4. c. 34, charging him with the following offence: "That he did at the borough aforesaid, on the 1st day of June, 1865, by memorandum in writing, contract to serve John Unwin, Philip Unwin, and Philip Askham, of Sheffield, in the said borough, cutlery manufacturers, and co-partners in trade, carrying on business under the style or firm of Unwin and Rodgers, as a journeyman in the business and employment of a spring-knife cutler, for a term of two years from the 1st day of June, 1865, at wages at certain prices named in the said memorandum, and having entered into his service according to his contract, had been, in the execution of the contract, and otherwise respecting the same, guilty of a misdemeanor, for that he did, on the 7th of November, 1865, before the term of his contract was completed, and on the 11th of November still did, unlawfully absent himself from his service without leave or lawful excuse, and without his master's consent, and neglected to fulfil the conditions of the contract, contrary to the statute in that case made and provided."

At the hearing, the appellants proved that the respondent had by a written agreement, dated the 1st of June, 1865, between himself and the appellants, hired himself to, and agreed with them to work for them solely for the term of two years from the date of the agreement, at a schedule of prices named therein, and that he would not hire himself during the term of two years, nor actually agree to serve nor be employed for any other person or persons except the appellants in any trade whatsoever, nor be employed on his own account nor for his own profit. And in consideration of such work being done, the appellants agreed to find the respondent full employment for the term of two years, and to pay him wages for the same at the prices named in the schedule. The respondent entered into his employment at the date of the agreement, and continued to work for the appellants until November last, when he absented himself and refused to perform his agreement.

At the hearing, the respondent, in answer to the charge, said that he had applied to the appellants to make an advance in his wages in the same manner that the large majority of cutlery-manufacturers in Sheffield had recently done to their hired workmen, which the appellants had refused to do; and in consequence he had felt himself justified in refusing to work for them at the low rate of wages. He declared that he would not return to his work, but would go to prison and break his agreement.

The Justice pointed out to the respondent that the agreement was fixed and certain as to the prices, and could not be altered except by mutual consent; and as the masters declined to raise the prices, he would have to be committed to prison unless he promised to return to his work and perform his agreement. The respondent still refused, and said he would not return to his work at the prices named, and would sooner go to prison, and so break his agreement, if the Magistrates should so adjudge him. He was thereupon committed to prison for twenty-one days, to be kept to hard labour, and his wages to be abated during that period, which sentence was carried out.

On the 15th of December, 1865, the respondent appeared before two

Justices for the borough of Sheffield, in answer to a second summons, issued on the 11th of December, 1865, at the instance of the appellants, under the same statute. This summons stated his contract with the appellants in the same terms as the previous one, and charged that, having entered into the service according to his contract, he had been, in the execution of the contract and otherwise respecting the same, guilty of a misdemeanor, "for that he did on the 7th of December, 1866, before the term of his contract was completed, and on the 11th of December still did unlawfully absent himself from his service without leave or lawful excuse, and without his master's consent, and neglected to fulfil the conditions of the contract, contrary to the statute in that case made and provided."

At this second hearing the agreement was again produced, and it was also proved that since the respondent's liberation from prison he had not returned to his work, but had gone to his masters' premises and demanded his working tools (his own private property in the possession of his masters), when he was told by one of his masters that he must return to his work and carry out the terms of his agreement. He replied that he should not, as he considered his agreement broken and at an end by his going to prison.

In defence, before the Justices, it was contended by the respondent's attorney, that although the agreement might still be in existence, it could not be enforced by them, and that they had no power to commit the respondent to prison a second time for the same offence. In support of this argument the cases of *Ex parte Baker* (2 Hurl. & N. 219; s. c. 26 Law J. Rep. (N.S.) M.C. 155) and *Youle v. Mappin* (6 Hurl. & N. 753; s. c. 30 Law J. Rep. (N.S.) M.C. 234) were cited.

The Justices were of opinion that the respondent *bona fide* believed that he could not be compelled to return to his employment after having been sent to prison, and that he did not intend to return after his discharge therefrom. They were also of opinion that the agreement still existed, and was in full force and operation, and that the fact of the respondent going to prison and afterwards refusing to return to his work did not operate to destroy the contract. As, however, from the cases above cited, they considered it doubtful whether they had the power to commit the respondent to prison a second time, they dismissed the information, and at the request of the appellants stated this case.

The question for the opinion of the Court was, whether, under the circumstances above stated, the Justices had power to commit the respondent to prison a second time, as they would have done if they had thought that they had power so to do.

Price (Waddy with him), for the respondents.—The Justices had power to commit the appellant a second time under 4 Geo. 4 c. 34.¹ *Ex parte Baker*

(1) By 4 Geo. 4. c. 34. s. 3. "If any servant in husbandry or any artificer, calico-printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person shall contract with any person or persons whomsoever, to serve him, her or them for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract (such contract being in writing and signed by the contracting parties), or having entered into such service shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same, then and in every such case it shall and may be lawful for any Justice of the Peace of the county or place where such servant in husbandry, &c., labourer or other person shall have so contracted, or be employed, or be found, and such Justice is hereby authorized and empowered, upon complaint thereof, made upon oath to him by the person or persons, or any of them, with whom such servant in husbandry, &c., labourer or other person shall have so contracted, or by his, her or their steward, manager or agent, which oath such Justice is hereby empowered to administer, to issue his warrant for the apprehending every such servant in husbandry, &c., or other person, and to examine into the nature of the complaint, and if it shall appear to such Justice that any such servant, &c., or other person shall not have fulfilled such contract, or hath been guilty of any other misconduct or misdemeanor as aforesaid, it shall and may be lawful for such Justice to commit every such person to the House of Correction, there to remain and be held to hard labour for a reasonable time not exceeding three months, and to abate a proportionable part of his or her wages for and during such period as he or she

(7 El. & B. 696; s. c. 26 Law J. Rep. (N.S.) M.C. 193) is in point. There a workman was convicted a second time though he had never re-entered the service of his master after quitting it; Lord Campbell saying, "As to the first point, I think a fresh offence was committed when the prisoner, after being liberated from imprisonment, did not return to the service because the contract continued and he absented himself, that is a distinct offence from the offence of which he had been before convicted." And Mr. Justice Coleridge, "It was the duty of the prisoner to return to the service, and if he does not he is liable to be again convicted as much as if he had gone back to his master's premises and walked out." The prisoner in *Ex parte Baker* (7 El. & B. 696; s. c. 26 Law J. Rep. (N.S.) M.C. 193) applied to the Court of Exchequer for a *habeas corpus* (2 Hurl. & N. 219; s. c. 26 Law J. Rep. (N.S.) M.C. 155), and there Chief Baron Pollock and Mr. Baron Martin expressed an opinion different from that of the Court of Queen's Bench.

[BLACKBURN, J.—But that was on a by-point. The question in the Queen's Bench was more like the present one.]

The statute was passed for the purpose of compelling workmen to perform their contracts. The section gives to the Magistrates an express power of discharging the prisoner from his employment. This is a strong reason for inferring that the legislature did not intend that the imprisonment which it imposed should put an end to the contract of service. It can make no difference to the master if the workman absents himself, by going away for his own pleasure or by going to prison. As for the objection that the respondent *bona fide* believed that he was at liberty to absent himself, *Youle v. Mappin* (6 Hurl. & N. 753; s. c. 30 Law J. Rep. (N.S.) M.C. 234), where the Court thought that a workman who had *bona fide* acted on the advice of his solicitor was not liable to be convicted, will be relied on. But it is submitted that the effect of the agreement is a question of law, and the *bona fides* of the belief in any particular construction is immaterial.

Quain, for the appellants.—The section in question is a one-sided piece of legislation of the most penal character, and ought to be construed with great strictness.

[BLACKBURN, J.—Surely we have only to ascertain the meaning of the legislature from the words used.]

The section makes no provision for compelling the master to receive the workman back in his employment. The contract is treated as rescinded and gone.

[BLACKBURN, J.—I am not aware of any case to shew that two actions may not be brought for different breaches of the same contract.]

The Magistrates must be presumed to have punished the respondent for the absence which he threatened as well as for that of which he had been guilty. In *Youle v. Mappin* (6 Hurl. & N. 753; s. c. 30 Law J. Rep. (N.S.) M.C. 234) Martin, B. repeated his impression that a workman must be punished once for all under this statute; saying that otherwise the man might be kept in prison during the whole term of his service, and a species of slavery would be created. There cannot be more than one breach of the workman's agreement to enter upon his service, and yet the same arguments as those which have been used in the present case might be urged to prove that the contract to enter the service was not rescinded by breach.

[BLACKBURN, J.—The mischief is much greater when the servant has once entered upon his service.]

When is the Statute of Limitations to begin to run with respect to a breach of the contract?

[BLACKBURN, J.—I should say there would be no bar till the end of the service.]

shall be so confined in the House of Correction, or in lieu thereof to punish the offender by abating the whole or any part of his or her wages, or to discharge such servant in husbandry, &c., or other person from his or her contract, service or employment, which discharge shall be given under the hand and seal of such Justice *gratis*."

The opinion of Martin, B. in *Youle v. Mappin* (6 Hurl. & N. 753; s. c. 30 Law J. Rep. (N.S.) M.C. 234) is directly to the contrary.

[BLACKBURN, J.—In the report of that case in the *Law Journal Reports*, the observations of my Brother Martin are not of so decided a character.]

With regard to the question of *bona fides*, *Rider v. Wood* (29 Law J. Rep. (N.S.) M.C. 1) is in point.

[MELLOR, J.—Do you say that if a workman acted under the advice of one of his companions, who was reputed to be an authority on the subject, that this would entitle him to the benefit of a *bona fide* belief?

Here Judges have differed, and still differ, as to the construction of the section.

Price, in reply.

[BLACKBURN, J.—In this case our judgment is in favour of the appellants. The question is one turning upon the construction and effect of a statute, the terms of which have been so thoroughly brought to our notice that there is no reason why we should bestow further time upon it. We have arrived at the same conclusion, but not quite for the same reasons. My own judgment and that of my Brother Mellor are, apart from the authorities, in favour of the appellants; my Brother Shee will explain how far he concurs with us. It is our duty to find out the meaning of the act 6 Geo. 4. c. 34. This act was, no doubt, passed for the protection and assistance of masters against their workmen. It has been said that it was a one-sided piece of legislation, but we have only to do with its meaning. If it be a one-sided piece of legislation, the best thing we can do is to enforce the observation of it, in order that its defects may be made notorious. Section 3. provides that if any servant in husbandry, &c.—[His Lordship read the section.]—Now, the first question with regard to these words is, has the respondent “absented himself” within the meaning of the section? The respondent, after entering into service, refused to stay because his employer would not raise his wages. He is brought before the Justices, and imprisoned for twenty-one days. At the end of that time he came back, asked for his tools, and refused to continue in his employment because he thought that his imprisonment excused him from going on with his work. We have to say whether this second refusal was an “absenting himself” within the meaning of the statute. It seems to me that it was. The contract, which was a contract to serve for two years, had not been performed; and the respondent refuses to work, and stays away when it is still in force. It has been contended on his behalf that the contract having been once broken was rescinded, and that his obligation to serve was at an end, so that he could not be imprisoned a second time. But in all the cases that I can remember, a breach of a contract, accompanied by a declaration of an intention not to complete it, was held to give an option to the person injured, if he pleased, to rescind, but to give no rights to the wrong-doer. There can be no doubt that if the present case had existed in an action at law against the respondent, it would have been no plea for him to have said, that though his contract did not expire till June, he had absented himself during the previous month of May; for his contract, despite his absence, would still continue. Then it was said that the authority of the Lord Chief Baron and Mr. Baron Martin was in favour of the proposition that under this section, where a man has once been imprisoned for absenting himself from his employment, the master must be taken to have elected his remedy, and that the workman cannot be imprisoned again for the same offence. But there are no words in the statute by which such a view can be supported, and the presumption is against it; since the section gives power to the Magistrates to discharge the workman from his service. Mr. Quain hardly contended that there had been a rescission of the contract; and I do not see why a workman should be punished for an offence which he has only threatened to commit, or why he should be allowed to get rid of an engagement for two years by a slight imprisonment. In *Ex parte Baker* (7 El. & B. 696; s. c. 26 Law J. Rep. (N.S.) M.C. 193) the Judges all thought that there had been a fresh offence, for which

there might be a second imprisonment. The case was carried to the Exchequer, where my Brother Martin expressed himself strongly against the view of the Queen's Bench. I think, however, that the majority of the Judges who have had to consider this subject have expressed themselves in favour of the construction which we now adopt; and that being so, I have no hesitation in saying that the respondent has absented himself without lawful excuse within the meaning of the statute.

As to the second point, it was held in *In re Turner* (9 Q.B. Rep. 80; s. c. 15 Law J. Rep. (N.S.) M.C. 140) that though the words "without lawful excuse" were not in the statute, the conviction was wrong, as there might have been a lawful excuse; as if the man had had his leg broken, or were otherwise disabled. In *Rider v. Wood* (29 Law J. Rep. (N.S.) M.C. 1) it appeared that the workman had a right to terminate his service on giving notice, and that he gave what he thought to be a good notice; and it was held, that as he had stayed away under a mistake in fact, he could not be convicted. But there was hardly such a mistake here. There was no doubt about the facts; and the respondent can only be assumed to have thought, relying on the opinions of the Lord Chief Baron and Mr. Baron Martin in the Exchequer, that he might lawfully absent himself. But this was only a mistake as to the law, which no man can set up in his defence. The Justices might think that this was a good ground for imposing only a nominal punishment; or they might reasonably conclude, looking at all the circumstances, that the respondent had contumaciously absented himself. I think, therefore, that there ought to have been a conviction; and the case must be sent down to the Justices for a re-hearing, and to convict or not, as they think proper.

MELLOR, J.—I am of the same opinion. The view which we have adopted is contrary to that of my Brother Martin, but I think that his doctrine is not applicable to this case. The principle that a man ought not to be punished twice for the same offence is enforced in penal statutes where there can be but one offence which is made liable to punishment by the legislature. But I cannot think where a workman has been imprisoned under this section that he ought not to be again punished after coming out of prison because he has been guilty of a previous offence. My opinion is much fortified when I consider the power of discharging the workman from his service which is contained in the section, and which would be a very unnecessary provision if imprisonment put an end to the contract. With regard to the question of *bona fides*, I agree with my Brother Blackburn in thinking that it could only be considered by the Magistrates in mitigation of punishment. It would be a most mischievous decision if we held that an erroneous impression as to the law of the country could prevent a conviction under this statute.

SHEE, J.—I should certainly not have arrived at the same conclusion as my learned Brethren if the question had not been recently before the Courts, and the weight of authority had not been in favour of their opinion; as it seems to me that the respondent was not properly convicted. The words of the section are as follows.—[His Lordship read then.] Now it appears to me perfectly clear from these words that for the offence of not entering upon his duties, a workman can only be punished once, by imprisonment for three months; and having undergone that term of imprisonment he could not again be punished for not returning to his duties. And I cannot think that any difference was contemplated in a case where a man has entered upon his service and absents himself from it. A workman, in my opinion, has ceased to be in his master's service within the words of the statute when he has once absented himself, and where he is proved to have expressed his intention not to return, I think that he ought to be punished once for all. I entirely agree with what was said by the Lord Chief Baron and my Brother Martin in *Youle v. Mappin* (6 Hurl. & N. 753; s. c. 30 Law J. Rep. (N.S.) M.C. 234).

With regard to the other point, I think that a *mens rea* must be proved;

and here I agree with the opinion of my Brother Martin in *Rider v. Wood* (29 Law J. Rep. (N.S.) M.C. 1), and cannot see the distinction suggested by my Brother Blackburn. To prove that the respondent has absented himself within the statute must not two things be shewn, viz. that he has stayed away without lawful excuse, and with the knowledge that he had no such excuse? In *The Queen v. Langford* (Car. & M. 602) it was held that where persons riotously assembled for the purpose of demolishing a house, really believing that it was the property of one of them, and in the assertion of a supposed right, the act was not a felonious one within 7 & 8 Geo. 4. c. 30. s. 8. Here the respondent really believed that his contract was rescinded, and that he was justified in refusing to return. My opinion is, therefore, independently of the authorities, that he ought not to have been convicted.

Judgment for the appellants.

[IN THE COURT OF QUEEN'S BENCH.]

May 7, 1866.

THE QUEEN v. SIR GEORGE GREY, BART.

35 L. J. M.C. 198; 7 B. & S. 434; L. R. 1 Q.B. 469; 14 L. T. 477; 14 W. R. 671; 12 Jur. N.S. 685.

Salmon-Fishery District, Limits of—Secretary of State—28 & 29 Vict. c. 121. ss. 4. and 5.

FISH AND FISHERIES.—*When the Justices in Quarter Sessions for a county apply under the 28 & 29 Vict. c. 121. s. 4. to a Secretary of State to form into a fishery district or districts all or any of the salmon rivers lying wholly or partly within their county, it is for such Secretary of State to fix by his certificate the limits of the district which he shall form in accordance with such request, and those limits need not be the same as those which had been intended by the Sessions.*

This was a rule calling upon the Home Secretary to shew cause why a *certiorari* should not issue to bring up a certificate under his hand, forming the River Tees Fishery District, in order that it might be quashed.

It appeared from the affidavits that, under the provision contained in the 4th section of the 28 & 29 Vict. c. 121, the Justices of the North Riding of Yorkshire, at the Michaelmas Quarter Sessions, 1865, made an application to the defendant, the Secretary for the Home Department, to form into a salmon fishery district so much of the river Tees as was below a specified point, together with its tributaries in the county of Durham and the North Riding. In the application certain limits were set out as those which the Justices suggested should be the limits of the district. The defendant exercised the power given to him by the same section, and made his certificate as provided by the 5th section; but it appeared therefrom that he had included in the district formed by him the whole of the river Tees and its estuary in the two counties, and a certain portion of the sea coast, and the streams flowing into the sea between two specified points. The limits defined by the certificate were more extensive than those set out in the application by the Justices, and included parts which they had not intended should form part of the district.

The Solicitor General (Sir R. P. Collier) and Hannen shewed cause against

the rule.—The question turns entirely upon the 3rd, 4th and 5th sections of the 28 & 29 Vict. c. 121. The 3rd section enacts, that the word "river" shall include such portion of any stream or lake, with its tributaries and such portion of any estuary, sea or sea-coast, as may from time to time be declared in manner hereinafter provided to belong to such "river"; and that "salmon river" shall mean any river as above defined, frequented by salmon or the young of salmon. By the 4th section it is enacted, that "The Justices of a county at any Court of Quarter Sessions held after the passing of this act (due notice having been previously given according to the practice of the said sessions), may, by writing under the hand of their chairman, apply to one of Her Majesty's principal Secretaries of State to form into a fishery district or districts all or any of the salmon rivers lying wholly or partly within their county, and the said Secretary of State may form such district or districts accordingly, and may include in any district so formed any river or rivers, or parts thereof, although not situated in the county on behalf of which the application is made." And the 5th section enacts that, "The limits of a river shall be defined for the purposes of this act, and a fishery district shall be formed, by a certificate under the hand of one of Her Majesty's principal Secretaries of State, describing the limits of the river or district by a reference to a map or otherwise, as to the said secretary may appear expedient, but no such certificate shall be granted unless one month's previous notice of the intention of the said secretary to grant the same, and of the intended limits of the river or district, has been given by advertisement in such newspaper or newspapers published or circulating within the intended limits, and in such daily morning newspaper or newspapers published in London, as may be directed by the said Secretary of State, and when a certificate has been granted, a copy shall be advertised in such newspaper or newspapers." There is nothing to shew that the Secretary of State is to be bound by the determination of the Sessions as to the limits, or that the Sessions before making their application to him are to mark out the boundaries of the district, while it seems clear that he is the person who, under section 4, is to "form" such district, and, under section 5, to make the certificate defining the limits. The application by the Justices may be in the most general terms, without setting out any limits whatever, but the metes and bounds are, by section 5, to be described by "a reference to a map or otherwise," and this is to be done by the Secretary of State. This is the first time a map is mentioned in the act. No doubt he could not mark out limits beyond the boundaries of the counties, but with that limitation he is to exercise a reasonable discretion as to what the limits should be. Then it is also clear that all persons who wish to object have an opportunity of doing so, for by section 5. no certificate can be granted until a month's notice has been given by advertisement. There would be no use in publishing such advertisement if the limits were fixed beforehand by the Sessions; and, again, power is given to him to include parts of rivers which are not situated in the county on behalf of which the application is made. The Justices of a county have no such power as that.—[They referred to *Ex parte Smith*¹ and to *Chapman v. Bowlby* (8 Mee & W. 249; s. c. 10 Law J. Rep. (N.S.) Exch. 299), although they admitted that there was no case bearing much upon the question.]

Mellish and Simpson, in support of the rule.—If the view presented on behalf of the Secretary of State be correct, there would be no necessity for going to the Sessions at all. The proper course is, that notice is to be given to the Sessions, so that the matter may be argued before them and decided by them, and then that they should apply to the secretary, who is to form the district "accordingly"; i. e. in accordance with the determination of the Sessions to apply for the formation of the district. That is the only meaning which can reasonably be given to the word "accordingly." The Sessions

(1) 1 Best & S. 412; s. c. nom. *In re the District of Todmorden*, 30 Law J. Rep. (N.S.) Q.B. 305.

having fully inquired into the case, determine what the limits are to be; but those limits are to be defined, *i. e.* made clear by reference to a plan or otherwise by the Secretary of State. The word "defined" does not mean the same as "settled," which would probably be the word used if the contention on the other side were right. The result of discharging the rule will be, that all the persons whose property is included within the limits fixed by the Secretary of State will be liable to be taxed for the preservation of salmon in the Tees, though they may have nothing to do with that river, and although the Sessions did not intend that their lands should be included in the district.

BLACKBURN, J.—I think that this rule must be discharged. The question turns entirely upon the language of the 28 & 29 Vict. c. 121. It is true that the intention of the legislature is not so expressed as to be self-evident, but it seems to me to be clear enough. The first clause of the 3rd section shews what the word "river" shall include; it is to be first taken to mean what it would mean according to its ordinary popular sense, and further, it is to include such portion of any estuary, sea or sea-coast as may from time to time be declared, in manner hereinafter provided, to belong to such river. These portions would not be included in the ordinary popular sense of the word. Then, in the same section, the words "'salmon river' shall mean any river as above defined frequented by salmon or young of salmon." The 4th section gives power to the Justices in Quarter Sessions to apply to one of Her Majesty's principal Secretaries of State to form into a fishery district or districts all or any of the salmon rivers lying wholly or partly within their county—(His Lordship read the section);—and then section 5. shews how the district is to be formed and the limits defined, namely, by a certificate under the hand of the Secretary of State. The initiative is therefore given to the Sessions where the river or rivers are wholly or partly within the county, and to them is intrusted the province of seeing whether or not it is expedient that a fishery district or districts should be formed. If they think so, they may apply to a Secretary of State, and then, as seems quite proper, the legislature has intrusted such secretary with power to define what shall be the boundaries, and to form the district including such river or rivers or parts thereof, and it must be supposed that he would act reasonably, and define such limits as would be reasonable and right. This power is shewn by section 4, and I agree with the argument of Mr. Hannen, that the Secretary of State is to form the district, and he is to include such parts as he may think fit. The Justices at the West Riding Quarter Sessions would have no jurisdiction to decide that part of another county should be included, but the Secretary of State may do so, power being given him to that effect by the latter part of section 4. By the 5th section, no certificate is to be granted unless one month's previous notice be given by advertisement, of the intention to grant the same, and of the "intended" limits. The meaning is plain; the Secretary of State is to define the limits, and say what part of the coast, &c. may be included, but the period of a month is given before the certificate is granted, so that any person may come in and object, if he thinks fit; but that opportunity having been given, confidence is placed in the Secretary of State that he will not do anything unreasonable. I am therefore of opinion that in this case the Home Secretary had jurisdiction to make his certificate as he has made it, and that the rule must be discharged.

MELLOR, J.—I am of the same opinion. The scheme of the act seems to be that the Justices are to determine the expediency of making an application to the Secretary of State for the purpose of having a district formed, and then, as seems very reasonable, that the defining the limits and formation of the district should be intrusted to another authority, inasmuch as part of another county may be added. There might be great difficulty in bringing about the joint action of the several Courts of Quarter Sessions, and the legislature contemplated giving power to the Secretary of State to form the district, but that a month's notice of the intention should be given in order to prevent

prejudice to other persons. Why is it that such a notice should not be prescribed to be given by the Sessions if it was their province to define the limits of the district? But there is no provision to that effect. The object of the notice is to give an opportunity to any person who has an objection to any particular portion being included in the district, to appeal to the Secretary of State, and request him not to include it so as to affect his interests. If it were otherwise, one would expect some machinery to be given by the act such as we find for including highways within a district, but no such machinery is given, and as the Secretary of State has power to include parts of another county, there is good reason for holding that the Home Secretary in the present case had power to make the certificate and define the limits.

LUSH, J.—I am entirely of the same opinion. The scheme is, that the provision is not to apply to any salmon river, unless the Justices first determine that it is advisable; and then it lies on the Secretary of State to form the district and define its limits. I rely on the 4th section and the others which have been referred to by my Brothers. All persons interested have a right to come and object if they please. Under section 4. the Justices have a right to apply that any given river may be formed into a district, but they have no power to define the limits; while by sections 3. and 4. the Secretary of State may declare that any portion of the estuary, sea, or sea-coast, or parts of other counties, may be included. Therefore, the Justices have to determine whether a particular river or rivers ought to be brought within the provisions of the act, but it lies upon the Secretary of State to form the district and define the limits.

Rule discharged.

[IN THE COURT OF QUEEN'S BENCH.]

April 26, 1866.

THE QUEEN v. THE JUSTICES OF KENT.

35 L. J. M.C. 201; 7 B. & S. 394; L. R. 1 Q.B. 385; 14 L. T. 331;
14 W. R. 635.

Appeal to Sessions—Order removing Lunatic Pauper—Union within several Jurisdictions—16 & 17 Vict. c. 97. s. 108.

POOR LAW.—*By stat. 16 & 17 Vict. c. 97. s. 108. an appeal is given to any union or parish against an order adjudicating the settlement of a lunatic, confined in an asylum, to the Quarter Sessions for the county within which the union or parish obtaining the order is situate, or if the union or parish extend into several jurisdictions, then to the Quarter Sessions of the county or borough in which the asylum it situate. Where such an order was obtained by a union which was made up of parishes, some of which were within a city, which, though in the county, had separate Quarter Sessions, and some in the county without the city,—Held, that the appeal against the order was to the Quarter Sessions for the county, and not to the Sessions of the borough within which the asylum was situate.*

Rule calling upon the Justices of Kent to shew cause why they should not enter continuances and hear an appeal. The appeal was against an order of Justices, obtained by the guardians of the Medway Union, adjudging the settlement of a lunatic pauper, confined in the Barming Heath Asylum, to be in the parish of Aldershot, and directing the overseers of that parish to pay the customary maintenance expenses. Part of the Medway Union is in

the city of Rochester, which, though in Kent, has a Recorder and a separate Court of Quarter Sessions; and part of the union is in Kent, and within the jurisdiction of the Kent Quarter Sessions. The asylum in which the lunatic was confined is within the boundary of the borough of Maidstone, which has its own Court of Quarter Sessions. When the appeal came on for hearing it was objected by the respondents that the Court had no jurisdiction, as the Medway Union extended into the separate jurisdictions of the county of Kent and the city of Rochester, and that the appeal ought therefore, according to the situation of the asylum, to have been entered at the Maidstone Sessions. The Justices thereupon dismissed the appeal, and the present rule was obtained.

Poland shewed cause.—The Sessions had no jurisdiction to hear the appeal. By 16 & 17 Vict. c. 97. s. 108, “If the guardians of any union or parish, or the overseers of any parish, feel aggrieved by any such order as aforesaid adjudging the settlement of any lunatic, they or he may appeal against the same to the next general Quarter Sessions of the Peace for the county in behalf of which such order has been obtained, or in which the union or parish obtaining such order is situate; or in case such parish or union extends into several jurisdictions, then to the next general Quarter Sessions of the Peace for the county or borough in which the asylum, registered hospital or licensed house in which such lunatic is or has been confined is situate, and such Sessions, upon hearing the said appeal, shall have full power finally to determine the matter.” Here, the Medway Union is within the jurisdiction of a county and of a borough, and the same principle must govern the case as if the union had been within the jurisdiction of several counties.

[BLACKBURN, J.—Suppose that the union were composed of two boroughs, would there then be no appeal to the county Sessions, although, if the union were composed of either borough alone, the appeal would lie?]

It is true that in *The Queen v. the Justices of Warwickshire* (28 Law J. Rep. (N.S.) M.C. 249) it was held that an appeal against an order of removal obtained by a parish situate wholly within a borough having separate Quarter Sessions, was to the county and not to the borough Sessions. But Mr. Justice Crompton, during the argument, said, “The last branch of the section (108.) means, when the parish is not wholly within one jurisdiction, but is *partly in the borough and partly in the county*, then the situation of the asylum shall determine the tribunal for appeal.” These words are exactly appropriate to the present case.—[He was then heard upon a second objection, upon which no judgment was given.]

Barrow, in support of the rule, was not called upon to argue.

[BLACKBURN, J.—I think that the rule must be made absolute, and that the Sessions have not put the right construction upon 16 & 17 Vict. c. 97. s. 108. That section enacts, “that if the guardians of any union or parish, or the overseers of any parish, feel aggrieved by any such order as aforesaid, adjudging the settlement of any lunatic, they or he may appeal against the same to the next general Sessions for the county on behalf of which such order has been obtained, or in which the union or parish obtaining such order is situate.” With reference to this part of the section, the Court of Queen’s Bench decided, in *The Queen v. the Justices of Warwickshire* (28 Law J. Rep. (N.S.) M.C. 249), that where a parish is entirely situate within a borough having separate Quarter Sessions, the appeal is to the county and not to the borough Sessions. The section proceeds, “Or in case such parish or union extends into several jurisdictions, then to the Sessions for the county or borough in which the asylum is situate.” The legislature seems to have thought that difficulties might arise where the parish or union was in several counties, and they made the solution of these difficulties depend on a fact about which it would seem that there could be no dispute, that is, on the situation of the asylum. It is, however, quite possible for a building to be in several jurisdictions, according to the construction contended for, and I

therefore think that the words "several jurisdictions" must be construed as if it were several *such* jurisdictions, that is, counties. With regard to the *dictum* attributed to Mr. Justice Crompton, I cannot but think that his Lordship would not, on consideration, have adhered to it. I am, therefore, clearly of opinion that the appeal was to the Quarter Sessions for the county of Kent.

LUSH, J.—I am of the same opinion. I agree with my Brother Blackburn in thinking that the words "several jurisdictions" must be construed several *such* jurisdictions.

Rule absolute.

[IN THE COURT OF QUEEN'S BENCH.]

May 2, 1866.

SMITH (*appellant*) v. REDDING (*respondent*).

35 L. J. M.C. 202; 6 B. & S. 617; L. R. 1 Q.B. 489; 14 L. T. 358;
12 Jur. N.S. 618.

Referred to, *R. v. Local Board of Grasmere*, [1873] E. R. A.; 42 L. J. Q.B. 181.

Beer-House—Hours of Closing—Population—Parish or Place—3 & 4 Vict. c. 61. s. 15.

INTOXICATING LIQUORS.—*A beer-house situated in a hamlet maintaining its own poor, but included in a parish the population of which according to the last census exceeds 2,500, may, under the 15th section of 3 & 4 Vict. c. 61, be kept open until eleven o'clock at night, although the population of the hamlet itself does not exceed 2,500.*

CASE stated by way of appeal against a decision of Justices, under the 20 & 21 Vict. c. 43.

At a petty sessions holden at Shenstone, in the county of Stafford, on the 14th of February, 1866, an information came on for hearing, in which the appellant was charged by the respondent with having kept open a beer-house for the sale of beer, in the hamlet of Wall, after the hour of ten o'clock at night, to wit, at thirty minutes past ten o'clock at night of the same day, he being a person duly licensed to sell beer by retail, and the said house not being "within the bills of mortality, nor within any city, cinque port, town corporate, parish or place, the population of which according to the last parliamentary census exceeded 2,500 persons."

Upon the hearing of the information, it was proved on the part of the respondent, and admitted on the part of the appellant, and found as a fact, that, on the day the alleged offence was committed, the appellant was a beer-house keeper in the hamlet of Wall, in the parish of St. Michael, Lichfield, in the county of Stafford, and was duly licensed to sell beer, ale and porter by retail, to be drunk and consumed in his house and premises there; that Wall is a hamlet or place maintaining its own poor, and has its own overseers and guardians, but is within the Lichfield Poor-law Union; that on the day in question, at half-past ten, p.m., the respondent, a police constable, visited the appellant's house and found it open for the sale of beer, there being four men drinking in it; that the population of Wall according to the last parliamentary census was 94, but the population of the said parish of St. Michael, Lichfield, within which it is situate as aforesaid, exceeds 2,500 persons. The hamlet of Wall, like several other places maintaining their

own poor within the said parish of St. Michael, Lichfield, has now a separate church and minister, and is duly constituted the district chapelry of St. John Wall; that the licence of the appellant is thus worded: "We, the undersigned, being the collector and supervisor of Excise for the collection of Lichfield and district of Lichfield, hereby authorize and empower Edward Smith, now being a householder and dwelling in a house in Wall, in the parish of St. Michael, Lichfield, within the limits of the said collection and district, to sell beer, &c. by retail, in order that it may be consumed in the said dwelling-house of the said Edward Smith," &c.

It was contended on the part of the appellant that Wall was within and formed part of a parish, the population of which exceeded 2,500 persons. The Justices being of opinion that the evidence given before them brought the case within the operation of the 15th section of the act 3 & 4 Vict. c. 61, and that Wall was a place of itself within the meaning of that act, gave their determination against the appellant.

The question for the opinion of the Court was, whether the hamlet of Wall was part of the parish of St. Michael within the meaning of section 15. of the statute 3 & 4 Vict. c. 61, so as to confer upon the appellant the privilege of keeping his house open until eleven o'clock at night. If the Court should be of opinion that the said conviction was legally and properly made and the appellant was liable as aforesaid, then the said conviction was to stand; but if the Court should be of opinion otherwise, then the said information was to be dismissed.

H. Matthews, in support of the conviction.—The question turns upon the construction to be put upon the words "parish or place." It is submitted that the conviction is right. Wall is a "place," and the population did not exceed 2,500 at the last census. It is a question of fact decided by the Justices. "Place" means an aggregation of houses—see *The Queen v. Charlesworth* (20 Law J. Rep. (N.S.) M.C. 181), where a place called Holmfirth was considered to be a place. It was an aggregation of houses and inhabitants, out with no local rights peculiar to itself; and Lord Chief Justice Erle in giving judgment, said, "The limitation of time for keeping the house open is fixed with reference to the wants of a dense population, and the enactment is an endeavour to give a description of the places in which the requisite degree of density may be expected to be found, rather than a precise definition."

Anstie, for the appellant.—All the enactments in the section confer a privilege, and there is no reason for holding that the number of persons in the hamlet, and not the number in the parish, is to be the test. The house is in a parish having a sufficient population to confer the right of keeping the house open till eleven o'clock. *The Queen v. Charlesworth* (20 Law J. Rep. (N.S.) M.C. 181) is overruled by *Scott v. Washington* (13 W. Rep. 939), in which Cockburn, C.J., said, "The rule is, that where a special term is used, followed by general words, the latter must be taken as *cjusdem generis* with the former." The 3 & 4 Vict. c. 61. incorporates 11 Geo. 4. & 1 Will. 4. c. 64, by the 32nd section of which the words "parish or place" shall be deemed to include any township, hamlet, tithing, vill, extra-parochial place, or any place maintaining its own poor."

H. Matthews replied.

[BLACKBURN, J.—The Justices were wrong in convicting the appellant; they thought that because Wall was a parochial hamlet, it was a "parish or place" within the meaning of the 15th section. But in construing that section it is necessary, first, to look at the 1st section, and then we find that in granting licences to retail beer and cider, regard is to be had to the number of inhabitants in the district, and the house must be rated at the amount provided for in the section. Under section 15. a house may be situated in a small parish and yet be within a cinque port or town corporate; and as under such circumstances it would have the privilege of being kept open until the

later hour of eleven o'clock, I see no reason for thinking that when it is situate in a small place within a parish the population of which exceeds 2,500, such privilege of being kept open till eleven o'clock should not also apply. It is not necessary to decide whether *The Queen v. Charlesworth* (20 Law J. Rep. (N.S.) M.C. 181) was rightly decided; whether it was so or not, *Scott v. Washington* (13 W. Rep. 939) is not inconsistent with it. Here, though Wall may be a "place," and although it has not the number of inhabitants specified in the 15th section, yet it is within a parish having the requisite number, and the occupier of the house is therefore exempt from liability to conviction.

LUSH, J.—The object of this part of the act is to regulate the time of closing houses licensed for the sale of beer and cider by retail, according to the supposed wants of the district as indicated by the population; and the meaning of the word "place," having regard to that object, is, that it may be made up of fragments of parishes, which may contain the specified number of inhabitants, so as to make up a populous district requiring houses which should be kept open after ten o'clock. *Scott v. Washington* (13 W. Rep. 939) is consistent with our decision. In that case Bradley Green was a place within the parish of Biddulph, the population of which exceeded 2,500, though the population of Bradley Green itself was less than that number, and the Court held that the conviction was wrong. In order to support the present conviction it must be shewn that the house was not within a parish or place the population of which exceeded 2,500, but in reality it was within such a parish, and therefore the conviction was wrong.

Conviction quashed.

[CROWN CASE RESERVED.]

June 9, 1866.

THE QUEEN v. BARNES.*

35 L. J. M.C. 204; 10 Cox. C.C. 255; L. R. 1 C.C. 45; 14 L. T. 601; 14 W. R. 805; 12 Jur. N.S. 549.

Larceny—Property in Money—Effect of amendment.

CRIMINAL LAW.—*The prisoner worked at a mill in the same room with three fellow-workmen, and was sent by them on pay-night for the wages of the four from the cashier of the works. The cashier gave the money for the four in a lump to the prisoner, who then went away and never gave any of it to his fellow-workmen. He was indicted for the larceny, and the indictment laid the property in the money in the workmen. At the trial, the indictment was amended by alleging the property to be in the proprietors of the works, instead of the workmen:—Held, that the property was rightly laid as at first, in the men, and not in the masters; and that, as the conviction had taken place on the amended indictment, which was wrong, the conviction must be quashed.*

The Recorder of Bolton stated the following

CASE.

Robert Barnes was tried before me at the General Quarter Sessions of the Peace for the borough of Bolton, holden on the 12th of April, 1866, on an indictment which charged him with stealing a sum of 13l. 6s., the monies of Reuben Smith and others.

* *Coram*, Erle, C.J., Martin, B., Bramwell, B., Byles, J., Channell, B. and Shee, J.

The evidence was as follows:

Reuben Smith.—On the 16th of December last the prisoner was a fellow-workman with me at Ormrod & Hardcastle's. The prisoner, myself and two others worked in the same room. It had been our custom for one of us to go every fortnight to get the wages of the four from the cashier, and pay over the amount due to each; we did this by turns. On the 16th of December last it was my turn to go for the wages. The wages due to me on that day came to about 5*l.* 0*s.* 6*d.* I cannot speak to the pence. The prisoner asked me if he might fetch the wages this time; I said "Yes, but you must fetch them again when it comes to your turn." He said he would. At twelve o'clock the prisoner went to get the wages; he never came back, and never gave me my wages. (Cross-examined).—We used to get the four men's wages in a lump, and pay them over in separate shares.

Thomas Unsworth.—I worked in the same room with the prisoner and Reuben Smith on the 16th of December last. My share of wages on that day was about 3*l.* 18*s.* On that day prisoner went for my wages; he never paid them to me.

Peter Critchley.—I worked in the same room with the prisoner on the 16th of December last. On that day 4*l.* 8*s.* 11*d.* was due to me for wages. Prisoner went to get the wages; he has not paid me my share.

John Makin.—I am cashier for Ormrod & Co.; on the 16th of December last the prisoner came to me for his wages, and those of the other witnesses. The account of wages due to each was made out in my office, under my superintendence, but I cannot say exactly how much was due to each on the day in question. When the prisoner came to me I believe I said "Whose wages are you come for?" He answered "No. 6. Sovereign." No. 6. is the number of the room in which the prisoner and the others worked, and "Sovereign" is the name of the mill. I had the money in one sum wrapped up in a paper. Our custom was to wrap up the wages for each room in a separate paper, inside which was written the names of the parties to whom they were to be paid, and the sum due to each, and this was done on the present occasion. On the 16th of December I handed the money to the prisoner wrapped up in a paper in the usual way. The sum which I handed to the prisoner was 18*l.* 5*s.* 1*d.*, and it was made up of 5*s.* 1*d.* in copper, 10*l.* in silver and 8*l.* in gold.

On this evidence it was objected, by counsel for the defence, that the indictment could not be sustained, because the money alleged to have been stolen was not the property of the prosecutor, but that of his employers, Messrs. Ormrod & Co., and I was of this opinion. Counsel for the prosecution thereupon applied to have the indictment amended by alleging that the money in question was the property of Messrs. Ormrod & Co., and I ordered the indictment to be amended accordingly, by inserting therein the words "Peter Ormrod and another," instead of the words "Reuben Smith and others." Counsel for the prisoner did not address the jury or call witnesses; but he contended that the above evidence was not, in point of law, sufficient to warrant a conviction on the indictment as amended, either at common law or under the 24 & 25 Vict. c. 96. s. 3. I then summed up the evidence, and the jury found the prisoner guilty; but on the application of counsel for the prisoner I admitted him to bail, to come up for judgment when called upon; and I reserved the above question for the opinion of this Court.

Sleigh, for the Crown.—The prisoner was the servant or agent of the Messrs. Ormrod, and was intrusted with the money by them to pay over to the men, and was not the agent specially of his fellow-men; and in that view, under the circumstances of this case, he was guilty of the larceny of their money—*Russell on Crimes*, by *Greaves*, 4th edit. 394, *Lavender's case* (2 East, P.C. c. 16. s. 15. p. 566), *The Queen v. Metcalf* (R. & M. C.C.R. 433), *The Queen v. Goodbody* (8 Car. & P. 665).

[BRAMWELL, B.—In all those cases the persons who ought to have received the money would still have their claim upon the persons who gave it.]

It is submitted that the Messrs. Ormrod here would not be discharged by giving the money to the prisoner.

[MARTIN, B.—If a man owes me money, and I send my servant to get it, and the servant gets it, is it not thereupon paid to me? If Unsworth had sued Messrs. Ormrod for his wages, and they had pleaded payment, what answer would there have been to that plea? The money ceased, upon the facts, to be the property of the Messrs. Ormrod, and became the money of the men who sent the prisoner.]

It was so charged in the first place in the indictment, and subsequently altered by amendment.

[CHANNELL, B.—It has been held, that the case must be decided upon the indictment in its amended form.¹]

There was a bailment by the Messrs. Ormrod of the specific monies.

ERLE, C.J.—We think this conviction should be quashed. The prisoner was charged with stealing the monies of the Messrs. Ormrod. It was their custom to pay their men on a certain day in the week, and their cashier had the money for that purpose. The prisoner was sent as the agent of other workmen working in the same room with him, and he demanded the money as their agent, and got it. It seems to me that Ormrod's agent paid off all those workmen, and, as soon as the money was given into the prisoner's hands for his fellow-workmen, the agent had discharged their wages.

Conviction quashed.

[CROWN CASE RESERVED.]

June 9, 1866.

THE QUEEN v. BOWERS.*

35 L. J. M.C. 206; 10 Cox. C.C. 250; L. R. 1 C.C. 41; 14 L. T. 671; 14 W. R. 803; 12 Jur. N.S. 550.

See *R. v. Turner*, 1870, 22 L. T. 278 (Q.B.). Applied, *R. v. Negus*, [1873] E. R. A.; 42 L. J. M.C. 62; L. R. 2 C.C. 34; 28 L. T. 646; 21 W. R. 687 (C.C.R.). Referred to, *R. v. Hall*, 1875, 31 L. T. 883 (C.C.R.). Followed, *R. v. Harris*, 1893, 69 L. T. 25 (C.C.R.).

Embezzlement—Clerk or Servant—Commission Agent.

CRIMINAL LAW.—*The prisoner, with the permission of his employers, traded in the retail coal trade on his own account, and was employed, under an agreement in writing, by them as their agent for the sale of coals on commission. He was also to collect monies in connexion with his orders, but not to be held responsible for bad debts; the commission was not to be due till the money had been received by his employers; he was not to keep such monies in his possession for more than a week after receiving the same; and in case of dissatisfaction on either side, a month's notice in writing to terminate the agreement was to be given:—Held, by the Court, that upon the construction of the above agreement, he was not a clerk or servant, or employed for the purpose or in the capacity of a clerk or servant within the meaning of 24 & 25 Vict. c. 96. s. 68, and could not therefore be convicted of embezzlement.*

(1) See *The Queen v. Pritchard, Leigh & Cave*, 36; s. c. 30 Law J. Rep. (N.S.) M.C. 169, and *The Queen v. Frost*, 1 Dears. 476; s. c. 24 Law J. Rep. (N.S.) M.C. 116.

* *Coram*, Erle, C.J., Martin, B., Bramwell, B., Byles, J., Channell, B. and Shee, J.

The following CASE was stated by the Assistant Judge of the Middlesex Sessions :

Samuel Bowers was tried before me, at the Sessions of the Peace for Middlesex, on the 10th day of January, 1866, upon an indictment which charged him with having feloniously embezzled several sums of money, the property of John Clark, by whom it was alleged that he was employed as clerk and servant. The prisoner was employed by the prosecutor under an agreement, dated the 9th of May, 1864, of which the following is a copy :

“ Memorandum of agreement made and entered into this 9th day of May, 1864, between Samuel Bowers, of 71, Upper Street, Pimlico, of the one part, and Robert Skirrow, John Clark and John Quick, coal owners and merchants, of 157, Great Portland Street, Saint Marylebone, both in the county of Middlesex, of the other part, witnesseth as follows: that the said Samuel Bowers hereby agrees to become, and the said Skirrow, Clark & Quick agree to engage, the said Samuel Bowers as their agent or traveller for the sale of coals, one guinea per week to be paid to the said Samuel Bowers as salary, and 1s. per ton to be paid as commission upon all coals sold by him, when the prices realized are in accordance with the current prices delivered; any dealers he may be the means of securing as customers to the wharf 6d. per ton to be paid for such services; 2s. 6d. per ton to be paid for cartage and delivery of coals. The said Samuel Bowers likewise agrees to collect all monies in connexion with his orders, but the said Skirrow, Clark & Quick will not hold him responsible for any bad debts that may be contracted, but expect him to be as cautious as practicable in securing good and solvent customers; the before-mentioned commission not to become due until the money has been received by the said Skirrow, Clark & Quick. The said Samuel Bowers also agrees not to keep or retain in his possession monies collected on behalf of the said Skirrow, Clark & Quick more than one week from the date of receiving the same. The said Skirrow, Clark & Quick agree to take the board and blinds now fitted up at the residence of the said Samuel Bowers at the cost price to him, on condition that they have free use without charge of that part of his residence now used as an office. It is mutually agreed that should dissatisfaction arise on either side a month's notice in writing must be given. As witness our hands, the day and year before mentioned.

“ Witness, { Skirrow, Clark & Quick.
“ William Clark. { Samuel Bowers.”

In June, 1865, the prisoner was desirous of selling coals by retail on his own account, and the prosecutor consented to supply him with coals for that purpose, but then made an alteration in the mode of remunerating him, which is specified in a letter of which the following is a copy :

“ Chief Office, 157, Great Portland Street, W.

“ London, June 3rd, 1865.

“ Mr. Samuel Bowers,

“ Dear Sir,—As you are now going into the retail coal trade on your own account, we think it best to have a proper understanding, and in future we pay you a commission only; your salary will be stopped from this date. We find a very large amount standing against you, and we particularly request you to do all you possibly can to get it in; the writer will wait upon you on Wednesday at the usual time, and hope you will have a large amount of money ready.—Yours truly,

“ Skirrow, Clark & Quick.”

The prisoner consented to the proposed alteration, and continued to obtain orders from various persons for coals, which were supplied by the prosecutor, the invoices being made out in the name of the prosecutor's firm, and in the three instances charged in this indictment such invoices were produced by the customers, who proved payment of the several amounts in such invoices to the prisoner, whose receipt was attached to each invoice. The prisoner did

not account to the prosecutor for either amount. The manner of accounting was for the prosecutor to call on the prisoner weekly, who then paid him a sum of money on account of what he had received, and once a month the prisoner attended at the prosecutor's office, when the names of the customers who had been supplied with coals were called over and the prisoner stated whether they had paid, handing over in respect of the amounts he reported as having been paid the surplus beyond his weekly payments on account. He did not report that either of the sums in this indictment had been paid, but on the contrary represented them as still due after he had received the money. The coals supplied for the purpose of his retail trade were charged to him as to other customers, but this account was kept quite distinct from the account of the monies received by the prisoner on the prosecutor's account.

The sums alleged to have been embezzled were not received by the prisoner until after the second agreement had been made, and at the prisoner's place of business a board was exhibited describing him as agent to the prosecutor, and it was contended that he was not a clerk or servant to the prosecutor within the meaning of the statute. I declined to stop the case, and the jury found the prisoner guilty, judgment being respited until the opinion of the Court of Criminal Appeal is pronounced upon the above objection, and defendant is on bail.

The question for the opinion of this honourable Court is, whether the prisoner, under the circumstances herein stated, was a clerk or servant to the prosecutor, so as to be liable to be convicted of the crime of embezzlement.

Collins, for the prisoner.—The prisoner, under the circumstances of this case, is an agent and not a servant or clerk. His employers had no right to dispose of his time or to command his services under the second agreement. He was to act as their agent when and where he chose, and his employers paid him a commission for such work as he was disposed to do for them. He had no salary. In *The Queen v. May* (30 Law J. Rep. (N.S.) M.C. 81; s. c. Leigh & C. 13) the prisoner was employed to get orders on commission, and it was his duty to account for any monies that he might receive, but he was held to be an agent only, and not a clerk or servant. *The Queen v. Walker* (27 Law J. Rep. (N.S.) M.C. 207; s. c. D. & B. 600) is on all-fours with this case, and the prisoner there was held to be an agent, and not a clerk or servant.

[MARTIN, B.—Have *The Queen v. Carr* (Russ. & Ry. 198) and *The Queen v. Hoggins* (Russ. & Ry. 145) been overruled?]

In *The Queen v. Tite* (30 Law J. Rep. (N.S.) M.C. 142; s. c. Leigh & C. 29) the prisoner was a commercial traveller and paid by commission, and was at liberty to take orders for other persons, and was held to have been rightly convicted of embezzlement: but that case is distinguishable from this in that the prisoner was found in that case to be a traveller, which was held to imply that he was under the prosecutor's orders to go here and there.

Metcalf, for the prosecution.—The prisoner was a servant and not an agent.

[ERLE, C.J.—We are inclined to think that if there had been no alteration in the engagement as it at first stood he would have been a servant.]

Then, under the second agreement he was under a contract to collect all monies in connexion with his orders. His time therefore was to a certain extent at the disposal of the prosecutor, and he was therefore his servant *pro tanto*. Having got the orders, he was compellable to collect the monies.

[SHEE, J.—The second agreement says, "As you are now going into the retail coal trade on your own account." That seems inconsistent with his being a servant.]

The jury here must be taken to have found that the prisoner was a servant, and the question was for them.

[MARTIN, B.—The point seems to me to turn upon whether, upon the

true construction of this agreement, the prosecutor could send the prisoner where he liked.]

Mr. Justice Williams, in delivering his judgment in *The Queen v. Tite* (30 Law J. Rep. (N.S.) M.C. 142; s. c. Leigh & C. 29), refers to *The Queen v. Batty* (2 Moo. C.C. 257) saying that it decided that the defendant is not less the servant of the prosecutor because he is paid by commission and not wages.

[ERLE, C.J.—But Mr. Justice Williams in that case recognizes the principle that the relationship of master and servant must exist, and that he must be more under the orders of his employer than to go about and get orders when he likes, to be within the statute.]

In *The Queen v. Walker* (27 Law J. Rep. (N.S.) M.C. 207; s. c. D. & B. 600) the prisoner was treated by the prosecutor as his debtor.

The Queen v. Carr (Russ. & Ry. 198) is on all fours with this case.

Collins replied.

ERLE, C.J.—We think that this conviction ought to be quashed. The cases have established that a clerk or servant must be under the orders of his master, or employed to receive the monies of his employer to be within the statute; but if a man be intrusted to get orders and to receive money, getting the orders when and where he chooses, and getting the money when and where he chooses, he is not a clerk or servant within the statute. The question in this case depends upon the construction to be put upon the two documents, and such construction is the province of the Judge. The first document shews, I think, the existence of the relationship of master and servant. The second document, however, changes the relationship, stops the salary, and says that in future the prisoner is to have a commission. After that day he was not under the daily orders or control of his employers, and therefore, not a clerk or servant within the meaning of the statute.

Conviction quashed.

[IN THE COURT OF QUEEN'S BENCH.]

May 31, 1866.

THE QUEEN v. STONE.

35 L. J. M.C. 208; L. R. 1 Q.B. 529; 14 L. T. 552; 14 W. R. 791.

See *Great Northern & City Railway v. Tillett*, [1902] E. R. A.; 71 L. J. K.B. 525; [1902] 1 K.B. 874; 86 L. T. 723; 50 W. R. 652 (K.B.D. Div.).

Lands Clauses Consolidation Act, 1845, section 121.—Compensation—Lands taken—Tenant for a Year or from Year to Year.

COMPULSORY PURCHASE.—*A tenant for a year or from year to year, is not entitled to have the amount of compensation, in respect of his interest, determined under section 121. of the Lands Clauses Consolidation Act, 1845, where the company have merely given a notice to treat under the 18th section, but have not required him to give up possession.*

Rule calling upon the defendant, an Alderman and Justice of the City of London and the Metropolitan Railway Company, to shew cause why a mandamus should not issue commanding the defendant to hear and determine the question of compensation to be paid by the company to John Gibbs, for the value of his unexpired term or interest in certain lands and hereditaments, required to be taken by the said company under the powers of their act, and for any just allowance which ought to be made by an incoming tenant, and for any loss or injury which he might sustain.

It appeared from the affidavits that John Gibbs was a lessee in possession of a shop and premises, and on the 10th of January, in the present year, the company served him with a notice to treat under the 168th section of the Lands Clauses Consolidation Act, 1845. The term under which he held would expire on the 24th of June. About the 16th of February he sent to the company the particulars of his claim as requested by the notice to treat, amounting to 573*l*. As the company took no steps, he summoned them before the defendant. It was objected that the defendant had no jurisdiction, as John Gibbs had not been required to give up possession, and the defendant held the objection good, and refused to hear the matter.

The rule above mentioned was then obtained.

Keane shewed cause against the rule.—The material sections of the statute are the 18th and the 121st.¹ All that the company have done was to give a notice to treat under section 18, and they have not required the claimant to give up possession of the premises. It follows that he is not entitled to claim compensation under the 121st section, and the defendant was right in holding that he had no jurisdiction to hear the case. *The Queen v. the Manchester, Sheffield and Lincolnshire Railway Company* (4 El. & B. 88) is strong to shew that the 121st section does not apply unless the land is taken. He also referred to *The Queen v. the Sheriff of Middlesex* (31 Law J. Rep. (N.S.) Q.B. 261), but it was admitted that no case could be found directly bearing upon the point.

H. Lloyd, in support of the rule.—The company have no right to withdraw from their notice to treat, and that notice must be treated as equivalent to their requiring possession to be given up. The claimant has been injured in three respects by the conduct of the company: first, he is prevented from getting an extension of his term; secondly, the company may get possession of his premises by giving a bond and depositing money by way of security, under the 85th section; thirdly, that being the case, he may be put to expense in securing new premises. The company say that they can go before the Magistrate at any time, but that the claimant cannot do so unless they require possession.

[*LUSH*, C.J.—The company do not require possession, they have only given notice that they will treat for the purchase of his interest.]

The notice to treat has as much effect in this case as in any other case, and the claimant ought to be able to force the company to go on. The 18th section is general, and applies equally to all cases.

[*COCKBURN*, C.J.—The notice to treat does not entitle the company to take possession until they have had the amount of compensation assessed, or have given the required security. When the immediate possession has

(1) Section 18. "When the promoters of the undertaking shall require to purchase or take any of the lands which by this or the special act or any act incorporated therewith, they are authorized to purchase or take, they shall give notice thereof to all the parties interested in such lands, . . . and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works."

The 121st section is as follows: "If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two Justices, in case the parties differ about the same; and upon payment or tender of the amount of such compensation all such persons shall respectively deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of the special act."

been demanded, and he is asked to give up possession, he has his remedy by going before a Magistrate, but that is not the case here.]

The notice to treat is in effect a demand for possession.

COCKBURN, C.J.—The real answer to the rule that has been granted is, that something is required which has not been performed. The question is, whether the claimant is entitled to the benefit of the 121st section, and to have the amount of compensation determined in the way provided for by that section. The company have given the notice to treat which is required by the 18th section, but they have not done anything more. Mr. Lloyd says that the notice to treat is equivalent to requiring possession to be given up under section 121. It is necessary that he should go that length, for that section only comes into operation where possession is required of the lands of a person who has not any greater interest than as a tenant for a year or from year to year. It is therefore necessary to see whether the notice to treat does entitle them to require the possession to be given up. Clearly it does not, for according to the provisions of the statute, the power to enter is either when the amount of the compensation has been settled, or when they have given the security provided for by the 85th section. Here they have not done anything more than give a notice to treat, and nothing beyond that has happened to entitle them to require possession. Nor is the claimant bound to give up possession. Section 121. fails to apply to this case altogether.

BLACKBURN, J.—I am of the same opinion. The whole question is, whether this notice to treat can be considered to be a requiring possession under section 121.—[His Lordship read the section.]—Now if the claimant has not been required to give up possession, he does not come within that section. There has been nothing more than a notice to treat, and that is very far from being required to give up possession before the expiration of his term. I say nothing as to whether the claimant has any other remedy.

LUSH, J.—I am of the same opinion. The being required to give up possession before the expiration of his term, is a condition precedent to the right to compensation under the 121st section, and I cannot construe the notice to treat as amounting to such a demand.

Rule discharged.

[IN THE COURT OF QUEEN'S BENCH.]

May 26, 1866.

THE QUEEN, *on the prosecution of* CARTER, *v.* FARRER AND GARLAND, JUSTICES, &c. FOR THE COUNTY OF DORSET.

35 L. J. M.C. 210; 10 Cox. C.C. 261; L. R. 1 Q.B. 558; 14 L. T. 515;
14 W. R. 777.

See *R. Odell*, 1870, 21 L. T. 556 (Q.B.); *R. v. Cheshire Justices*, 1884, 50 L. T. 483 (Q.B.D. Div.); *Loughborough Highway Board v. Curzon* [1886] E. R. A.; 55 L. J. M.C. 122; 17 Q.B. D. 344; 55 L. T. 50; 34 W. R. 621 (C. A.).

See also Highway Act 1878, 41 & 42 Vict. c. 77.

Highway Acts—25 & 26 Vict. c. 61. ss. 17, 18, 19.—*Liability to Repair admitted Highway*—*Bona Fide Denial of Road being a Highway*—*Power of Justices to direct Indictment*—5 & 6 Will. 4. c. 50. ss. 94, 95.

HIGHWAYS.—*Under section 19. of the 25 & 26 Vict. c. 61,—which enacts that when on the hearing of a summons under section 18, respecting the repair of any highway, "the liability to repair is denied" by the waywarden on*

behalf of his parish, the Justices shall direct a bill of indictment to be preferred, at the next assizes or Quarter Sessions, against the inhabitants of the parish for the non-repair,—the power to direct an indictment to be preferred does not arise when the liability to repair is denied on the ground alone that the road is not a highway, and the liability is admitted if the road be in fact a highway, and the denial of the road being a highway is made bona fide. In order to give the Justices a power, the liability must be denied on some ground other than that the road is not a highway, such as that some one else is bound to repair.

The expression in section 19, "when the liability to repair is denied," is to bear the same construction as the expression, "if the duty or obligation of such repairs is denied," in section 95. of 5 & 6 Will. 4. c. 50.

Semble—that sections 94. and 95. of 5 & 6 Will. 4. c. 50, and sections 17, 18. and 19. of 25 & 26 Vict. c. 61. apply only to admitted highways.

To a mandamus directing Justices to hear evidence upon and determine summonses issued under section 18. of 25 & 26 Vict. c. 61. or to shew cause why they should not, under section 19, direct a bill of indictment to be preferred against a parish for the non-repair of a highway, the Justices returned, that on the hearing of the summonses the parish admitted that the road was out of repair, and that they were liable to repair if the road was a highway, but denied that the road was a highway, such denial being made bona fide:—Held, on demurrer to the return, that the return was a good answer to the mandamus, since the power of the Justices to direct an indictment to be preferred only arises where the liability to repair is denied; and here the liability was not denied within the meaning of the section.

A writ of mandamus, dated the 18th of June, 1864, directed to O. W. Farrer and G. V. Garland, two of the Justices for the county of Dorset, after reciting that at the petty sessions for the highways holden at Wareham, in the said county, for the petty sessional division of Wareham, on the 26th of April, 1864, two summonses, one addressed to the highway board of "the Wareham highway district," and the other to the waywarden of the parish of Bere Regis, issued in pursuance of 25 & 26 Vict. c. 61. s. 18, came on to be heard, and that the two said Justices before whom such sessions were holden were then required on behalf of the prosecutor to receive evidence upon and hear and determine the matter of the summonses, or to direct a bill of indictment to be preferred and the necessary witnesses in support thereof to be subpoenaed at the next assizes or at the next Quarter Sessions for the county, in pursuance of the summonses and the said statute, but that the Justices wholly refused to hear and determine the summonses, and dismissed the same without hearing and determining the merits thereof, and had not at any time since heard and determined the same, commanded the Justices, at the next petty sessions for the highways to be holden for the said division, to receive evidence upon and to hear and determine the matter of the summonses, or to shew cause to the Court of Queen's Bench why the Justices should not, in pursuance of section 19. of 25 & 26 Vict. c. 61. and of the summonses, direct a bill of indictment to be preferred against the inhabitants of the parish of Bere Regis, in respect of a certain highway mentioned in the summonses being out of repair, and the necessary witnesses in support thereof to be subpoenaed at the next assizes or at the next Quarter Sessions for the said county within which the highway was situate.

The return of the Justices stated that, at the said sessions, on the 26th of April, 1864, on the hearing of the summonses, the prosecutor appeared by his attorney, and the highway board and the waywarden of the parish of Bere Regis appeared by their attorney; and it was stated on behalf of the prosecutor and admitted by the board and the waywarden, that the summonses related to a certain part of a road called the Hyde Road, within the parish

of Bere Regis, and that the same was then out of repair, and that the parish of Bere Regis was by a provisionanl order confirmed by a final order of the Quarter Sessions of the said county, included in the said district of the highway board of Wareham; that it was further alleged by the prosecutor, but denied by the waywarden on behalf of the parish, that the road was a common Queen's highway; that the liability to repair the road, if the same had then been a highway, was not denied by the waywarden on behalf of the parish, and on behalf of the prosecutor it was then admitted that the above denial by the waywarden was then made *bona fide* on behalf of the parish; that the only question then before the Justices on the hearing of the said information was, whether the road was a common highway as aforesaid or not; that thereupon evidence was tendered on behalf of the prosecutor to prove that the road was a common highway; that the Justices on the said hearing, in pursuance of sections 18. and 19. of the 25 & 26 Vict. c. 61, did hear and determine the matter of the summonses regarding the state of the road, and the liability of the party charged with the repair of the same; but finding that the summonses did not relate to an admitted highway, nor were in respect of any denial of a liability to repair an admitted highway, nor that the liability to repair the road as an admitted highway was then denied by the waywarden on behalf of the parish, they did not direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed under section 19, nor did they receive or hear the said evidence on behalf of the prosecutor in support of the road being such highway as aforesaid, as they were not as such Justices directed or empowered by section 19. to hear any evidence upon or determine the question of a road being a highway, or to direct a bill of indictment to be preferred under the above circumstances, and where the fact of a road being a highway is the only matter denied, but the liability to repair an admitted highway is not denied on behalf of the parish.

Demurrer to the return and joinder therein.

J. D. Coleridge (*Henry James* with him), for the prosecutor, in support of the demurrer.—The Justices were wrong in refusing to direct a bill of indictment to be preferred before they had satisfied themselves that the road was not a highway. It is admitted that if they came to the conclusion that it was not a highway they could not make any order; but it is not enough that the denial of that fact is made *bona fide* by the parish. The Justices must inquire into the facts, and determine the matter for themselves. If they decided that it was a highway they ought to make the order; but their decision would not, of course, be conclusive against the parish upon the trial of the indictment; and some of the decisions in the old cases, as to the finding of the Magistrates being conclusive, seem irreconcilable with common sense, such as those of Mr. Justice Richardson, in *Brittain v. Kinnaid* (1 B. & B. 442). Under sections 94. and 95. of the old act, 5 & 6 Will. 4. c. 50, they would have been bound to take this course; and my contention is, that sections 18. and 19. of the 25 & 26 Vict. c. 61.¹ were intended to extend the

(1) The provisions of 25 & 26 Vict. c. 61. are as follows :

Section 18. "Where complaint is made to any Justice of the Peace that any highway within the jurisdiction of the highway board is out of repair, the Justice shall issue two summonses, the one addressed to the highway board and the other to the waywarden of the parish liable to the repair of such highway, requiring such board and waywarden to appear before the Justices at some petty sessions, in the summons mentioned, to be held in the division where such highway is situate; and at such petty sessions, unless the board undertake to repair the road to the satisfaction of the Justices, or unless the waywarden deny the liability of the parish to repair, the Justices shall direct the board to appear at some subsequent petty sessions to be then named, and shall either appoint some competent person to view the highway, and report to them on its state at such other petty sessions, or fix a day, previous to such petty sessions, at which two or more of such Justices will themselves attend to view the highway.—At such last-mentioned petty sessions, if the Justices are satisfied, either by the report of the person so appointed, or by such view as aforesaid, that the highway complained of is not in a state of complete repair, it shall be their duty to make an order on the board limiting a time for the repair of the highway complained of; and if such highway is not put in complete and effectual repair by the time limited in the order, the Justices in petty sessions shall appoint

powers of the Justices. *The Queen v. Arnould* (8 El. & B. 550; s. c. 27 Law J. Rep. (N.S.) M.C. 92) shews that the Justices, under section 95, have no discretion to refuse to order an indictment, however clear the non-liability may be. In *Ex parte Bartlett* (30 Law J. Rep. (N.S.) M.C. 65), Mr. Justice Hill points out the ingredients necessary to give the Justices jurisdiction, viz., the fact of a highway and the fact of non-repair. The second fact the Justices are to inquire into by the mode pointed out by the statute, and the inference is, that they are also to inquire into the question of highway or no highway by the reception of evidence in the ordinary way.

[MELLOR, J.—In *The Queen v. Askerton*,² a doubt was expressed whether, under the sections of the old act, the Justices had power to order an indictment in any case except that of an admitted highway. BLACKBURN, J.—I said there, that in order to oust the jurisdiction of the Magistrates, there must be a *bona fide* denial of the fact of a highway. In the present case there was that.]

They ought to go further than a *bona fide* denial, and to determine *quoad jurisdictionem* that it is not a highway before refusing to act. *The Queen v. Heanor* (6 Q.B. Rep. 745; s. c. 14 Law J. Rep. (N.S.) M.C. 38) is in favour of my argument. It was there held that the provision in the 5 & 6 Will. 4. c. 50. s. 95, directing the costs of the indictment to fall on the parish, did not apply where the road was not really a highway.³ It would, no doubt, have been a hardship to cast them on the parish in such a case, and the inference attempted to be drawn was, that the Magistrates had no power to direct an indictment, except where the road was admitted to be a highway. That hardship cannot arise under section 19. of the 25 & 26 Vict. c. 61, which gives power to the Court to saddle either party with the costs; and since this section does away with the hardship, the inference is, that it also intended to do away with the construction that the powers of the Justices only arose in the case of an admitted highway. In drawing sections 18. and 19. of the 25 & 26 Vict. c. 61. it would have been easy to have inserted the word "admitted" before "highway," if that were the intended construction, and the point must have been present to the minds of the framers.

[BLACKBURN, J.—The object of the alteration in section 19. of the 25 & 26 Vict. c. 61. appears to be that a prosecutor may no longer be encouraged by getting his costs in any event to prosecute groundless cases. The main object of the statute was, by sections 17. and 18, to give the means of a speedy repair for undisputed highways. Section 19. is collateral. If your contention is right, the Justices might be occupied several days in

some person to put the highway into repair, and shall by order direct that the expenses of making such repairs, together with a reasonable remuneration to the person appointed for superintending such repairs, and amounting to a sum specified in the order, together with the costs of the proceedings, shall be paid by the board; and any order made for the payment of such costs and expenses may be removed into the Court of Queen's Bench, in the same manner as if it were an order of General or Quarter Sessions, and be enforced accordingly."

Section 19. "When, on the hearing of any such summons respecting the repair of any highway, the liability to repair is denied by the waywarden on behalf of his parish, or by any party charged therewith, the Justices shall direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpoenaed, at the next assizes to be holden in and for the said county, or at the next General Quarter Sessions of the Peace for the county, riding, division or place wherein such highway is situate, against the inhabitants of the parish, or the party charged therewith, for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be paid by such party to the proceedings as the Court before whom the case is tried shall direct, and if directed to be paid by the parish shall be deemed to be expenses incurred by such parish in keeping its highways in repair, and shall be paid accordingly."

(2) 5 New Rep. 305; s. c. 13 W. Rep. 339; reported as *The Queen v. Johnson*, 34 Law J. Rep. (N.S.) M.C. 85.

(3) In *The Queen v. Buckland*, 34 Law J. Rep. (N.S.) M.C. 178, Cockburn, C.J. and Shee, J. held that the Court has no power to order costs, where, on the trial of an indictment directed by Justices, under section 19. of the 25 & 26 Vict. c. 61, the jury find that the road is not a highway.

determining for themselves the question of highway or no highway, and if they ordered an indictment the matter would have to be tried all over again at the sessions or assizes.]

In ninety-nine out of a hundred trials on a road indictment the dispute is highway or no highway, not the liability *ratione tenuræ*. In *Williams v. Adams* (2 B. & S. 312; s. c. 31 Law J. Rep. (N.S.) M.C. 109) it was held, that under section 73. of the 5 & 6 Will. 4. c. 50, directing the removal of nuisances on highways, the Justices must determine for themselves whether the road was a highway or not.

[MELLOR, J.—Mr. Justice Crompton points out the reason why, in that particular case, the Justices were to determine that question, namely, that it lay at the foundation of their jurisdiction. If the road was not a highway, no offence was committed.]

This is not within the rule that where a question of title is raised the Magistrates' jurisdiction is ousted. The denial of the road being a highway might be raised at any time frivolously.

[COCKBURN, C.J.—If the denial were not made *bona fide*, I do not think the jurisdiction would be ousted.]

Brown v. Evans (34 Law J. Rep. (N.S.) M.C. 101) and *The Queen v. Cridland* (27 Law J. Rep. (N.S.) M.C. 28) are not in point.

Maule, for the defendants.—Sections 17, 18. and 19. of the 25 & 26 Vict. c. 61. only apply to admitted highways. By section 42, that act is to be construed as one with the 5 & 6 Will. 4. c. 50, so far as is consistent with the later act. If the intention had been as contended on the other side, the words would have been inserted in section 19. of the 25 & 26 Vict. c. 61, "or if it be denied that the road is a highway."

[BLACKBURN, J.—In section 95. of 5 & 6 Will. 4. c. 50. the words are, "If the duty or obligation of such repairs is denied." In section 19. of 25 & 26 Vict. c. 61. the words are "when the liability to repair is denied." You contend that there is no change intended by the later act. If so, this is another instance of the careless habits of the framers of our statutes in changing their language without intending to change their meaning.]

The Queen v. Heanor (6 Q.B. Rep. 745; s. c. 14 Law J. Rep. (N.S.) M.C. 38) and *The Queen v. Askerton*² are strongly in my favour. Mr. Justice Hill, in *Ex parte Bartlett* (30 Law J. Rep. (N.S.) M.C. 65), said that sections 94. and 95. of the 5 & 6 Will. 4. c. 50. only applied to admitted highways.

[SHEE, J.—The proviso at the end of section 94, that the Justices shall not make the order where the obligation of repairing the highway comes in question, is limited to the word "order," and does not appear to include "conviction." BLACKBURN, J.—Perhaps the legislature thought "order" and "conviction" were the same thing. It is very clumsily worded.]

The change in section 19. of the 25 & 26 Vict. c. 61. is not from the cause contended on the other side, but because, where a prosecutor chooses to put in force the machinery of the later act against a parish in respect of a road which is a highway out of repair, but which some one other than the parish is liable to repair, it is unfair that the parish should in all cases be saddled with the costs. So far from the change in the later act as to costs shewing an intention on the part of the legislature that the later act should apply to cases of disputed highway, as was contended on the other side, it is an *a fortiori* argument in our favour, for it shews that the legislature desired to give less encouragement to prosecutors to get an order made for an indictment in doubtful cases. In the present case the prosecutor is not deprived of the ordinary remedy, but may proceed by indictment in the usual way.

Coleridge, in reply.—It is admitted that where the road is not actually a highway the Justices have no jurisdiction to order an indictment under section 19. of the 25 & 26 Vict. c. 61, but *The Queen v. Heanor* (6 Q.B.

Rep. 745; s. c. 14 Law J. Rep. (N.S.) M.C. 38) shews that the Justices must inquire into the fact.

[COCKBURN, C.J.—Under that section the only event in which the Magistrates' jurisdiction arises is "when the liability to repair is denied." Here the liability was expressly admitted if the road was a highway. Therefore, even if you were right in your contention that the Justices must inquire into the question of highway or no highway, still they could not order an indictment.]

Then, it is contended that in section 19. of the 25 & 26 Vict. c. 61, the words "when the liability to repair is denied," include the case where the liability to repair is denied on the ground that the road is not a highway.

COCKBURN, C.J.—I think that the return is a sufficient answer to the mandamus, and the demurrer, therefore, must be overruled. I own I think the legislature did not intend these sections to apply to the case of a *disputed* highway. I cannot think that the legislature, when it gave Justices a summary jurisdiction to compel the repair of highways, intended to substitute that summary jurisdiction for a jury to determine the question as to whether there was a highway or not. I cannot but think that this summary jurisdiction was meant to be confined to cases where there was no dispute as to the road being a highway, and where the only question was, whether the highway needed repair. Now, to determine the question here, it is most important to look at the object of the mandamus, which is to order the Magistrates to direct a bill of indictment to be preferred against the parish for the non-repair of the road; and it is necessary to look at the words of the act to see under what circumstances the Justices are called on to make the order. It seems that they must not only be dealing with a highway out of repair, but in order to give them jurisdiction to make the order to prefer an indictment against the parish called on to do the repairs, the parish must deny "the duty or obligation of such repairs," in the words of the old act, and "the liability to repair," in the words of the later act. Assume, then, that the road is a highway, either because it is admitted to be so by the parish, or because, as Mr. Coleridge contends should be the case, it has been found to be so by the Magistrates who have heard evidence on the subject, what construction are we to put on the words "if the duty or obligation of such repairs is denied," in the old act, or the words in the later act, "when the liability to repair is denied"? I think the construction must be, that it presupposes the existence of a highway, and therefore that it is meant to meet the case where the obligation or liability to repair is denied on the only ground on which a parish can in such a case avoid its liability, namely, that some one else is bound to repair, as that a corporation is bound to repair *ratione tenuræ*. Now, here there is no dispute that the parish is bound to repair, if the road be a highway; and the only dispute is as to its being a highway. I think Mr. Maule gave a very lucid explanation of the reasons why the legislature, under the earlier act, made the parish liable for the costs of an indictment. The prosecutor, on behalf of the public, is entitled to insist on the road being repaired if it be a highway out of repair, and he is right in coming upon the parish for the repairs. If the parish seeks to get rid of the liability by fixing some one else with it, then it should be disputed at the expense of the parish. I can quite understand that when the act gave the Magistrates a summary jurisdiction to enforce the repair of a highway out of repair, the legislature should go on to say, "If this be a highway and out of repair, and the parish proceeded against be *prima facie* liable to repair, and that liability be disputed on the ground that some one else is liable, and the parish be indicted, then the costs of that indictment shall fall on the parish which seeks to get rid of the liability." I think *The Queen v. Heanor* (6 Q.B. Rep. 745; s. c. 14 Law J. Rep. (N.S.) M.C. 38), so far from making in favour of Mr. Coleridge, as he contended,

is against him. If he is right, the Magistrates would have had jurisdiction to make the order for the indictment; but the Court held that the costs could not be fixed on the parish, because the verdict of the jury was, that the road was not a highway. The argument from that, therefore, is, that the Magistrates had no jurisdiction. Besides that, in *Ex parte Bartlett* (30 Law J. Rep. (N.S.) M.C. 65), Mr. Justice Hill gave an opinion on this very question; and I own I am only too happy to be able to fortify my own opinion by anything that fell from that most eminent and learned Judge. He there said, "Sections 94. and 95. only apply to cases of admitted highway. In order to give the Justices jurisdiction to make the order, the road must be a highway, and it must be out of repair; the latter fact is to be ascertained by the Justices in person or by sending a surveyor, and if the highway be found out of repair, and the liability to repair is denied, the Justices are then to order an indictment to be preferred. But if these two facts do not co-exist, the Justices have no jurisdiction to direct an indictment." If that be the right explanation of the meaning of the legislature, and I think it is, then it is as applicable to one act as much as to the other. Then, if that be so, the facts shewn on the face of this return are sufficient to entitle the Justices to our judgment; since those facts shew that there was no dispute on the part of the parish of their liability to repair if the road was a highway.

BLACKBURN, J.—I am of the same opinion. I think the return to the mandamus is good. The question really turns on the construction of three sections, namely, the 17th, 18th, and 19th, of the 25 & 26 Vict. c. 61; and the construction of those depends greatly on the construction of the 94th and 95th sections of the 5 & 6 Will. 4. c. 50, which are not repealed by the later act; but it is there (25 & 26 Vict. c. 61. s. 42) enacted that the two acts are to be construed together as one act. I agree with my Lord as to the construction of those sections, and I am chiefly influenced by looking at the general object which the legislature had in view, which was this: where there are highways in a parish the public have a right to have them kept in repair, and, as a general rule, the public are interested in that; but the remedy at common law, by indicting the parish, is slow, and the object of the legislature in the 5 & 6 Will. 4. c. 50. was, that when there was a highway out of repair, there should be a quick remedy for repairing it, provided by sections 94. and 95. Now, as a general rule, Magistrates have no summary jurisdiction where a question of title is *bona fide* raised, unless there is something to shew that they were intended to have the summary jurisdiction in the particular case. In *Williams v. Adams* (2 B. & S. 312; s. c. 31 Law J. Rep. (N.S.) M.C. 109) it was held, that the Justices were to determine whether the road was a highway or not; but it was pointed out by Mr. Justice Crompton that that question involved the very foundation of their summary jurisdiction under the particular section, and that that did not conflict with the general rule, that where a question of title was *bona fide* in dispute Justices have no summary jurisdiction. We should expect, then, that the legislature would not intrust Justices with the duty of determining whether the road was a highway or not, or whether the liability to repair rests on the parish or on some one else. If either of these questions is raised, the Justices are not to determine it. I think that the effect of section 94. of the 5 & 6 Will. 4. c. 50. is, that if there is a *bona fide* denial either that the road is a highway or that the parish is liable, then the Justices are to hold their hands, and not convict the surveyor or make the order for the immediate repairs. At the end of section 94. there is a proviso "that the said Justices shall not have the power to make such order as aforesaid (whether the word 'order' is there meant to be equivalent to or to include 'conviction' or not we need not now inquire; the grammatical meaning would be 'the order' only, the common sense meaning would be 'the order or conviction'; but, however that may be, the order is not to be made) in any case where the duty or obligation of repairing the said highway comes in question." In one sense of the words, no doubt, "the duty or obligation of repairing" is denied where there is a dispute as to

the road being a highway; and it is true that, if the road is denied to be a highway, then it is also denied that the parish is liable to repair. But that is a strained sense in which to interpret the words, and I think the meaning must be that the denial of the liability is to be distinct from the denial of the road being a highway. The proviso is introduced in order to bring in section 95. That section enacts that "if on the hearing of any such summons respecting the repair of any highway, the duty or obligation of such repairs is denied," the Justices shall order a bill of indictment to be preferred. Looking, then, at the object of the legislature, I think the indictment is to be ordered then, and then only—namely, when the duty or obligation is denied on the ground that some one else is liable. I quite agree with my Lord that, though the point in the case referred to⁴ was not exactly the same, the dictum of Mr. Justice Hill is a very weighty authority, for he was so exact and careful in the language he used; and the point in that case comes very near the present case. Then comes the question, is the intention of the new act, the 25 & 26 Vict. c. 61, different from that of the former act? It is true that the words are altered—"liability" being used instead of "duty or obligation"—but I cannot see that that makes any difference in the construction.

MELLOR, J.—I am of the same opinion. I think that, after considering carefully the sections bearing on the matter, the meaning of the legislature was, that where there was a disputed highway there the parties should be left to their ordinary remedy by indictment. It is not as if that remedy was taken away by these statutes. With regard to *The Queen v. Heanor* (6 Q.B. Rep. 745; s. c. 14 Law J. Rep. (N.S.) M.C. 38), I agree with my Lord that it makes against Mr. Coleridge's contention, instead of in favour of it. Now, in the new act,⁵ the words are changed; but if it was intended, as Mr. Coleridge says, to change the construction, such words as these, "or where the fact of the road being a highway is denied, the Justices shall order an indictment to be preferred," might easily have been inserted. For these reasons, I quite agree with my Lord and my Brother Blackburn that the return is a good answer to the mandamus.

SHEE, J. concurred.

Judgment for the defendants.

[IN THE COURT OF QUEEN'S BENCH.]

June 6, 1866.

THE QUEEN v. PHILLIPS AND ANOTHER.

35 L. J. M.C. 217; L. R. 1 Q.B. 648; 14 W. R. 791; 12 Jur. N.S. 920.

Principle applied, *R. v. Surrey Justices*, 1872, 26 L. T. 22 (Q.B.).

Highway—Diverting and Stopping up—Substitution of New Highway—Justices' Certificate—Nearer or more Commodious—5 & 6 Will. 4. c. 50. ss. 85, 91.

HIGHWAYS.—By a certificate of two Justices, obtained for the purpose of diverting and stopping up a highway, &c., and made under the 85th section of the 5 & 6 Will. 4. c. 50, it was stated that the proposed new highway "will be more commodious to the public, by reason," &c., and that the old highway called, &c., "will if and so soon as such diversion or substitution be effected, become and be wholly unnecessary and useless, by reason," &c. The certificate also shewed that the way to be substituted for the old one was not an entirely

(4) *Ex parte Bartlett* (4).

(5) 25 & 26 Vict. c. 61. s. 19.

new way, but would consist of two existing ways which were to be widened and enlarged so as to make them more commodious and convenient:—Held, overruling The Queen v. Shiles (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (N.S.) M.C. 157), that the certificate was not bad by reason of its not stating that the new highway would be nearer as well as more commodious.

Held, also, that it was not bad by reason of its not stating that the new highway is more commodious, and that it was sufficient to state that it would be, &c.

Held, also, overruling Welch v. Nash (8 East, 394), that it was not necessary that the highway to be substituted should be entirely new.

This was a rule calling upon the defendants to shew cause why an order of Sessions, allowing an appeal of Edward Goodale and others against a certificate under the hands of William Gilpin and Octavius Ommaney, Esq., two of Her Majesty's Justices of the Peace in and for the county of Surrey, dated the 28th of August, 1865, and purporting to be made under the 85th section of the Highway Act, 1835, for the purpose of diverting and stopping up certain highways, called Thames Street and Brewhouse Alley, situate in the parish of Mortlake in the said county, should not be quashed for the insufficiency thereof.

The Court of Quarter Sessions for the county of Surrey, holden at Kingston-upon-Thames, upon the 17th of October, 1865, upon hearing the appeal, stated a case, which was substantially as follows.—

This was an appeal unto this Court, by and on behalf of Edward Goodale and others, against a certain certificate under the hands of William Gilpin and Octavius Ommaney, Esqs., two of Her Majesty's Justices of the Peace, acting in and for the said county, of their having viewed certain highways in the parish of Mortlake, in the said county, for the purpose of diverting, stopping up and opening such highways as are mentioned and described in the said certificate, in pursuance of an act passed in the fifth and sixth years of the reign of his late Majesty King William the Fourth, intituled 'An act to consolidate and amend the laws relating to highways in that part of Great Britain called England,' which said certificate is in the words following, that is to say: 'Surrey, to wit. Whereas Charles John Phillips and James Wigan, both of the parish of St. Mary, Mortlake, in the county of Surrey, brewers, being desirous of diverting and stopping up a certain highway called Thames Street, situate in the said parish of St. Mary, Mortlake, leading from the towing-path of the river Thames, opposite to the wharf of the said parish, through their property, to and joining the public road or highway from Richmond to Mortlake, at the back of the King's Arms public-house, in the High Street, Mortlake, aforesaid, and also of diverting and stopping up a certain branch highway or alley called Brewhouse Alley, situate in the parish and county aforesaid, and leading from Thames Street aforesaid to the High Street, Mortlake, and in lieu thereof, and in substitution for the same, first, of opening a new highway, to commence at the said towing-path opposite the said parish wharf, and to lead into the High Street, Mortlake, aforesaid, by throwing into and adding to a certain highway or passage there, known as Bull's Alley, so much of their land on the east side thereof and next adjoining thereto, as would make such last-mentioned way or passage 30 feet wide, or thereabouts; and, secondly, of widening the public highway called the High Street aforesaid, from the east corner of a wooden building called or known as the Tithe Barn to the King's Arms corner of the said High Street, by throwing into and adding to such street a piece of land on the north side of and next adjoining to that part of the said High Street of sufficient width to make all that part of such street of the width of from 28 feet 9 inches to 40 feet and upwards, did, on or about the 22nd day of February, in the year of our Lord 1865, in pursuance of the Highways Acts, duly give notice, in writing, to the Kingston District Highway Board of and in the county aforesaid, of such their said desire. And the said Charles John Phillips and James Wigan did then require the said board to give notice to the churchwardens of the said parish to assemble the

inhabitants of the said parish in vestry, and to submit to them the aforesaid desire of them the said Charles John Phillips and James Wigan. And whereas, in pursuance of the said notice or requisition, the said Kingston District Highway Board, did, by a notice signed by Thomas Terry, their chairman, on behalf of the board duly authorized in that behalf, on or about the 23rd day of February, in the year of our Lord, 1865, give notice to the churchwardens of the said parish to assemble the inhabitants of the said parish in vestry, and to submit to them the aforesaid wish of the said Charles John Phillips and James Wigan. And the said churchwardens did, in manner required by the statutes in that behalf, give notice of and convene a vestry meeting of the said inhabitants, to be holden on the 16th day of March, in the year last aforesaid, at which the aforesaid wish of the said Charles John Phillips and James Wigan should be submitted to the said inhabitants then and there assembled. And whereas a meeting of the said inhabitants in vestry assembled was, in pursuance of such last-mentioned notice, duly held at the vestryroom in the parish of Mortlake aforesaid, on the day and year last aforesaid, at which meeting Richard Fountain Stratton, one of the churchwardens of the said parish, presided as chairman, and at such meeting the aforesaid wish of the said Charles John Phillips and James Wigan was submitted to the said inhabitants then and there assembled, and a majority of such inhabitants then and there agreed to the said proposal, and deemed it expedient that the said highways should be so diverted and stopped up as proposed by the said Charles John Phillips and James Wigan; but a poll was then and there demanded by certain of such inhabitants, and the said meeting was thereupon adjourned to the 6th day of April then next for the purpose of taking such poll, and afterwards, on the day and year last aforesaid, such adjourned vestry meeting of the inhabitants of the said parish was duly held at the last-mentioned place for the purpose of taking the said poll; and at such last-mentioned meeting the said Richard Fountain Stratton again presided as chairman, and the said poll was then and there taken accordingly, and the majority of the votes of the inhabitants of the said parish, then and there present, were then and there given in favour of the said proposal; and the said inhabitants then and there agreed to the said proposal, and deemed it expedient that the said highways should be so diverted and stopped up as proposed as aforesaid, and thereupon the said Richard Fountain Stratton (as chairman at such respective meetings as aforesaid) did, by an order in writing, dated the 25th day of April, in the year last aforesaid, direct and request the said Kingston District Highway Board and their district surveyor to apply to two of Her Majesty's Justices to view the said ways, and proceed according to the provisions of the Highway Act, 1835. And whereas, in pursuance of the said last-mentioned order, the said Kingston District Highway Board did (by John Niblett, their district surveyor), on the 25th of July, in the year last aforesaid, duly apply to and request us, the undersigned William Gilpin and Octavius Ommamey, then and still being two of Her Majesty's Justices of the Peace for the said county of Surrey, and acting in and for the division of Richmond, within the said county (within which division the said highways so proposed to be diverted and stopped up are situate), to view the said highways so proposed to be diverted and stopped up, and also the said proposed new highways, and proceed according to the provisions of the Highway Act, 1835. And we, the said Justices, did accordingly, on the 27th day of July, in the year last aforesaid, together and at the same time, view the said highways so proposed to be diverted and stopped up (that is to say), first, the said highway called Thames Street, which last-mentioned highway leads from the towing-path of the River Thames, opposite to the wharf of the said parish of Mortlake, to the public road or highway from Richmond to Mortlake, and joins such last-mentioned road at the back of the King's Arms public-house, in the High Street, Mortlake, aforesaid; and also, secondly, the said branch highway or alley called Brewhouse Alley, which last-mentioned highway or alley leads from Thames Street aforesaid to the High Street, Mortlake, aforesaid. And we the said Justices did also, on the day and year last aforesaid, at the like application and request, together and at the same time,

view the said proposed new highways (that is to say), first, the said piece of land next adjoining to and on the east side of Bull's Alley, Mortlake, aforesaid, which runs from north to south from the said towing-path to the said High Street, and is in length from north to south 99 feet or thereabouts, and in width at the north end thereof 12 feet 9 inches or thereabouts, and becomes wider from north to south, and is at the south end thereof 21 feet 9 inches in width or thereabouts; and, secondly, the said piece of land next adjoining to and on the north side of the High Street, Mortlake, aforesaid, and which extends from the east corner of the wooden building called or known as the Tithe Barn to the King's Arms corner of the said High Street, and is in length from east to west 255 feet or thereabouts, and in width at the west end thereof 21 feet or thereabouts, and tapers to a point towards the east end thereof, but is of sufficient width throughout to increase the width of all that part of the said High Street, and to make the same of the width throughout of from 28 feet 9 inches (on the east) to 40 feet and upwards (on the west); and it appearing to us the said Justices on such view, for the reasons hereinafter stated, that the said old highways, called Thames Street and Brewhouse Alley, may be diverted and turned as aforesaid, so as to make the same severally and respectively more commodious to the public (that is to say) by the substitution for the same of the High Street and Bull's Alley respectively aforesaid, when the same shall have been so widened as respectively aforesaid by the addition thereto of such new highways or pieces of land as respectively aforesaid, and that the said new highways will be more commodious to the public than the said old highways called Thames Street and Brewhouse Alley, and that the said old highways called Thames Street and Brewhouse Alley will, if such diversion or substitution be effected, become and be unnecessary and useless; and the said Charles John Phillips and James Wigan, the owners of the land through which such new highways are proposed to be made as aforesaid, having, by writing under their respective hands, consented to the same being so made, we the said Justices did, on the 27th of July, in the year last aforesaid, direct the said highway board of the said district surveyor to affix a notice, in the form or to the effect of Schedule No. 19. to the Highway Act, 1835, annexed, in legible characters, at the place and by the side of each end of each of the said highways from whence the same are respectively proposed to be diverted or stoppd up, and also to insert the same notice in some one newspaper published and generally circulated in the said county of Surrey, for four successive weeks next after we the said Justices had viewed the said highways as aforesaid, to affix a like notice at the door of the church of St. Mary, Mortlake, in which the said highways so respectively desired to be diverted or stopped up lie, on four successive Sundays next after the making such view. And whereas it hath this day been proved to the satisfaction of us the said Justices that such several notices have been so affixed and published as aforesaid, and a plan hath been delivered to us at the same time, particularly describing the said old and proposed new highways by metes, bounds and admeasurements thereof, which plan hath been verified before us by Frederick Atwood, a competent surveyor, and is hereunto annexed:—Now, therefore, we the said William Gilpin and Octavius Ommaney, so being and acting as such Justices as aforesaid, do hereby, in pursuance of the statute in that case made and provided, certify that we did, on the said 27th day of July, 1865, together and at the same time, view the said highways called Thames Street and Brewhouse Alley, so respectively desired to be diverted and stopped up, and did upon such view find and we do hereby certify, that for the reasons hereinafter stated, the said highways called Thames Street and Brewhouse Alley, and which are respectively delineated on the said plan, may be diverted and turned in manner aforesaid, so as to make the same severally and respectively more commodious to the public (that is to say), by the substitution for the same of the High Street and Bull's Alley respectively aforesaid, when the same shall have been so widened as aforesaid by the addition thereto of such new highways or pieces of land as aforesaid; and we do further certify that we did, on the day and year last aforesaid, together and at the same time, view the said proposed

new highways, and which as to the one, or part thereof, situate on the north side of the High Street contains in length 255 feet, and is of the width hereinbefore mentioned, and is delineated on the said plan between the letters G. and H, and therein coloured red, and which as to the one, or part thereof, lying on the east side of Bull's Alley contains in length 99 feet or thereabouts, and is of the width hereinbefore mentioned, and is delineated on the said plan between the letters E. and F, and also therein coloured red; and we did upon such view find and do hereby certify, that the said proposed new highway will be more commodious to the public than the said old highways or either of them, by reason that the said old highway, called Thames Street, is in the widest part thereof only 31 feet 9 inches in width or thereabouts, and becomes gradually narrower as the same approaches the said wharf or towing-path, being at the last-mentioned end thereof only 15 feet 3 inches in width or thereabouts (including footpath, way or space for the same), and by reason that the said alley, called Brewhouse Alley, is only of the width of from 4 feet to 4 feet 4 inches or thereabouts, and is wholly impassable by carts, whereas by the said addition to the said High Street the inconvenient north-west corner of such street will be rounded off and the approach and entrance thereto rendered much easier and safer, and the said High Street will be considerably widened at and towards the west end thereof, so as to be made to be of the width of 40 feet and upwards at the west end, and to be from thence to the point at the east end of the Tithe Barn marked G. on the said plan, of a width of 28 feet 9 inches or upwards throughout, (the same being at present in part of the width of 22 feet only); and in no part to the west of Bull's Alley will such High Street be of less width than 25 feet 5 inches; and also by reason that the said alley called Bull's Alley, which is now in part of the width of 8 feet 3 inches only or thereabouts will be made to be from double to treble such width throughout, whereby the traffic to and from the said wharf, and the convenience of the persons using or resorting to the same, will be greatly benefited; and whereby also the said High Street will be made greatly more commodious to the public generally as well as to persons having occasion to go to or from the said wharf; and we do further certify that the said old highway called Thames Street and the said old branch highway called Brewhouse Alley will, if and so soon as such diversion or substitution be effected, become and be wholly unnecessary and useless by reason of the said new highways being more commodious as aforesaid, and by reason that all persons who would otherwise have occasion to use the said old highways, will be able to use the said new and widened highways in the High Street and Bull's Alley aforesaid, in lieu and stead thereof, with at least equal, if not greater, facility and convenience. And we do further certify that the stopping up of Thames Street will remove a source of considerable danger to persons going by the Lower Richmond Road from Richmond to Barnes and London, or in that direction, on foggy or dark nights, inasmuch as Thames Street on such occasions appears to be, or is liable to be mistaken for a part and continuation of the main high road, and persons making such mistake and passing up the same accordingly are in danger of being precipitated into the river. And, lastly, we do certify that the several highways so respectively proposed to be stopped up or diverted as aforesaid, were and are so connected together that they cannot be separately stopped up or diverted without interfering one with the other, and may be lawfully included in and stopped up or diverted as aforesaid by and by virtue of one order or certificate. Given under our hands, at Mortlake, in the county of Surrey, this 28th day of August, 1865.—William Gilpin, Octavius Ommaney." And by which said certificate for diverting, stopping up and opening such highways as therein mentioned, the said appellants apprehend themselves aggrieved. Now, after hearing counsel on both sides, and the premises being fully considered, it is ordered by this Court that the said appeal be and the same is hereby allowed, subject nevertheless to the opinion of the Court of Queen's Bench. And it is further ordered by this Court, subject likewise to the said Court of Queen's Bench being of opinion that the said appeal has been properly allowed by this Court, that Messrs. Charles John Phillips and James Wigan, the respondents, do forth-

with pay to the said appellants the sum of 244*l.* 2*s.* 10*d.*, being the costs and expenses incurred by the said appellants in prosecuting the said appeal.

The Kingston District Highway Board, on receipt of the notice and ground of appeal, delivered a copy of the same to Messrs. Phillips and Wigan, on whose requisition the application to the Justices had been made, pursuant to the Highway Act.

The said appeal came on for trial on the 19th of October, 1865, and counsel appeared on behalf of the said highway board, and stated that such board considered the improvement would be very beneficial to the public, and that the new way would be very much better than the old one. Counsel also appeared on behalf of Messrs. Phillips and Wigan in support of the said certificate. The notice and grounds of appeal having been admitted, the certificate and the plan annexed to it were agreed to be taken as read.

It was then objected, on the part of the appellants, that the said certificate was defective and bad in law on the face of it on several grounds (that is to say): first, because (assuming the proposed alteration to be in fact a stopping up of the old highways) the certificate stated that the old highways Thames Street and Brewhouse Alley would become unnecessary when the proposed new ways should be made, and not that they were unnecessary at the then present time; secondly, because (assuming the proposed alteration to be in fact a diversion of the old highways or either of them) the certificate did not state that the proposed new highways would be nearer and more commodious to the public, but only that the same would be more commodious (and in support of this objection the case of *The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (n.s.) M.C. 157) was cited and relied upon); and, thirdly, it was objected that the proposed alterations were not, in fact, a diversion or turning of a highway within the meaning of the statutes.

The Court having considered these objections, decided the first and third in favour of the respondents, but the second in favour of the appellants.

The respondents' counsel thereupon applied to the Court to grant a special case on the second point, which the Court consented to do, whereupon the counsel for the appellants applied for a case upon the first and third points also, to which the Court also consented.

It being thus the opinion of the Quarter Sessions that the certificate must be quashed, the Court considered it unnecessary for the present to empanel a jury for the purpose of determining the questions of fact, and the certificate was quashed, subject to this case for the opinion of the Court of Queen's Bench.

The question for the opinion of this Court is, whether the certificate is defective on the face of it and bad in law on any one or more of the three grounds of objection above mentioned.

If the Court shall be of opinion that the certificate is bad in law on one or more of such grounds, the judgment or order of the Court of Quarter Sessions is to be confirmed. If the Court shall be of opinion that the certificate is not bad in law on any of the said grounds, then the said judgment is to be reversed, and the matter is to go back to the Quarter Sessions for the purpose of having the questions of fact determined and of proceeding thereon according to law.

Ballantine, Serj. and Garth, in support of the order of Sessions, shewed cause against the rule.—It will be convenient to dispose at once of the second ground which was urged at the trial, and which is set out in the case. The Sessions were quite right in quashing the certificate upon that ground, because *The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (n.s.) M.C. 157) was binding upon them; but it must now be admitted that that case can hardly be considered to be law, inasmuch as great doubt was thrown upon it in *Wright v. the Overseers of Frant* (4 Best & S. 119; s. c. 32 Law J. Rep. (n.s.) M.C. 214). The doubt suggested by two of the members of the Court seem to make it useless now to argue that the decision in *The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (n.s.) M.C. 157) can be sustained. But the judgment of the Sessions may be supported upon other grounds. First, upon the third ground referred to in the case; the diversion of the highway is not such a diversion as

was contemplated by the Highway Act. When a highway is to be diverted, a new one must be made, and it is not enough to make alterations in an old and existing highway, as has been done in the present case. *Welch v. Nash* (8 East, 394) is an authority directly in point, although it arose under the 13 Geo. 3. c. 78. In that case Lord Ellenborough said, "The Magistrates have only jurisdiction conferred on them in a given case; they may divert an old road so as to make it nearer or more commodious to the public; that is, by making a new road. The whole section contemplates that a new highway is to be made in lieu of the old one, which is to be stopped up, and the Magistrates can only order the old highway to be stopped up on the condition that a new highway has been made and put in a proper state. But what *diverting* or *turning* of the old road has there been in this case? or what new highway has been given in lieu of the old one which is stopped up? The facts are simply these: the Magistrates have extinguished and stopped up one old road, and have enlarged another in different parts of it; but the *termini a quo* and *ad quem*, and the direction of it, remain the same as before. Increasing the width of an old highway is neither diverting another old highway nor making a new one; and the Justices cannot make facts by their determination, in order to give to themselves jurisdiction contrary to the truth of the case. There is the less reason, too, for saying that a new highway has been set out in lieu of the old one, because Egg Lane has not been widened through its whole course, but the additions are only made in patches; so that if the whole course of the highway there were stopped up, there would be no continuity of road in any other place in lieu of the other old highway, which has been stopped up. Therefore, however desirous we may be of consulting the convenience of individuals in this respect, in a case too where we may reasonably conclude from the adjudication of the Magistrates in sessions that the alteration is more commodious to the public, yet the words of the act are too strong to get over; and we cannot extend the jurisdiction of others any more than we can our own." And the other Judges agreed. Now the facts of the present case are rather stronger against the validity of the certificate than they were in *Welch v. Nash* (8 East, 394). An entirely new highway ought to be made before the old one is stopped up, for, otherwise, there would be no protection for the public.

[BLACKBURN, J.—I cannot see why the making an addition to an old road so as to make it more commodious should be the same as making an entirely new one, but *Welch v. Nash* (8 East, 394) seems to be an authority that such is not the case.]

If it had been intended merely to widen the High Street and Bull's Alley, the proceedings should have been under the 82nd section of the 5 & 6 Will. 4. c. 50, and not under the 85th section, as the present proceedings are, being for the stopping up of the present highway. The 82nd section gives full power to widen and enlarge such highways as are not of sufficient breadth, making recompense for the land which is taken. Therefore, the judgment of Lord Ellenborough is in point.

[MELLOR, J.—I have great difficulty in distinguishing it from the present case.]

And it is submitted that the decision is clearly right, for all the provisions of section 85. apply to a "new highway so proposed to be made."

[SHEE, J.—But is not the whole of the 85th section prospective? The highway is not to be diverted or stopped up till after the appeal has been dismissed, or the time for appealing has passed without any appeal being made. The actual order for diverting or stopping up the highway is to be made by the Sessions, under section 91. The old highway is not to be stopped till the new one is made, so that the public seem to be fully protected.]

But where a highway is to be merely widened, as is to be done here, the proceedings under sections 85. and 91. are inapplicable, for those sections apply to new highways and the stopping up of old ones.

The next ground upon which it is submitted that the certificate is bad, is that which is set out first in the case, namely, that it merely shews that

Thames Street and Brewhouse Alley will become unnecessary and useless if and so soon as the diversion or substitution has been effected, whereas it ought to have shewn that they were unnecessary and useless. Nothing can be more vague than the certificate in using such terms as "if and so soon," while the intention to be gathered from the words of the 85th section is that the certificate ought to shew that the proposed new highway is nearer or more commodious to the public, and if more commodious, as is asserted in the present case, the reasons why it is so.

[BLACKBURN, J.—Must we not read the 85th and 91st sections together?]

It is not clear that section 91. affects section 85. at all; at any rate, it is cumulative, and affords an additional protection over and above section 85, and it is difficult to see how such a question could be left to the jury under section 89.

[BLACKBURN, J.—By the 85th section the notices are to be in the form given in schedule 19, and that form shews that the notice must refer to the plan; but if your contention is right, one would expect that the notice would refer to the new highway, as set out and marked by posts, &c. I can see no express words in section 85. that the new highway must be made and set out first.]

It is submitted that the proper construction to be put upon the words is, that when a highway is to be stopped up, the certificate must shew that at the time of the view it has become unnecessary.

Hawkins, J. Browne and L. Kelly, in support of the rule.—*The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (N.S.) M.C. 157) was wrongly decided, and cannot now be considered as an authority. The certificate is good, although it does not state that the new highway would be nearer and more commodious.

[BLACKBURN, J.—We are with you on that point.]

Then the next point is, can this be said to be a diversion of the highway? It cannot be necessary that there should be an entirely new highway. It is not the highway itself which is to be diverted; it would be impossible to do that; all that is meant is, that the traffic should be diverted from one course into another course.

[BLACKBURN, J.—It means diverting the right of way.]

Bull's Alley had been used only as a footway, but is now to be made into a highway for carriages. The decision in *Welch v. Nash* (8 East, 394) has never been expressly overruled; but it has never been acknowledged as a binding authority. Besides, there may be a distinction between that case and the present in this respect. The alteration in that case of the old highway was only in patches, while here the alteration is continuous; so that it is really the same as making a new highway. Is it to be said that it is not a new highway, merely because part of it is old? It is a mistake to say that these proceedings ought to have been under the 82nd section, because it is a case of widening an old highway; that section only applies where the old highway is to be kept in full play. Further, *Welch v. Nash* (8 East, 394) was questioned in *De Ponthieu v. Pennefeather* (5 Taunt. 634). In that case one of the points made was, that there was no new way made in lieu of the old way, because the new way did not directly lead from the same *terminus a quo* to the same *terminus ad quem*; and *Welch v. Nash* (8 East, 394) was cited in support of the objection. In delivering the judgment of the Court Chief Justice Gibbs said, "The last objection is, that no sufficient new way has been set out in lieu of the old way. It is urged for the defendant that if the Magistrates take away the old road, to which the defendant has a confessed right, they must give him in lieu of it a complete title to a new road for the whole distance, on their order and on their order alone. We think the act is not to be so construed. We are of opinion that if the new road given by the order carries the subject into a public highway that carries him to the point to which the old road led, it is sufficient."

[BLACKBURN, J.—The two decisions might stand together; the point is not quite the same as in *Welch v. Nash* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (N.S.) M.C. 157), which seems to be directly in point; although I admit that I have great difficulty in following Lord Ellenborough's judgment.]

They also referred to *Brittain v. Kinnaird* (1 B. & B. 440) and the observation of Burrough, J. upon *Welch v. Nash* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (N.S.) M.C. 157).

Next, the legislature never intended that the new highway should be actually made before the certificate was granted.—(They were then stopped.)

BLACKBURN, J.—This case is rather a peculiar one, and unfortunate in this respect: in the first place, *The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (N.S.) M.C. 157) was quoted at the Sessions, and although considerable doubt had been thrown upon it, the decision had not at that time been overruled; and the Sessions, in deference to it, decided that the certificate was bad, and quashed it, subject to a case for the opinion of this Court. On that the question comes here whether or not we can overrule *The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (N.S.) M.C. 157).

Further than that, there were two other objections, which were overruled by the Sessions. One of them arose on the authority of *Welch v. Nash* (8 East, 394), which seems positive against the decision. We are called upon to support the certificate when there have been these decisions, one upon one point and the other upon the other, against the certificate; and looking at all the circumstances and the arguments, we have all come to the conclusion, perhaps too presumptuously, that both *Welch v. Nash* (8 East, 394) and *The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (N.S.) M.C. 157) were wrong. If this were the ordinary case, where the matter was determined here, and could not be appealed against, we should think ourselves bound by two positive decisions. In the present case, if we decided that the certificate was bad, for either or both of these reasons, the decision would be final, and this road could never be diverted at all. If we follow the decisions, we follow them finally and without appeal; but if we decide against them, then, as shewn by *Welch v. Nash* (8 East, 394), the question may be raised either by action of trespass or by issuing a writ in any form the parties may agree to, so as to take the case to a Court of error, and appeal against the opinion of this Court. Under these circumstances, although not without some doubt, we think that we may follow our own view, and, notwithstanding the authority of those two cases, decide against them. We may decide upon what seems to us to be the right view of the law, although it has the effect of going against those decisions.

As to *The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (N.S.) M.C. 157), the Highway Act, 5 & 6 Will. 4. c. 50, provided a code for the manner in which highways were to be diverted, stopped up and turned. In the first place, the inhabitants in vestry are, under section 84, to be called together, and if they think that the proposed alteration is a good one, the surveyor is to be directed to apply to the Justices to view the same. Then, by section 85, it is provided that "when it shall appear upon such view of such two Justices of the Peace, made at the request of the said surveyor as aforesaid, that any public highway may be diverted or turned, either entirely or subject as aforesaid," which means subject to the reservation of the footway or bridleway, "so as to make the same nearer or more commodious to the public, and the owner of the lands or grounds through which such new highway is proposed to be made shall consent thereto by writing under his hand, or if it shall appear upon such view that any public highway is unnecessary," the said Justices are to proceed to grant a certificate. From this it would appear that the legislature were contemplating that there may be two cases: one where the highway is wholly unnecessary, and simply because it is wholly unnecessary it may be stopped up—and what the Justices are to ascertain is, whether it is wholly unnecessary; the other is, where the highway is to be diverted or turned. The words refer to each matter plainly enough. Where there is to be a substitution, something in lieu of the old highway, where the owner of the land says, "I will dedicate this part of the land for a new highway, in lieu of and in substitution for the old highway," then the right of way which was over that part of the land will be stopped up, and the land given up. There must be

the assent of the vestry; but the legislature has said, in addition, that this shall not be done unless the two Justices who view it certify that the new highway is nearer or more commodious. I should think, looking at these words taken by themselves, that one view would be that if the inhabitants were content to take a road which was nearer, and which, though not necessarily more commodious, would generally be so, and the Justices certify upon the view that such road would be nearer, the diversion may be made. And that the other view would be, that if the inhabitants are willing to take the new highway, on the ground that, although not nearer than the old one, it would be more commodious, because it goes round a hill, or something of that sort, if the Justices certify that it will be more commodious, it may be done. Through the rest of the 85th section the words are, "nearer or more commodious"; but, nevertheless, the Court of Queen's Bench thought, in *The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (N.S.) M.C. 157), that the word "or" was to be read as *and*, and that the highway was not to be stopped up unless the proposed new highway was nearer as well as more commodious. That would strike one as a straining of the words; and if it stood only upon the 85th section, it would be very difficult to agree with it. The 89th section, which is the appeal clause, proceeds thus: That in case of an appeal the Justices are to summon a jury, and to inquire whether the new highway is nearer or more commodious, or whether the public highway "so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or whether the said party appealing would be injured or aggrieved," and the jury may return "a verdict that the proposed new highway is nearer or more commodious to the public, or that the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or that the party appealing would not be injured or aggrieved;" and in such case the Sessions may dismiss the appeal. The reasoning in the case of *The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (N.S.) M.C. 157), from the disjunctive being used, is that if the jury find any one of the three alternatives, the appeal would be allowed, but if the reverse, the appeal would be dismissed; the machinery of an appeal would not work the matter out. But I think that, looking at the appeal clause and the others which come before it, the words in the appeal clause are according to the allegations in the certificate of the Justices, and that the jury are to find one or the other. If the Justices certify that the proposed new highway is nearer, the jury are to find whether it is nearer; but if the Justices do not find that it is nearer, but that it is more commodious, then the jury are to find whether it is more commodious or not. If the Justices do not find both, they are to find one or the other. We ought to take the meaning to be that "or" should mean "or," and that the finding should be in the alternative *secundum allegata et probata*, in the certificate of the Justices. I should not so readily have come to this conclusion if it had not been for the case of *Wright v. the Overseers of Frant* (4 Best & S. 119; s. c. 32 Law J. Rep. (N.S.) M.C. 214). When my Lord and myself sat alone, we thought that we should then have to decide whether we should follow *The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (N.S.) M.C. 157) or not. My Lord was very decided indeed, and said without hesitation that he was ready at any time to overrule it. I certainly thought at the time that the decision was not right, but I do not think that I expressed myself so strongly. However, we did not think it right that two of us should overrule that decision, and therefore the case was adjourned to be re-argued on another day. On that day my Brother Mellor was present, but it turned out that it was not necessary that we should decide that *The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (N.S.) M.C. 157) was wrong, although we thought that it was so. Now it does become necessary to decide upon the very point, and we think that decision wrong, and inasmuch as to follow that case would be to follow what we think is wrong, and without there being any appeal, whereas, if we go against it, we still leave it in the power of the parties, if they are so advised, to question our decision in a Court of error, we have come to the conclusion, feeling at the same time what a strong thing it is to do so, to decide against it.

Then, as to *Welch v. Nash* (8 East, 394). We feel it all the more a strong thing to deal with this case, because we have already in this same matter dealt with *The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (N.S.) M.C. 157), but the same reason applies, that if we overrule it, an appeal will lie. As I have already pointed out, the proceeding for stopping up is by going to the vestry, and then if they and the Justices think that the road should be stopped up, and the jury upon an appeal find that it is unnecessary, it may be done. As to the other part of the case, when a road is to be diverted or turned, taking the words by themselves, I think they mean that when people have offered to substitute something in lieu of an old highway, and the owner of land has said that he is willing to dedicate a piece of land elsewhere, so that the public should have a right of way over it, although the road itself cannot be altered, the right of way can be so, and if the vestry think and the Justices certify, and the jury, in case of an appeal, find that the proposed new highway is nearer or more commodious, it may be done. Now, in the present case, there was a narrow old road, called Bull's Alley, along which persons might go, and what is offered as a substitute for the old highway is that they should add a breadth of 21 feet on one side, so as to make this narrow alley a good broad carriageway 30 feet wide. They say, we will substitute for the old road in Thames Street a new road, consisting partly of a right of way over this new ground, where we have knocked down the houses, and partly of Bull's Alley, where there is an existing right of way. It seems to me that this is to all intents and purposes a diversion and substitution, and offering the new and substituted right of way for the old one. I cannot see in technical reasoning or popular sense any difference between the offering of a right of way to the public over a portion of the land covered by the old narrow way, or offering to give a right of way over a similar portion of land which happens not to be used. I should have thought it very clear, if it was not that Lord Ellenborough's judgment in *Welch v. Nash* (8 East 394) stands in the way.—[His Lordship read from the passage set out above.]—I quite agree that the widening of an old way is not the diverting of another, but I cannot agree that to throw a portion of land into a highway, so as to give the public a right of way over the part thrown in, is not making a new highway, if it is made for the purpose of being in lieu of and in substitution of another highway, so as to justify the inhabitants of the parish in assenting to the stopping of it up. I cannot but think, with great deference to the high opinion which I entertain for Lord Ellenborough, that such a case would be within the meaning and spirit of the enactment. In *De Ponthieu v. Pennefeather* (5 Taunt. 634) the argument went to distinguish and not to overrule *Welch v. Nash* (8 East, 394), and the two cases do not clash as far as the decision goes; but it is impossible to read the judgment of Chief Justice Gibbs without seeing that it differs from the reasoning in *Welch v. Nash* (8 East, 394). Part of the reasoning is overthrown, and part not much questioned.

Then there is one other point, somewhat bearing upon *Welch v. Nash* (8 East, 394), namely, that in both the old and the new act there is a power given to Justices to order the widening of inconvenient highways, and to make compensation for the land taken, provided that they do not take houses, paddocks, &c. or inclosed ground. The question is, whether or no, where, as here the party cannot be compelled to assist in a great public benefit by the widening of Bull's Alley, but is willing to do so on condition that Thames Street, which runs through his land, should be stopped up, the legislature has said that shall not be done. If he is willing to give up what will make the way more commodious though he is not bound to do so, I do not see why he may not.

There is one more point, upon which there seems to be very little doubt. Where there is to be a diversion and a substitution to be made in this way, the whole scheme of the act is that the Justices who are to view are to view the land intended for the proposed new highway, and if they find that such new highway will be satisfactory and good, they are to direct the surveyor to put up the notice set out in the Schedule No. 19, wherein the public

are told that the Justices have viewed the place of the old and of the proposed new highway, a plan of which would be lodged with the clerk of the peace for a certain number of days before the Court of Quarter Sessions is asked to make an order. At the Quarter Sessions the consent of the owner is to be produced, not that the land has been actually given and the new highway made, but that it shall be. Then, in the 91st section, there is a proviso that if no such appeal be made, or if it shall be dismissed, the Sessions shall order that the old highway be stopped up and the new one made, and from that time the new one will continue; then there is another proviso, that no old highway shall be stopped until such new highway shall be completed, &c. There is, therefore, a careful provision in the act that the Sessions are to determine on the Justices viewing the proposed new highway, and being of opinion that it is the right thing to substitute for the other, the road is to be made. I take it to be clear that the new highway is not to be carried into effect beforehand, and that it was not contemplated by the statute that the alteration should be made before the matter came before the Sessions. I think that the houses ought not to have been knocked down or the alleys widened before going to the Sessions. Therefore I think that the order of Sessions as it stands to quash the certificate should be reversed and the certificate affirmed.

MELLOR, J.—I am of the same opinion upon all the points. I am bound to say that I entirely agree with my Brother Blackburn as to the reluctance with which one ventures to say that either of the decisions which are now brought directly in question, as it appears to me, are decisions by which we cannot abide. With reference to *The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (n.s.) M.C. 157), I was obliged to go away during the first part of the argument. My Lord and my Brother Blackburn had expressed a very decided opinion that the case had been wrongly decided; but it was thought not to be right, in a Court constituted by two Judges only, to express a judicial opinion contrary to it. The argument was resumed again when I was present, and we all, I think, agreed that the reasoning upon which that case proceeded was erroneous; but it was not then necessary to express that opinion as the decision of the Court. Now, the case having been shaken by the opinion expressed by my Lord and Brother Blackburn, we come to a review of it, and I now, of course, feel the less reluctance in saying that the reasoning upon which it was founded appears to me a misconception of the statute, and it seems rather to have been brought about by a suggestion made in the course of the argument by Lord Denman, who said, "*Non constat* that the two Justices would have made the order if they had not been satisfied of both." With all respect for Lord Denman, I cannot help thinking that the Justices ought not to have certified as to either without being satisfied of each. I observe afterwards, in the judgment, Lord Denman said, "Believing, therefore, that we are more likely to effectuate what was probably the meaning, by holding that all the requisites should concur before an order is made, and the latter words being as favourable to that construction as the earlier are to the opposite, we think (in answer to the first question) that one alternative having been negatived, the order should not have been made." I think that is erroneous, and that the order is to be made if the proposed new highway is either nearer or more commodious, and not necessarily that both these alternatives should concur. We must give the same construction to the words as to the finding of the jury as to the earlier part of the section, and I think that the case was erroneously decided. This opinion is fortified by the consideration which it received upon the former occasion.

When we come to the consideration of *Welch v. Nash* (8 East, 394), I agree with my Brother Blackburn, that there are kindred reasons affecting both that case and *The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (n.s.) M.C. 157), and which induce me to come to the conclusion at which I have arrived. The Judges who expressed the suggestion that the proceeding ought to have been upon the widening clause do not appear to me to have paid

sufficient attention as to what was intended by that clause. I entirely agree in the view just now expressed, that, with respect to the widening clause, the proceeding is to be independent of the wish of any particular party, and is to be at the suggestion of two Justices for the public convenience, and the recompense for the ground is to be paid out of the public fund, if it can be agreed upon, and if not, then after the intervention of a jury impanelled for the purpose of assessing the damages. But this case proceeds upon the intervention of the party who proposes to shew that what he has asked the Justices to do is a reasonable thing to be done, and will be not only beneficial to himself but to the public. What is he to do? He is first to get the vestry to consent, and then the parties interested, and then there is to be a view of the Justices. I cannot help thinking that the decision in *Welch v. Nash* (8 East, 394) proceeded on placing too little stress upon the words, "When it shall appear, upon such view of such two Justices of the Peace, made at the request of the said surveyor as aforesaid, that any public highway may be diverted and turned, either entirely or subject as aforesaid, so as to make the same nearer or more commodious to the public." Therefore the diversion contemplates either that the road will be made nearer or more commodious, and if either of these appears to the Justices who are to view it, they are to make the certificate, so that it appears to me that one of the alternatives alone is sufficient to sustain the order. Where the Justices have had this view, and have had the necessary proof, and have seen the metes and bounds, and so on, they are to proceed to certify under their hands that they have viewed the said highway, and that the proposed new highway is nearer or more commodious to the public. Now, I think that the mistake into which, as I venture to suggest, Lord Ellenborough fell, was in reading "new highway" as if it meant an actually different highway, different in position, situation, and so on. I do not think that is the real meaning, but that when you couple it with the preceding part of the section, it means the highway; if it be proposed to be diverted by making it nearer or more commodious, it is then a new highway, as contemplated by the section. And under circumstances like the present, where the diversion consists in removing houses and substituting one part of the way for another, treating it as a diversion of the existing way by taking down part of the buildings, adding to the width of the way, so as to make what was before really and practically a useless and unusable way a road that is useful and usable, I think that is a diversion which does take place by making it more commodious to the public. By the course we are taking, we are really putting it into the power of the other side, if they are dissatisfied with our judgment, of going to the Court of error, where *The Queen v. Shiles* (1 Q.B. Rep. 919; s. c. 10 Law J. Rep. (n.s.) M.C. 157) or *Welch v. Nash* (8 East, 394) can be reviewed, and without the same reluctance which we naturally feel in reversing them, and which we could not have done had it not been necessary for the decision of this case.

With reference to the other point, I entirely agree with the reasons assigned by my Brother Blackburn. This is not a proceeding to stop up a road as useless, but for diverting a road. If it had been to stop up a highway as useless, the certificate must necessarily have shewn that the highway was now useless. But that is not the proceeding at all; it is only incidental, and does not, as it appears to me, at all affect the consideration of this question. Instead, therefore, of certifying that the way is useless, the certificate certifies that when these proceedings are taken, and all these alterations are made, it will become useless. I think that it would be an extraordinary construction, and would lead to an absurdity, if we were to hold that a party, before he knows the opinion of the Justices, is to go to the expense of pulling down the houses and widening the other road, and that he may not obtain that opinion, by calling the attention of the Justices to the circumstances as they now exist, and pointing out by the plan to their satisfaction what are the alterations which he proposes to make. I think it would be a monstrous thing to hold

that this was all to be done, the building pulled down, and all the expenses incurred before the Justices are to certify. Upon these grounds, I am of opinion that we must come to the conclusion that the certificate must remain in force, and the order of Sessions be set aside.

SHEE, J.—I entirely agree with what has been said by my Brothers Blackburn and Mellor, and I do not think that I can add usefully anything to what they have said.

Order of Sessions reversed, and certificate affirmed.

[IN THE COURT OF QUEEN'S BENCH.]

May 30, 1866.

THE GREAT EASTERN RAILWAY COMPANY, *appellants*, v. THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF HAUGHLEY, *respondents*.

35 L. J. M.C. 229; L. R. 1 Q.B. 666; 14 L. T. 548; 14 W. R. 779;
12 Jur. N.S. 596.

Adopted, Great Western Railway v. Pontypridd Union (otherwise *R. v. Llantrissant*), [1869] E. R. A.; 38 L. J. M.C. 93; L. R. 4 Q.B. 354; 20 L. T. 364; 17 W. R. 671 (Q.B.). See, *R. v. South Staffordshire Waterworks*, [1886] E. R. A.; 55 L. J. M.C. 88; 16 Q.B.D. 359; 54 L. T. 782; 34 W. R. 242 (C. A.). Referred to, *Great Central Railway v. Banbury Assessment Committee*, [1909] E. R. A.; 78 L. J. K.B. 225; [1909] A.C. 78; 100 L. T. 89 (H.L.).

Poor-Rate—Railway—"Contributive Value"—Deduction in respect of a Fund for the Renewal of Rolling Stock.

RATES AND RATING.—*The rateable value of a portion of a railway, consisting of the net annual profits from the traffic upon the portion rated, cannot be increased by any part of the profits earned by the same traffic upon other portions of the line. Therefore the expenses of traffic over one portion of a line cannot be estimated according to a mileage proportion, formed by taking into account the increased profit and relative decrease in the cost of conveying the same traffic, with a large accession to it, upon other parts of the line.*

In rating a railway, an arbitrator took as the amount to be deducted in respect of the depreciation of rolling stock the proportionate part of a fund for renewing the stock when it would naturally be worn out:—Held, that this mode of calculation was warranted by the terms of the Parochial Assessment Act, as the tenant of a railway might reasonably think that his tenancy would last over the time when it could legally be terminated.

Upon appeal to the Quarter Sessions of Suffolk, against a poor-rate for the parish of Haughley, in Suffolk, the appeal was by consent referred to Mr. Cleasby to find the facts and state a case, and at the request of either party to raise points of law for the opinion of the Court.

The following CASE was accordingly stated.

The appellants are the Great Eastern Railway Company; their line runs through the parish of Haughley, in the county of Suffolk, with two branches, one leading to Bury, and the other leading to Norwich. There is a station in the parish of Haughley, and there are together 1 mile 6 chains of railway in the parish. On the 4th of December, 1863, a rate for the relief of the poor was duly made in the parish of Haughley, in which the appellants were

assessed at a rateable value of 900*l.* for their railway and station, without distinguishing them. No objection is made that the rate does not distinguish the land from the station, or on any other technical ground. The rate was duly appealed against. The gross yearly earnings on the railway in the parish of Haughley are 2,660*l.* The principal traffic is that passing over the railway in Haughley from Bury in the direction towards London and back, and from Norwich in the same direction and back; and there is also considerable traffic passing over the railway from Bury to Norwich and back, the mere local traffic, namely, that originating or ending at Haughley, is very small.

The following are the expenses and deductions which I find to be fairly applicable to that part of the railway and works which are in the parish of Haughley: maintenance of way and works, 251*l.*; locomotive expenses, 468*l.*; carriage and waggon expenses, 115*l.*; miscellaneous expenses, 478*l.*; income duty, 39*l.*; tithe rentcharge, 5*l.*; rental of stations, 106*l.*; rates and taxes, 4*s.* in the pound upon assessments.

The above expenses amount to 1,462*l.*, with the addition of the amount of rates and taxes, which depend upon what is determined to be the rateable value of the railway.

I also find the following deductions from the gross receipts to be properly made in ascertaining the rateable value: fund for renewal of way, 236*l.*; fund for depreciation of rolling stock, 76*l.*; risks and casualties, 20*l.*; interest and tenants' profits, 15*s.* per cent. on capital employed in rolling stock and stores, 400*l.* These sums added together amount to 732*l.*; and supposing that the line in Haughley is properly rateable only in respect of the earnings of Haughley, the figures in this and the preceding paragraph give the rateable value of the line in Haughley about 388*l.*: in that case the blank left for rates and taxes would be filled up 77*l.* And I find the rateable value of the station at Haughley to be 110*l.*; so that, upon the above figures, the whole rateable value of railway and stations in Haughley would be 498*l.* The above figures shew the value of the occupation of the railway derived from the actual earnings in the parish of Haughley, and that portion of the expenses and deductions fairly applicable to the portion of the line in the parish of Haughley. The expenses and deductions depend, to some extent, upon the amount of traffic or earnings; as, for instance, the item for miscellaneous expenses, which is arrived at by dividing the whole amount of miscellaneous expenses in proportion to the earnings upon each part of the line. They also depend, to some extent, upon the distance run by the engines, and would be the same whether there was one carriage attached or several, and whether the carriages were empty or full.

And I have been desired to state, for the opinion of the Court, the following question as to the occupation in Haughley being increased in value by a participation in some portion of the profits earned on other parts of the line.

The respondents contend that there is an additional portion of the profits beyond those actually earned in Haughley properly attributable to the occupation in Haughley, and therefore to be taken into account in ascertaining the rateable value; they contend that, in respect to that portion of the traffic which passes not only over the line in Haughley, but also other portions of the line, there should be a participation in all the profits earned, and therefore that, inasmuch as the same traffic is carried at a much greater profit over other portions of the line where the traffic is greater than over Haughley, each part of the line may be regarded as contributing to earn those additional profits. And the amount of contribution which the respondents insist upon is found by the mileage in Haughley, as they contend that, in respect of the same traffic passing over any portions of the line, each mile over which it passes must be considered as participating equally in the profits earned by that traffic, or, in other words, as earning a proportionate part of them. If they are right in so contending, as hereinbefore mentioned, for the participation according to mileage of all profits in respect of the same traffic,—and the fact that the

whole line is worked as one concern is sufficient to establish that proposition,—then I find as a fact that, independently of the profits derived from the actual profits in Haughley, there is a further profit which, upon the aforesaid mileage principle, would, to the extent of 75*l.*, be applicable to Haughley. If the respondents are not right in so contending, then I find as a fact that there are no profits attributable to the occupation in Haughley beyond those derived from the actual earnings there.

The question for the opinion of the Court is, at what sum the Great Eastern Railway Company ought to be rated in Haughley? I reserve the question of costs until the decision of the question by the Court of Queen's Bench.

The case having been referred back to the arbitrator to raise any questions of law that either party might think fit, he further certified and reported as follows:

I have already raised upon the case the only question of law that I was, according to my understanding of what took place, called upon to raise. I was requested to raise, as a matter of law, the question of what was called "contributive value," that is to say, of some additional value beyond the immediate value of the occupation in Haughley. This was treated by both parties as a separate question; and the respondents, who had to establish the propriety of this addition, placed their case entirely upon the ground stated in the case, viz., that in respect of the traffic which passed over Haughley, as well as other parts of the line, each mile of the railway over which that traffic passed must be regarded as contributing equally to the earnings of the profits derived from that traffic; in other words, that if the same traffic is carried at a much greater profit over one part of the line than over another, still each part of the line must be considered as equally earning the profit. Being struck with the generality of this proposition, and the apparent difficulty of sustaining it, I took care to have it distinctly understood that this part of the claim made by the respondents was founded entirely upon the correctness of that proposition, and that, if that proposition were not sustained, that part of the respondents' claim failed. If that proposition be correct, there can be no other question of law, the figures arrived at being merely a result of the calculation of the profits. In obedience to the rule of court, and at the request of the parties, I make an addition to the case as follows:

I have been requested by the appellants to state upon what principle certain figures in the expenses and deductions have been arrived at. The item for locomotive expenses, 468*l.*, has been arrived at by taking the locomotive expenses on the whole Great Eastern system, and then giving to Haughley the same proportion as the number of miles run by trains through Haughley bear to the number of train miles run over the whole system. The item for carriages and waggons, 115*l.*, was arrived at in a similar manner, the difference being that a number of carriages and waggons in each train must be taken into account. The item for miscellaneous expenses, 478*l.*, was agreed to on both sides, and was arrived at by taking the gross amount of miscellaneous expenses applicable to the whole system, and then taking that proportion which the gross receipts in Haughley bore to the gross receipts over the whole line. Both parties agreed that this was the proper mode of apportioning these expenses. The gross traffic in Haughley, 2,660*l.*, is arrived at by taking that part of the receipts which arises from traffic not entirely local on the mileage principle; for example, if the whole fare of a passenger is a certain sum, a proportionate part of this sum is attributed to Haughley according to the number of miles in Haughley.

I have also been requested by the appellants to raise as a question of law for the opinion of the Court the proper mode of making the allowance for the depreciation of rolling stock. I have in the items for locomotive expenses and carriage expenses made a full allowance for the annual repairs of the rolling stock, taken upon an average of several years; and as this stock would after

a certain number of years be worn out, I have allowed the item 76*l.* as the proportionate part of a fund for the renewal of stock worn out. The appellants now contend that I ought, as a matter of law, to have allowed for the depreciation of stock by taking its value at the beginning of the year, and then ascertaining what a new tenant would give for it at the end of the year, and making the difference the amount to be distributed over the line for this deduction. I understood this question to be brought before me as a question of fact; and as the mode of arriving at the supposed value, both at the beginning and at the end of the year, is by estimate and valuation, and not satisfactory (the parish not having the means of testing it), I adopted the first-mentioned mode as more easily applied as well as more correct in principle. If the Court is of opinion that I ought, as a matter of law, to have adopted the mode contended for by the appellants, then, upon the evidence before me, this item of deduction should be increased by the sum of 56*l.*, and the rateable value diminished by a corresponding amount.

J. D. Coleridge (*Keane and Bushby* with him), for the appellants.—It will be convenient, first of all, to consider the proper mode of making the allowance for the depreciation of rolling stock. The appellants contend that this allowance ought to be ascertained by taking the difference between the value of the stock at the beginning of the year (when it is supposed to be let to a yearly tenant) and its value at the close of the year. The depreciation in the value of rolling stock during the first four or five years after its renewal is rapid, but for some ten or fifteen years afterwards it is very slight. It is therefore quite plain that, if the amount to be deducted in respect of annual depreciation is merely that sum which, if put by every year, would, with interest, defray the expense of renewing the stock at the end of a number of years, the deduction will be less than the difference between the value of the stock at the beginning and at the end of the first year. Now, the Parochial Assessment Act provides, that the rateable value of premises is to be the rent at which they might reasonably be expected to let year by year,—deducting therefrom the probable average annual cost of repairs, insurance and other expenses. The act, no doubt, was never intended to apply to railways; but as it has not been amended, its words must be adopted according to their ordinary meaning.

[*COCKBURN, C.J.*—Are we obliged to assume that the statutory tenant from year to year intends to go out at the end of the year?]

The act speaks of a tenant from year to year, and such a tenant can be turned out at the end of eighteen months. If it be objected that the depreciation would be less during the second year, the answer is, that it would bear the same proportion to the reduced price which the incoming tenant would pay for the stock.

[*COCKBURN, C.J.*—But may we not consider, looking at the relation which would subsist between the proprietors and tenants of a railway, that they would contemplate that the tenancy, though legally a yearly one, would last many years?]

To construe the act in this manner would be to treat the word “tenant” as equivalent to lessee for a term of years.

With regard to the second point, respecting what is called “the principle of contributive value,” the claim urged by the respondents is utterly absurd. The Court of Queen’s Bench has long since decided, in *The Queen v. the London and Brighton Railway Company* (15 Q.B. Rep. 313; s. c. 20 Law J. Rep. (N.S.) M.C. 124), *The Queen v. the Great Western Railway Company* (15 Q.B. Rep. 519; s. c. 21 Law J. Rep. (N.S.) M.C. 84) and *The Newmarket Railway Company v. St. Andrews-the-Less* (3 El. & B. 94; s. c. 23 Law J. Rep. (N.S.) M.C. 76), that the mileage principle is not to be adopted, and that the profits can only be taken into account in the parish where they are actually earned. That which is now contended for is really nothing but the mileage principle under another name. Besides, if that which is earned in a

profitable parish is to be added to the earnings of an unprofitable one, the loss sustained by the passage of the line through an unprofitable parish ought to have been deducted from the rateable value of the line in the profitable parish, in order to achieve perfect fairness and equality.—They referred to *Hodgson on Railways*, 819, and *The Queen v. the North Staffordshire Railway Company* (30 Law J. Rep. (N.S.) M.C. 68).

Field (*Horace Lloyd* and *Guise* with him), for the respondents.—The words of the Parochial Assessment Act, with reference to a letting from year to year, cannot exclude all consideration of the subject-matter of the tenancy. It may reasonably be expected that the tenant of a railway would imagine that he was not likely to be disturbed in his possession for some considerable time. The arbitrator was therefore quite right in apportioning the ordinary cost of renewing the stock, instead of supposing that its value ought to be taken at the beginning and end of the year. With regard to the other point, the arbitrator was wrong. He has not taken into account the value which, in addition to the strictly local earnings, is attached to the possession of the line to be rated. The whole line is worked as one concern, and a great portion of the traffic which passes over it is through-traffic. The parish which sends the passenger is the inducing cause of his being forwarded along the whole line, and has a right to have all the profits derived from him in other parishes brought into account. A train starting from Norwich to London, takes up a number of passengers beyond Haughley, who add to the profit of the journey from Haughley to London, though the locomotive expenses of that journey are not increased in the same proportion. It is, therefore, submitted that all the parishes over which passengers are conveyed are equally entitled, per mile per passenger, to any benefit or profit which may be derived from the traffic, and consequently to any increase of profit that in the course of the journey may result from taking up other persons and conveying them in the same carriages. In *The South-Eastern Railway Company v. Dorking* (3 El. & B. 491; s. c. 23 Law J. Rep. (N.S.) M.C. 84), Lord Campbell expressly says that the rateable value of a portion of railway is not necessarily determined by the pecuniary receipts for the use of it within the parish. The estimate ought, therefore, to have been a larger one, and the rate must be amended.

Coleridge, in reply.—Each parish is entitled to the benefit of accidental advantages. The mileage principle, wherever it is possible, ought to be disregarded.—He referred to and distinguished *The South-Eastern Railway Company v. Dorking* (3 El. & B. 491; s. c. 23 Law J. Rep. (N.S.) M.C. 84).

COCKBURN, C.J.—Two questions have arisen in this case. First, whether, in assessing Haughley for rating purposes, the traffic beyond it ought to be taken into account in order that the expenditure within the parish may be reduced; for the more we reduce this expenditure the greater is the profit of the line rated, and the greater, of course, is its rateable value. After some attention to the case, it seems to me that the decision of the arbitrator, Mr. Cleasby, was right. There is a through-traffic from London to Norwich, and, beyond Haughley, on the road to London, there is a large accession to this traffic. Now, it is said by Mr. Field that the effect of this additional traffic is to reduce the expenditure with respect to each individual traveller, so that, supposing him to have started from Norwich, the expense of his carriage through the parish of Haughley must be lessened by taking into account the diminished expense of conveying him upon other parts of the line on the way to London. But I do not think that the expenses of the line to be rated ought to be calculated with reference to the cost of conveying passengers. The working expenses of the whole of the traffic between Norwich and London ought to be ascertained, and a proportionate part of these expenses must then be apportioned to the traffic in Haughley. The cost of carrying a passenger may vary upon different parts of the line, but the working expenses may still be after a uniform rate. This may be illustrated by the case of the old stage-

coaches. The expense of running a stage-coach between Norwich and London was so much per mile, with hardly any variation. Sometimes there were five passengers, sometimes fifteen. If there were five passengers, the coach ran at a loss; if there were fifteen, its journey was a profitable one. So, also, with this railway: when it is being worked from Norwich to Haughley the profit is likely to be less than when it is being worked along those parts of the line beyond Haughley, where there is received a large addition to the passengers and traffic, so that the rest of the journey is lucrative and profitable. There is also this fallacy in Mr. Field's argument, for according to him, the working expenses of the line rated are to be got at by taking into account the profits of the additional traffic beyond Haughley, and not the mere working expenses of this traffic. These profits, whether by accident or not, are acquired without and beyond the parish of Haughley, and they cannot be rated as belonging to that parish. The first question must therefore, I think, be decided in favour of the appellants.

The other question is, whether, in making deductions in respect of the repairs and renovation of the railway stock, the arbitrator was right in dealing with the case upon the supposition that the hypothetical tenant would make his calculations as to the amount of rent under the assurance that the stock would be replaced at the end of what may be called its natural life, or whether these deductions are to be made by finding the difference in the value of the stock at the beginning and end of the year of tenancy. Mr. Coleridge strongly urged upon us that we should be departing from the words of the statute if we held that the arbitrator was right in his view that the deductions in respect of repairs ought to be spread over the whole period of the natural life of the stock. But it is one thing to start with the assumption that you are dealing with a tenancy from year to year, and another to say that the circumstances are such that the hypothetical tenant, in considering what rent he shall pay, is bound to assume that his tenancy will not last beyond a year. It is undoubtedly a tenancy from year to year, but it is a tenancy of such a character that the tenant may well think it worth his while to deal with the rolling stock as though he were sure that his tenancy will not be broken up at the end of the year; and if it were shewn that in a large number of yearly tenancies the tenant does deal with his stock in this manner, this fact ought to be considered in valuing the rent payable under a yearly tenancy of this railway. At all events, the question, whether the tenant would make his deductions upon one principle or the other, is a matter of fact which must be decided by an arbitrator or at sessions, as the case may be. Now, I think that there is nothing in the Parochial Assessment Act which requires us to say how the arbitrator ought to have decided upon a question of fact, and whether he has decided rightly or wrongly. He must find out the circumstances which are likely to exercise an influence upon the person to whom a railway is let from year to year, and how much rent he might fairly be expected to give. When he has come to a conclusion, it is not our province to disturb it, or even to pass an opinion upon the reasoning which has guided him. This question must, therefore, be decided in favour of the respondents.

MELLOR, J.—I am of the same opinion on both points. It is our task to say what is the rateable value of a portion of a line of railway passing through several parishes. This value must depend upon the actual earnings of the railway within the parish, deducting the expenses which properly belong to this part of the line. Now, Mr. Field has argued, with much ingenuity, that the earnings within the parish ought to include part of the profits of the traffic when it has passed beyond the parish. But, as it seems to me, there is this fallacy in his argument—he loses sight of the fact that the fares of the passengers, which go to make up these profits, are actually earned in parts beyond the parish. And with regard to his argument that the part of the line within the parish, by serving as a feeder to those parts in other parishes, makes

the average expenses per passenger of those parts less than they otherwise would be, the same observation may be made. The accession of traffic, and the consequent diminution of expenses without the parish, are the result of an accident, the benefit of which belongs to those parishes where the accident takes place. The rent and the rateable value of the line in those parishes will be greater than that in others. It seems to me, therefore, that, with regard to the first question, Mr. Cleasby is right.

With reference to the second, it is, no doubt, one of the difficulties which arise upon the construction of this act of parliament; but I do not think that the arbitrator is bound to disregard any other circumstance than the value of the stock at the beginning and end of the year. I think that it is quite fair for him to look at the nature of what is supposed to be let, and the probable though uncertain duration of the tenancy,—in fact, at all matters which would be considered by a tenant in contracting to pay rent. For my own part, I think that much is to be said in favour of the conclusion at which the learned arbitrator has arrived, although it is not necessary for us to say more than that he was not compelled to come to another conclusion. The question is one of fact, and must be settled by the arbitrator or the Sessions. I think, therefore, that our judgment must be in favour of the company on the first point, and against them on the other.

SHEE, J.—I am of the same opinion. The decision of the learned arbitrator is objected to by the respondent parish, because he has taken, as the basis of his calculation, the actual gross receipts of the railway in the parish of Haughley, although the mode in which the amount of receipts included in his calculations was ascertained is not objected to. The respondents attack the sufficiency of the estimate of profits; and, without finding fault with the mode in which each item was ascertained, say that an item was left out which ought to have been admitted. They say that the learned arbitrator has omitted from his estimate what is called "contributive value," that is, a value beyond that of the actual receipts of the railway in the parish of Haughley, arising from the circumstance that the company occupy it, together with other parts of the line, particularly that between Haughley and London; and that this contributive value ought to be added to the actual value found by the arbitrator in the manner described in the case. It appears to me that this cannot be done without adopting the mileage principle, instead of the parochial principle; although the parochial system has always been adopted in assessing railways to the poor-rate. It has been expressly decided in several cases, following *The King v. Kingswinford* (7 B. & C. 236), where the parochial system was applied to a canal, that railway is to be rated in respect of the profits earned within the parish. And in *The Queen v. the London, Brighton and South Coast Railway Company* (15 Q.B. Rep. 313; s. c. 20 Law J. Rep. (N.S.) M.C. 124) it was laid down that the amount of the traffic over the portion of the railway in each parish, taken in connexion with the proper deductions, must regulate the amount of the rate; and that if the portion of a line within a parish is more productive than other portions in other parishes, either because there is more traffic or because the yearly outgoings and expenses there are less, it ought to be assessed at a higher proportionate value. This being the case, I cannot think of any better mode than that adopted by the learned arbitrator, or one less likely to produce difficulty or lead to inconvenience and injustice.

We now come to what is urged on the part of the appellants, the railway company. They say that, putting aside all questions of contributive value, the arbitrator, in ascertaining the net annual value of the traffic in the parish, ought to have deducted the actual amount of depreciation in the rolling stock by wear and tear in the course of one year from the commencement of the tenancy. The principle adopted by the arbitrator was not to assume that the supposed tenancy would only continue for a year and a half, and he made his estimate upon the supposition that no tenant would contemplate so early

an end of his tenancy, and that the fair mode of finding the annual cost of preserving the rolling stock necessary for the line to be rated, would be to see what amount per annum, during the natural life of the rolling stock, would be sufficient to keep it in the same effective state. Now, it cannot be denied that in what he did he was unable to comply literally with the directions of the Parochial Assessment Act, that the estimate must be according to the rent at which the hereditaments might reasonably be expected to let from year to year. But these words are hardly applicable to such a particular description of property as a railway, and must, I think, be taken according to some reasonable intendment. If we find that a tenant of a railway, although his legal interest would not be greater than that of a tenant from year to year, would make his calculations upon the understanding that he would not be dislodged before the lapse of a number of years, we cannot say that the estimate made by the learned arbitrator was an improper one. I think, therefore, that he came to a right conclusion on both points.

Judgment for appellants on the question of contributive value, and for respondents on the question of deductions

[IN THE COURT OF COMMON PLEAS.]

June 21, 1866.

BUDENBERG, *appellant*, v. ROBERTS, *respondent*.

35 L. J. M.C. 235; L. R. 1 C.P. 575; 15 L. T. 387; 14 W. R. 992.

Customs Amendment Act, 1859, 22 & 23 Vict. c. 37. ss. 6. and 8.—Importing Goods of one Denomination concealed in those of another—"Cause to be imported."

CUSTOMS AND EXCISE.—*It is an offence, under section 6. of the Customs Act, 22 & 23 Vict. c. 37, to cause to be imported goods of one denomination concealed in packages of goods of any other denomination, though the goods be such as are not subject to any duty on importation.*

The 6th section imposes a penalty on any person who "shall cause to be imported goods of one denomination concealed in packages of goods of any other denomination," and the 8th section enacts, that the word "importer" in any act relating to the Customs is "to apply to and include any owner or other person for the time being possessed of or beneficially interested in any goods imported":—Held, that the words "cause to be imported" in the 6th section are not to be interpreted according to the meaning given to the word "importer" in the 8th section, which includes many persons who would not come within the 6th section.

Case stated by the stipendiary Magistrate for the borough of Liverpool, in the county of Lancaster, under the 20 & 21 Vict. c. 43.

At a petty sessions, holden at Liverpool aforesaid for the borough of Liverpool, on the 29th of March and on the 2nd of April, 1866, Arnold Budenberg, hereinafter called the appellant, was convicted on an information, preferred by John Roberts, an officer of Customs, and hereinafter called the respondent, under the direction of the Commissioners of Customs, charging that he, the said appellant, did, on the 21st of December, 1865, cause to be imported into the port of Liverpool, being a port of the United Kingdom, to wit, at Liverpool, in the borough of Liverpool aforesaid, certain

goods of one denomination, to wit, eight kegs containing 7 cwt. of gunpowder, the said gunpowder being then and there concealed in certain packages of goods of another denomination, to wit, in eight casks containing about 18 cwt. of china clay, contrary to the 6th section of "The Customs Amendment Act, 1859," whereby the said appellant had forfeited the penalty of 100*l.*, for which the Commissioners of Customs had elected to sue, and the appellant was adjudged for his said offence to forfeit and pay the sum of 100*l.*, to be paid and applied according to law, and also to pay the sum of 8*l.* 5*s.*, being the amount of costs awarded to Her Majesty in that behalf; and if the said several sums were not paid forthwith, the appellant was adjudged to be imprisoned in the gaol at Walton, in the said county, until the said several sums should be paid.

On the application of the appellant, the Magistrate stated and signed the following

CASE.

On or about the 15th of December, 1865, one A. Ehrenberg shipped at Antwerp, on board the *Neva* steamer, for Liverpool, eight casks, which he represented as containing china clay.

Ehrenberg consigned the casks so shipped to Messrs. Dunkerley & Steinmann, of Liverpool, the agents for the *Neva*, and took from the captain of the vessel a bill of lading in the ordinary form, undertaking to deliver the casks to Messrs. Dunkerley & Steinmann or their order; and by a letter, dated Antwerp, December 15, 1865, he wrote Messrs. Dunkerley & Steinmann with the bill of lading, and stated that the casks were for Messrs. Schäffer & Budenberg, whose directions they would have to follow. In each of five of the casks of clay so shipped by Ehrenberg was concealed a keg of gunpowder of 100 pounds in weight, and in each of the other two casks of clay was also concealed a keg of gunpowder of 50 pounds in weight.

On the 17th of December Dunkerley & Steinmann received from Messrs. Schäffer & Budenberg a letter, of which the following is a copy:

" Manchester, Dec. 16, 1865,
96, George Street.

" Messrs. Dunkerley & Steinmann,
Liverpool.

" Gentlemen.—We have been informed that Mr. Ehrenberg shall forward to your address, and for our disposal, by the steamer *Neva*, leaving Antwerp for Liverpool on Monday, the 18th instant, eight barrels of china clay, namely,

" B. No. 1.	Gross weight,	196	kilog.
" 2.	"	208	"
" 3.	"	208	"
" 4.	"	220	"
" 5.	"	190	"
" 6.	"	200	"
" 7.	"	210	"
" 8.	"	200	"

" Please store the above, informing us of their safe arrival, and we shall instruct you how to forward the same to different places. We remain, &c.,

" Schäffer & Budenberg."

On Sunday, the 17th of December, 1865, Ehrenberg, who was then in London, saw Budenberg, and informed Budenberg of the shipment to Messrs. Dunkerley & Steinmann of the eight casks, and that the clay contained the kegs of gunpowder.

There was no evidence before me that prior to the 17th of December Budenberg had any knowledge of the shipment of the clay, or of the fact of

its containing the kegs of gunpowder. The *Neva* arrived in Liverpool on or about the 21st of December, 1865, and forthwith discharged her cargo.

On the 19th of December, 1865, Budenberg went to Liverpool, and there saw Messrs. Dunkerley & Steinmann, to whom the casks of clay had been consigned. He then informed them of the fact that there was gunpowder contained in the clay, and requested them to take steps to get the casks passed through the custom-house.

After this interview, Messrs. Dunkerley & Steinmann took the usual steps to get the goods passed through the custom-house, and their clerk requested the examining officer to pass them without examination; but on his refusal to do so, and after directing a sub-officer to bore the casks, the clerk informed the Customs officer that there was gunpowder contained in the clay.

On receiving this information the custom-house authorities caused the clay and the powder contained in it to be seized, and it has ever since been retained by the custom-house authorities, and they ultimately caused the information above set forth to be laid against Budenberg, his partner Schäffer residing abroad.

In addition to the above facts, it appeared that neither china clay nor gunpowder is subject to any duty on importation.

I considered it was proved that goods of one denomination concealed in goods of another denomination had been imported; and, having regard to the meaning of the word "importer," as defined by the 8th section of "The Customs Amendment Act, 1859," I came to the conclusion that Budenberg was the importer thereof; and I also considered that the same definition must be applied to the term, "if any person shall cause to be imported," used in the 6th section of the said last-mentioned act.

The question for the opinion of the Court is, whether, under the circumstances, my decision was right in point of law.

Holker, for the appellant.—In the first place, it is submitted that, to bring the case within the 6th section of the Customs Amendment Act, 1859 (22 Vict. c. 37),¹ it is not enough that a person should import goods of one denomination concealed in packages of goods of another denomination; but it must be done to evade duty, and where neither class of goods is subject to any duty, there is no offence within that section; for the section goes on to say, or "shall cause to be imported any package of goods as of one denomination, but which shall afterwards be discovered . . . to contain other goods subject to a higher rate or amount of duty." The offence to which the section points is evidently the offence of importing goods liable to a higher duty concealed under goods subject to a lower duty. That, however, was not what occurred in the present case. Here the Customs were not defrauded, and the only persons who had a right to complain were the owners of the vessel that carried the goods. If the construction contended for by the other side be the true one, the importing sugar mixed with sand or cotton packed with stones to increase the weight would equally be offences under this section. Next, there was no evidence that the appellant was a person who caused to be imported within

(1) The following are sections 6. and 8. of the Customs Amendment Act, 1859 :

Section 6.—"If any person shall cause to be imported goods of one denomination concealed in packages of goods of any other denomination, or shall directly or indirectly cause to be imported or entered any package of goods as of one denomination, but which shall afterwards be discovered, either before or after delivery thereof, to contain other goods subject to a higher rate or amount of duty than those of the denomination by which such package was entered, such package and all goods contained therein shall be forfeited, and every person shall forfeit and pay for every such offence a penalty of 100*l.*, or treble the value of the goods contained in such package, at the option of the Commissioners of Customs."

Section 8.—"For the removal of doubts as to the meaning and application of the word 'importer,' as used in the Customs Acts, the word 'importer' in any act relating to the Customs is hereby declared to apply to and include any owner or other person for the time being possessed of or beneficially interested in any goods imported into the United Kingdom, from the time of the importation thereof until they shall, on payment of the duties thereon or otherwise, be duly delivered or discharged from the custody or control of the Customs."

the meaning of the 6th section. The Magistrate considered the 6th section was to be interpreted by the 8th section; and that, according to the meaning of "importer" in that last section, the appellant was an importer within the 6th section. That must be erroneous, for the legislature never could have intended that the person mentioned in the 6th section as the person who caused to be imported was to comprise every one who came within the meaning of "importer" in the 8th section. The 6th section intended to create an offence as regards only the person who might be presumed to have had knowledge of it, that is to say, the person who caused the goods to be so imported; but if it is to extend to all who are comprised in the 8th section, it would include many who might be entirely innocent of any fraud. Lastly, the appellant does not appear to have known anything of the concealment of gunpowder in the clay until after the shipment of the casks; and a person ought not to be convicted under the 6th section of the act, unless it was shewn he had knowledge of the concealment.

Lock (T. Jones with him), for the respondent.—It is not necessary that the goods should be subject to any duty; the words in section 6, "If any person shall cause to be imported goods of one denomination concealed in packages of goods of any other denomination," constitute a separate offence from that of concealing goods in packages of goods subject to a lower rate of duty, to which the rest of the 6th section relates.

[*ERLE, C.J.*—I think that section points to two offences: one importing goods of one denomination concealed in those of another denomination, and the other importing goods liable to the higher duty concealed in goods liable to the lower duty. You need not argue any further this first point.]

Then, as to the second point. There was evidence that the appellant caused these goods to be imported. The consignees of the casks were the mere agents for the steamer, and they were told by the consignor that the casks were for the appellant and his partner, whose directions they were to follow. The letters of the 15th and 16th of December clearly shew for whose account the casks were sent, namely, that of the appellant and his partner. Moreover, the appellant informed the consignees, after the casks had arrived, that there was gunpowder in the clay, and requested them to pass the casks through the custom-house, so that altogether there was evidence on which the Magistrate might have come to the conclusion, without reference to the 8th section, that the appellant was, to all intents and purposes, the importer; and the Magistrate was therefore well warranted in finding him to be the importer.

Holker, in reply.—The Magistrate was not satisfied from the evidence before him that the appellant had caused the gunpowder to be imported, for the Magistrate evidently only considered the appellant was the importer by reason of the large interpretation given to the word "importer" by the 8th section.

ERLE, C.J.—I think that the statement of the conclusion of law relating to this statute at the end of the case is a statement of a conclusion of law which has not my concurrence; because, if I understand the statement of the learned Magistrate rightly, he has in effect stated that the importer, according to the definition of the 8th section, is a person who has caused to be imported within the meaning of the 6th section. I think the word "importer" in section 8. includes many persons who would not come within the meaning of the 6th section. If any beneficial interest in goods imported be created in a third person, that third person would become an importer within the meaning of the 8th section, and yet he would be by no means a person within the meaning of the 6th section; otherwise if a person had imported goods, and there was a concealment, such as inclosing one within another, I might buy them ever so innocently whilst they were in the custom-house, and the words of this conviction would make me liable to a penalty of 100*l.* and the forfeiture of the goods, as the importer of the goods. But I

am not within the meaning of the words of the man who caused the goods to be imported. I think the two sections have a different bearing. Then I think that a finding that the party "caused to be imported" is abundant to convict under that 6th section; and I propose to send the case back again to the Magistrate, not to re-state the facts,—he has examined all the facts and he has all the evidence before him,—but after stating what I have done about the difference between the man who causes to be imported and the person who is included in the definition of "importer" in the 8th section, I think it ought to be sent back to the Magistrate to see whether he draws the inference that Budenberg "caused to be imported." And I am of opinion that Budenberg caused to be imported, either if he sent an order to Mr. Ehrenberg, and in pursuance of the order Ehrenberg sent them, or if there had been a communication between Ehrenberg and Budenberg, and both of them had co-operated with mutual knowledge that gunpowder should be sent into England inclosed in casks of clay, or if there had been a communication between them "whenever a convenient season let some gunpowder be sent in a certain number of casks." If there was anything of an understanding between Ehrenberg and Budenberg, in pursuance of which Ehrenberg sent the gunpowder to Budenberg, there was abundant evidence from which the Magistrate might have drawn the conclusion that Budenberg caused to be imported. As it is, I do not know whether he means to negative such knowledge on the part of the appellant, or to find that the appellant caused to be imported. It appears to me that the whole transaction has upon the face of it many signs of the parties acting mutually with knowledge of illegality, and the sending of an article from a foreign correspondent to a correspondent in England, with a known violation of the Customs law, is very good evidence that those parties were acting with an understanding.

MONTAGUE SMITH, J.—I understand that the Magistrate has asked us whether he was right in point of law in considering the words "caused to be imported," in the 6th section, are to be interpreted in the same way as the word "importer" is to be interpreted by force of section 8. in the same act. I think the words are not to be interpreted by that interpretation clause, and that the words "caused to be imported" in the 6th section are to be read in their fair and ordinary sense, and not in the constructive sense that is given to the word "importer" in the interpretation clause, section 8. Therefore, I agree with my Lord in thinking that in point of law the Magistrate was wrong in the construction of the act, and I concur in thinking that the case should be sent down to him to be re-stated, not that he should take fresh evidence, but in order that he should state as a fact whether with reference to the words "caused to be imported" in the 6th section, he was at the time of the conviction satisfied that the appellant had caused those goods to be imported.

Case remitted. .

[IN THE COURT OF COMMON PLEAS.]

June 21, 1866.

THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY,
appellants, v. REEVES, respondent.

85 L. J. M.C. 239; 1 H. & R. 845; L. R. 1 C.P. 580; 14 L. T. 662;
14 W. R. 967; 12 Jur. N.S. 786.

See *Toomer v. Reeves*, [1868] E. R. A.: 37 L. J. M.C. 49; L. R. 3 C. P. 62;
17 L. T. 149; 16 W. R. 83 (C.P.).

Turnpike Act—3 Geo. 4. c. 126. s. 32—*Exemption from Toll—Stores for the Use of Troops—Carrier.*

HIGHWAYS.—*The exemption from toll in the Turnpike Act, 3 Geo. 4.*

c. 126. s. 32, in favour of carts conveying stores for the use of Her Majesty's forces, applies, although the cart conveying such stores be the cart of a common carrier hired for that purpose by the contractor for such stores, and although the contract contains a power to the officer in command at the depot to which they are being conveyed, of rejecting them, if they should not be of a certain quality.

CASE stated by Justices, under 20 & 21 Vict. c. 43, from which it appeared that an information was laid under the General Turnpike Act, 3 Geo. 4. c. 126, charging the respondent with having taken from the appellants at a toll-gate called the Farnborough gate, in the county of Hants, the sum of 6d. for toll in respect of a waggon containing hay drawn by two horses, which waggon and horses were then exempt from toll as being employed in conveying commissariat for the use of Her Majesty's forces within the meaning of the 32nd section of the said act.

At the hearing it was proved that the hay being conveyed in the said waggon had been delivered by certain persons trading under the name and firm of Messrs. Toomer Brothers (who were then contractors for the supply of forage and other commissariat supplies for the uses of Her Majesty's forces at Aldershot, in the said county) to the appellants, to be conveyed by them to the commissariat stores at Aldershot aforesaid. That the said hay was sent by the said Messrs. Toomer Brothers for the use of Her Majesty's forces at Aldershot, in pursuance of a certain contract for commissariat supplies made on the 17th of January, 1866, between them and Her Majesty's Deputy Commissary General to supply hay and other forage at Aldershot camp and command in such quantities, at such times, and at such barracks or camps as might be required within the command by the proper officers, as specified in certain conditions thereto annexed, subject, among other things, to the following conditions:

" 2. The contractor shall deliver the forage at his own expense, at such periods and in such quantities as may be required, into the stores or on the ground at Aldershot, or at Woolmer Forest, or wherever horses may be quartered or picketed within the command as may be directed by the officers appointed for that duty.

" 4. The officer commanding may, on application from officers commanding regiments or corps for their respective services, or whenever he may deem fit, appoint a brigade or additional board to inspect the supplies, and if the board shall be of opinion that they are not of the quality specified in the conditions, they shall be rejected, and the officer of the commissariat may, without further appeal, purchase such supplies as may be required to replace those rejected, as provided in clause No. 3.

" 16. A stock of oats, hay and straw, sufficient at least for fourteen days' consumption for the number of horses actually in the camp and command, shall be kept by the contractor. This stock shall be inspected and approved by the Deputy Commissary General, or other officer acting for him; and the issues to the troops shall be made from such supply in the order in which the same may have been inspected and approved. The Deputy Commissary General, or other officer acting for him, shall have full power and authority to reject any article offered which may appear to be of inferior quality; and in case of a proper supply of the respective articles not being immediately provided in lieu of those so rejected, or whensoever the stock of forage shall be less than the fourteen days' supply prescribed, the Deputy Commissary General, or other officer acting for him, shall have full power to purchase such quantities as may be thus rejected or deficient, as provided in clause 3."

The said hay was being conveyed according to the terms of the said contract for delivery, on behalf of the contractors, in terms of the provision in clause 2. of the contract; and in order to take the hay to the said

commissariat stores, it was necessary for the said waggon and horses to pass through the said toll-gate.

On the waggon and horses arriving at the said toll-gate, the respondent demanded and took from the appellants the sum of 6*d.* as and for toll in respect of the said waggon and horses, and refused to allow the same to pass except on payment of such toll, although the appellants then claimed exemption from such toll, on the ground that, the said hay being for the use of Her Majesty's forces, the said waggon and horses were exempt from such toll. The respondent was a person duly authorized to demand and take such toll as was legally payable at the said toll-gate, and the amount demanded and taken would be the amount of toll legally payable for the said waggon and horses if any were payable.

It was contended, on behalf of the appellants, that no toll was payable, inasmuch as the waggon and horses were within the exemptions from toll mentioned in the 32nd section of the said act, and were a waggon or other carriage and horses drawing the same, conveying commissariat or other public stores for the use of Her Majesty's forces. The said Justices were, however, of opinion that the said waggon and horses were not within the said exemption. The question for the opinion of the Court of Common Pleas was, whether such decision of the said Justices was right.

C. Wood, for the appellants.—It is submitted that the Magistrates were wrong, and that the waggon of the appellants came within the exemption of section 32. of 3 Geo. 4. c. 126. That section exempts from toll "any waggon, wain, cart, or other carriage whatsoever," &c., "employed in conveying any ordnance, or barrack, or commissariat, or other public stores, of or belonging to His Majesty, or for the use of His Majesty's forces." In the present case the hay was being sent for the use of the forces at Aldershot; but, because the contract under which the hay was sent contained a power to the officer in command to reject it, if not of a certain quality, it was contended before the Magistrates, on behalf of the respondent, that the hay was not necessarily part of Her Majesty's stores. Still, notwithstanding such power of rejection, the waggon was conveying stores for the use of Her Majesty's forces, and was, therefore, within the exemption. In the points of argument delivered for the respondent, it is stated that the exemption does not apply to carriers for hire, but is limited to the contractor removing from his store to the depot. If that were so, the Crown would, indirectly, have to pay the toll, as the price would be affected by it, and so the exemption would be lost.

No one appeared for the respondent.

ERLE, C.J.—I am of opinion that the decision of the Magistrates was wrong. It is clear that stores sent for the use of Her Majesty's forces are by the act exempt from toll, and these stores were here in course of being conveyed by the contractor for the use of Her Majesty's forces. It is said, however, that if a contractor employs an agent or carrier to convey and deliver the stores for him, that then the exemption does not apply; but that is not so, for I am clearly of opinion that the contractor may hire any one he pleases to carry the stores for him, and that, according to the maxim *qui facit per alium facit per se*, the person so carrying the stores for the contractor is the same as the contractor himself conveying stores for the use of Her Majesty's forces, and within the exemption.

BYLES, J., and MONTAGUE SMITH, J., concurred.

Decision reversed.

[IN THE COURT OF COMMON PLEAS.]

May 26, 28, 1866.

WILDES v. RUSSELL.

35 L. J. M.C. 241; L. R. 1 C.P. 722; 16 L. T. 478; 14 W. R. 796;
12 Jur. N.S. 645.

*Office of Clerk of the Peace—Misdemeanor—1 W. & M. c. 21. s. 6.—
Impeaching Adjudication of Sessions.*

MAGISTERIAL LAW.—*A contumacious refusal by a clerk of the peace to record an order of the Court of Quarter Sessions is a misdemeanor in the execution of the office of such clerk within the meaning of section 6. of 1 W. & M. c. 21, and for which therefore the Justices may discharge him from such office.*

Where a judgment of the Court of Quarter Sessions shewed that charges in writing, under the 1 W. & M. c. 21, had been exhibited before such Court against the clerk of the peace, alleging that he had wilfully and contumaciously refused to enter and record a certain order of that Court, ordering certain costs incurred by the Justices to be paid, and that having heard the same and what the clerk had to allege in defence, the said Court had adjudged the charges to be proved, and had adjudged such clerk to be guilty of the misdemeanor in his office with which he was so charged, and had on account thereof dismissed him from his said office:—Held, that such judgment, being good on the face of it, was conclusive, and could not be reviewed by a jury in an action by such clerk against a subsequently appointed clerk to try the right to the fees of the office.

Held, also, that such judgment could not be impeached in such action, on the ground that the Justices who had adjudged had a pecuniary interest in the order being recorded which the clerk had so refused to record, nor on the ground that the charges against the clerk had been exhibited at the instigation of the Justices who afterwards adjudged him guilty thereon.

This was an action for money had and received, brought by the late against the present clerk of the peace for the county of Kent, to try the question whether the plaintiff had been properly removed from the said office.

The plaintiff had held the office of clerk of the peace for the county of Kent for several years prior to his dismissal, which occurred on the 23rd of May, 1865, and having claimed a right to certain fees called transportation fees, which the Sessions disputed, he had in November, 1864, obtained a rule nisi from the Court of Queen's Bench for a mandamus to compel the payment of the same. This rule was afterwards discharged on terms, the matter being compromised; but a Mr. Scudamore, an attorney, had been engaged by certain of the Justices, acting on behalf of the Sessions, to resist the mandamus, and a bill of costs, amounting to 169*l.* 16*s.* 6*d.*, had become due to Mr. Scudamore for services rendered by him as such attorney on the occasion of such mandamus and in effecting the compromise. This sum the finance committee of Justices recommended to be paid out of the county-rate, in a report they made at a Court of Quarter Sessions held on the 10th of January, 1865, and that Court, adopting such recommendation, thereupon ordered its payment.

It would be the duty of the clerk of the peace to enter such order on the proceedings of the Court and for the county treasurer afterwards to pay the bill so ordered to be paid. In practice, the treasurer, however, pays before the order is formally entered and recorded by the clerk of the peace, and he did so on this occasion.

Although full particulars of Mr. Scudamore's bill of costs had been given to the finance committee, only a short note of the bill had been presented to

the Sessions by such committee, in which the amount was stated to be due to Mr. Scudamore for professional services rendered and money paid on account of the general business of the county. The plaintiff refused to record the order for the payment of this bill, and, in a letter which he wrote to Lord Romney, the chairman of the Court of Sessions, he stated that his reason for not entering the order was, that the bill had not been presented in the usual manner by the finance committee, but only a short note of it, and that he would therefore report to the Court on the subject. At the next meeting of the Court the plaintiff did so, when, amongst his reasons for not entering the order, he stated his objection to there not being a bill of costs with the items presented, and also that the costs were such as ought not to be borne by the county, but only by those Justices who had engaged Mr. Scudamore and who had so incurred them on their own individual responsibility. Being, however, called on by the chairman to state whether he still refused to enter the order, he replied he did, and the matter was referred to the finance committee to take such measures as they should think right on the subject. This committee took counsel's opinion, and acting thereon got the county treasurer to exhibit at the Court of Sessions charges in writing against the plaintiff, under the statute 1 W. & M. c. 21, in which, after setting out the order of the Court of Sessions, ordering 169l. 16s. 6d. to be paid to Frederick Scudamore by the treasurer, and stating that it was the duty of the plaintiff as clerk to enter and record such order on the proceedings of the Court, it was alleged that the plaintiff "wilfully, wrongfully, maliciously and contumaciously, and without reasonable or lawful excuse, refused to enter and record such order, and so had misdemeaned himself in the execution of his office."

These charges came before the Court of Quarter Sessions on the 23rd of May, 1865, when, after hearing evidence and counsel both for and against the plaintiff, the Court adjudged the charges to be proved, and dismissed the plaintiff from his said office of clerk. The formal judgment of such Court as drawn up set out the written charges which had been so exhibited, and after stating the hearing on the 23rd of May, 1865, and what was then insisted on by the plaintiff and his counsel in his defence, proceeded as follows: "The Justices in Court of Quarter Sessions, on the said 23rd of May, do adjudge and find that the said complaint and charges in writing, and all and every the allegations and averments, matters and things in the same contained, have been duly proved before them and are true, and that the said Henry Atkinson Wildes has been duly proved to be and is guilty of the several misdemeanours in the execution of his said office of clerk of the peace in the said complaint and charges in writing alleged, and the said Justices do now therefore openly in the said last-mentioned Court of General Quarter Sessions of the Peace holden in and for the said county, on account of the said misdemeanors, and of each of them, so proved as aforesaid, discharge the said Henry Anderson Wildes from his said office of clerk of the peace for the said county, pursuant to the statute in such case made and provided."

At the trial, before Erle, C.J., on the facts above stated, the counsel for the plaintiff sought to impeach the judgment of the Court of Quarter Sessions, on the ground that the Justices had acted both as prosecutors and Judges, and had moreover a pecuniary interest in the matter which disqualified them from trying the charges against the plaintiff, as, if Mr. Scudamore's bill was not paid out of the county-rate, it would have to be paid by those Justices who had engaged him, and that the plaintiff was justified in refusing to enter the order, and that his refusal to do so was, under the circumstances, not a misdemeanour within the meaning of the statute. The learned Judge, however, ruled that the judgment of the Court of Quarter Sessions was conclusive, and could not be reviewed by a jury or impeached in the way proposed, and he accordingly non-suited the plaintiff.

A rule *nisi* was subsequently obtained by *Montagu Chambers*, for the plaintiff, to set aside such nonsuit and for a new trial, on the ground that the plaintiff was entitled to sue for the fees pertaining to the office of clerk of the peace of the county of Kent, as the lawful holder of that office; that the plaintiff was not lawfully dismissed from the said office, nor the defendant lawfully appointed thereto; that the order or adjudication of the Court of Quarter Sessions purporting to dismiss the plaintiff from the said office was illegal and void; that the Court of Quarter Sessions by whom such order was made was improperly and illegally constituted, the Justices, or some of them, who were present or taking part in the proceeding being incompetent or disqualified through personal or pecuniary interest, or as accusers, prosecutors, parties, witnesses, or otherwise interested in the result; that all the proceedings, or some of them, for the purpose of removing the plaintiff from his said office, were unlawful and void; that the alleged misconduct of the plaintiff did not constitute a misdemeanour in the execution of his office within the 1 W. & M. c. 21. s. 6, and that the Justices had no jurisdiction to examine or adjudicate thereon; that no sufficient complaint or charge in writing was duly or lawfully exhibited against the plaintiff to the Justices in Sessions, or in compliance with the statute, and that the information or complaint upon which the Justices assumed to proceed was merely colourable; that the plaintiff did not misdeemean himself in the execution of his duty within the meaning of the statute, nor was he guilty, or proved to be guilty, of the charges or offences made or alleged against him; and that the order purporting to discharge the plaintiff from his office of clerk of the peace was not fairly or lawfully obtained.

Against this rule,

Bovill and *C. Pollock* now shewed cause.—This action is brought to try the question whether the plaintiff was rightly dismissed from the office of clerk of the peace. The 6th section of the statute 1 W. & M. c. 21, on which this question arises, enacts, "that if any clerk of the peace already nominated, or to be nominated, as aforesaid, shall misdeemean himself in the execution of the said office, and thereupon a complaint and charge in writing of such misdemeanour shall be exhibited against him to the Justices of the Peace in their General Quarter Sessions, it shall be lawful for the said Justices or the major part of them, from time to time, upon examination and due proof thereof, openly in their said General Quarter Sessions to suspend or discharge him from the said office." It is said by the other side that this section gives no power to dismiss unless the clerk be guilty of an indictable offence; but that is not the meaning of misdemeanour in this section, as shewn by the preceding section, the 5th, which makes the appointment "for so long only as such clerk of the peace shall well demean himself in his said office." Here the charge which was exhibited against Mr. Wildes shews a wilful neglect and an absolute refusal to obey the order of the Justices. That of itself, it is submitted, would amount to a forfeiture of his office. How could the Quarter Sessions have gone on after such refusal had they done otherwise than they did? But it was for such Court alone to determine the character of the act of their clerk; and they having so determined it, their judgment is conclusive—*The Queen v. Bolton* (1 Q.B. Rep. 66; s. c. 10 Law J. Rep. (N.S.) M.C. 49), *In re Clarke* (2 Q.B. Rep. 619; s. c. 11 Law J. Rep. (N.S.) Q.B. 75) and *The King v. Grundon* (Cowp. 315). And in *Carus Wilson's case* (7 Q.B. Rep. 984) the Court of Queen's Bench held that whether what had been done by Mr. Wilson was a contempt or not of the Royal Court of Jersey was a matter which that Court had to decide for itself. That a wilful and absolute refusal to act is a forfeiture of an office is well established by authority—*Bac. Abr.* tit. 'Office and Officers,' M, and *Philips v. Bury* (1 Ld. Raym. 5. 9), where Lord Chief Justice Holt laid down as law that "contumacy was a good cause of deprivation," and in *The King v. Wells* (4 Burr. 2004) Lord Mansfield, in giving judgment, said, "I think the law is well laid down

by Serj. Hawkins in treating of offences by officers by neglect or breach of duty. He says, it is certain that an officer is liable to a forfeiture of his office, not only for doing a thing directly contrary to the design of it, but also for neglecting to attend his duty at all usual, proper and convenient times and places whereby any damage shall accrue to those by or for whom he was made an officer." If the facts were as they are stated in the judgment of the Quarter Sessions, the Justices would be entitled to discharge the plaintiff from the office he held, and the finding of that Court as to those facts cannot be controverted by a jury. That the evidence need not be set out in the order, as this Court will intend everything to be right which does not appear to be otherwise, is established by *The King v. Lloyd* (2 Strange, 996), and by Buller, J., in *The King v. the Undertakers of the Aire and Calder Navigation Company* (2 Term Rep. 666). On the part of the plaintiff, it was said that he had a right to take the opinion of the jury as to whether the plaintiff had acted properly or not in refusing to record the order for the payment of Mr. Scudamore's bill of costs on the ground that the order was not a valid one. This, it is submitted, he had no right to do, and that nothing the jury could say would affect the validity of the order. Next, it was said that some of the Justices would have been personally liable for the amount of these costs unless they were paid out of the county-rate; that therefore they had a pecuniary interest in the matter. Even if they were interested, that would not have affected the validity of the order; until it had been quashed, the decision of the Justices would have been good, and the conduct of the plaintiff in refusing to record it would have been equally wrong, and laid him open to the charge which was made against him. The case, however, of *The King v. Essex* (4 Term Rep. 591) shews that the costs of litigation which the Justices have *bona fide* incurred may be ordered to be paid out of the county rate, so that the order was a valid one, and the Justices had not, in fact, such a pecuniary interest as alleged. But the circumstances of their being so interested would not make the order void, but at most only voidable—*Dimes v. the Proprietors of the Grand Junction Canal* (3 H.L. Cas. 759) and *Ranger v. the Great Western Railway Company* (5 Ibid. 72). With regard to the objection that the charges were exhibited at the instigation of the Justices, and that they acted therefore both as prosecutors and Judges, it is only another branch of the same question, and the case of *Ex parte Pettitman* (33 Law J. Rep. (N.S.) M.C. 99, note.) shews that would be no ground for objecting to a conviction. *The Queen v. the Dean, &c., of Rochester* (17 Q.B. Rep. 1; s. c. 20 Law J. Rep. (N.S.) Q.B. 467) also shews that the interest was not such as to disqualify. The decision, moreover, in the present case altered the status of the party affected, and was therefore a decision *in rem*—*The Duchess of Kingston's case* (2 Smith's Lead. Cas. 674, 5th edit.)

Montagu Chambers and Gates, in support of the rule.—It is said, in the first place, that the judgment of the Court of Quarter Sessions is conclusive in this action; next, that it is at most voidable and not void; and, thirdly, it has been said to be a judgment *in rem*, and, therefore, unimpeachable. Now, it is submitted that there is a marked distinction between a case in which a person seeks to justify what he has done under an order of Justices and a case between third persons, who can impeach the order on the ground that it has not been fairly obtained, or the Court making it was not properly constituted, or had not jurisdiction to make it—*Day v. King* (5 Ad. & E. 359), *Christie v. Unwin* (11 Ibid. 373; s. c. 9 Law J. Rep. (N.S.) Q.B. 47), *Briscoe v. Stephens* (2 Bing. 213), *Mico v. Morris* (3 Lev. 234), *Adney v. Vernon* (Ibid. 243), *Basten v. Carew* (3 B. & C. 649) and *Crepps v. Durden* (1 Smith's Lead. Cas. 649, 5th edit.). No doubt, if the Quarter Sessions here was a properly constituted Court, its judgment could not now be impeached by extrinsic evidence; but it is submitted that the Court was not properly constituted. Some of the Justices composing it were individually liable for

Mr. Scudamore's costs, and there had been an ill will and irritable feeling in the matter between them and the plaintiff, and therefore a Court so constituted was not likely to be a fair Court; they had, moreover, directed the prosecution of these charges against the plaintiff, and they were acting, therefore, at the time of adjudicating on the case, both as prosecutors, Judges and witnesses. That is contrary to the principles of the law—*Bac. Abr. tit. 'Courts,' (B)*, where it is said, "No person can be a Judge in his own cause, but the Chief Justice of the Common Pleas may bring an action in that Court, but then the entry must be special, viz., *placita coram Johanne Blencow, milite,*" &c., and a reference is there given to *Salk. 396*, as stating that the Mayor of Hereford was laid by the heels for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he, by the charter, was sole Judge of the Court. To the same effect is *Broom's Maxims*, p. 118, 4th edit., where it is said to be "a rule always observed in practice, and of the application of which instances not unfrequently occur, that where a Judge is interested in the result of a cause he cannot, either personally or by deputy, sit in judgment upon it." For this is cited *Brooks v. the Earl of Rivers* (*Hard. 503*) and *The Earl of Derby's case* (*12 Rep. 114*). Mr. Broom also gives *Dimes v. the Proprietors of the Grand Junction Canal* (*3 H.L. Cas. 759*) as a leading case in illustration of this maxim, and he refers to *The Queen v. the Aberdare Canal Company* (*14 Q.B. Rep. N.S. 854; s. c. 19 Law J. Rep. (N.S.) Q.B. 251*), as shewing that proceedings heard before Commissioners, under a statute which forbade persons to act in that capacity when interested, have been adjudged void. It has been held that the presence of one interested Magistrate will render the Court of Quarter Sessions improperly constituted and vitiate the proceedings—*The Queen v. the Justices of Hertfordshire* (*6 Q.B. Rep. 753; s. c. 14 Law J. Rep. (N.S.) M.C. 73*), *The Queen v. the Justices of Suffolk* (*21 Law J. Rep. (N.S.) M.C. 169*), *The Queen v. the Cheltenham Commissioners* (*1 Q. B. Rep. 467; s. c. 10 Law J. Rep. (N.S.) M.C. 99*). The case of *The King v. the Bishop of Chester* (*2 Strange, 797*) is also in point. The judgment of Mr. Justice Blackburn in *The Queen v. Rand* (*35 L. J. M.C. 157; s. c. 1 Law Rep. Q.B. 30*) is favourable to the present plaintiff, as that learned Judge admits "that any direct pecuniary interest, however small, in the subject of inquiry does disqualify a person from acting as Judge in the matter." If a Judge is disqualified from acting, it is an objection which goes to the jurisdiction, and it is not necessary that the conviction should be quashed. In *Thompson v. Blackburn* (*1 Nev. & M. 266*) a judgment of a county court was held to be not conclusive. *Doe d. Davy v. Haddon* (*3 Dougl. 310*) was the case of an ejectment against a schoolmaster, who had been removed by sentence of the trustees of the school for misbehaviour, and the Court of King's Bench allowed evidence to shew corruption in one of the Judges. The case of *Price v. Dewhurst* (*8 Sim. 279*) is also an authority in support of the plaintiff; Vice Chancellor Shadwell there held to be void the judgment of a foreign Court, consisting of persons interested in the property in dispute. With regard to the statement that the judgment here was a judgment *in rem*, it does not come within the definition of one.

[WILLES, J.—There is no authority for saying that a judgment *in rem* cannot be set aside if pronounced by a Court improperly constituted.]

Then, was the act of the plaintiff a misdemeanour within the meaning of the statute? It is submitted that it was not, though it is admitted that a wilful neglect of duty or intentional misconduct might work a forfeiture of office. That is not the character of the plaintiff's conduct in declining to record the order. Surely, if a clerk of the peace believes the order he is asked to record is an illegal one, he is entitled to direct the attention of the Justices to the matter before he enters it on the proceedings. Then, who is to determine the point whether the refusal by him was an improper

refusal? It is submitted that the plaintiff has a right to have that matter inquired into and determined by a competent tribunal.

WILLES, J.—This was an action for money had and received, to try the question whether the plaintiff or the defendant was entitled to the office of clerk of the peace of the county of Kent; and at the trial the question was raised whether the removal of the plaintiff, who formerly held that office, was a valid removal. The plaintiff, being clerk of the peace, appears to have claimed a right to certain fees, which right was contested, and the Justices entertained an opinion adverse to such claim, whereupon the plaintiff applied for and obtained a writ of mandamus to the Justices, ordering that they should do what was necessary towards the plaintiffs' receipt of those fees. Certain of the Justices, acting upon the part of the whole body, as is usual where a mandamus is directed to a large and fluctuating body, made a return to such mandamus, and resisted the litigation thereby instituted, and for that purpose they employed as their attorney a Mr. Scudamore. It appears that the proceedings under the mandamus were settled by a compromise, and a bill of costs to Mr. Scudamore was incurred in the matter of such mandamus. I think it is unnecessary for the decision of this case to consider whether Mr. Scudamore could have recovered the amount of that bill of costs against the Justices personally who employed him, or whether the costs would be payable out of the county-rate. It is sufficient that such bill of costs was incurred, and that it came under the consideration of the finance committee, and that that committee considered that as such costs related to a proceeding in which the county was interested, and which determined a question affecting its funds, the costs ought to be paid out of the county-rate. The recommendation of the committee was acted on by the Sessions ordering that the bill of costs should be paid.

Now, assuming that to be a valid order, it became the duty of the plaintiff, as clerk of the peace, to enter it, and to make out a certificate or order to the treasurer, by means of which Mr. Scudamore might obtain the amount. The plaintiff, however, resisted the order of the Justices, and refused to enter it and make out the necessary documents for the receipt of the money from the treasurer, and the plaintiff gave several grounds for doing so in his report to the Justices. Amongst others, he said that the costs had been incurred by individuals, and ought not to come out of the county-rates, and also that no bill of costs had been produced with items, but only an abstract; and that the order, therefore, was not an order that should bind the county.

I do not find that at that time the plaintiff raised the point which has been made by Mr. Chambers, namely, that although the costs generally might have been allowed to be paid out of the county-rate, yet that a certain portion of them had been incurred, not in the defence of the mandamus, but in respect of the compromise that had afterwards been entered into, and that, at all events, such portion of the costs ought not to have been allowed. I do not mean to say that had the plaintiff done so this would have made any difference in my opinion, for reasons which I shall presently mention; but it was not one of the reasons stated by the plaintiff why he refused to enter the order.

The plaintiff made his explanation before the Justices, and the Justices adhered to their opinion that the order was valid, and the plaintiff adhered to his, and refused to register the order. That being so, his refusal was referred to the finance committee, and that committee appear to have come to the conclusion that a misdemeanour in his office had been committed by the plaintiff, and they appear to have recommended that a prosecution should be instituted and taken up by the treasurer, who should make a statement of the grounds of the offence for which it was proposed that the plaintiff should be removed. The treasurer thereupon drew up a statement, which was brought before the Sessions. The Sessions adjudged the plaintiff to be guilty of such misdemeanour, and that he should be removed. The Custos Rotulorum thereupon

appointed the defendant. The plaintiff was dissatisfied with these proceedings, and brought this action. At the trial, these facts, and others which I can more conveniently refer to in the course of my judgment, having been opened by Mr. Chambers, the counsel for the plaintiff, Mr. Bovill, for the defendant, stated that, assuming all the facts to be proved as opened, he should insist that there was no cause of action; that the judgment of the Court of Sessions was conclusive, and could not be inquired into by a jury; and that, therefore, the plaintiff must be taken conclusively to have been removed, and incapable of maintaining this action. To this the Lord Chief Justice assented, and nonsuited the plaintiff. The present rule was obtained to set aside such nonsuit, on the various grounds mentioned in the argument. The Court has heard an argument on both sides, which has given the Court the greatest assistance, and it is very satisfactory to be sure that all the relevant topics and all the main authorities have been brought forward. If after having heard the case so thoroughly investigated, we had entertained any doubt in the matter, we should have taken time to consider; but we have come clearly to the conclusion about to be pronounced, and I see no reason why there should be any delay in giving judgment.

I am of opinion that the course taken by my Lord at the trial was the right one, and that this rule ought to be discharged. During the argument a variety of questions was presented to us for decision, and it would probably be better to go through these questions in their order. In the first instance I will refer to the statute 1 W. & M. c. 21. s. 6, which confers an authority on the Justices to dismiss any clerk of the peace who shall misdemean himself in the execution of the office.—[The learned Judge here read the section.]—The section points out the consequences of such dismissal: the first consequence is, that the office is void; the second is, that the Custos Rotulorum may appoint a new clerk; and the third is, that in case the Custos Rotulorum neglect or refuse to appoint a new clerk before the next General Quarter Sessions, the Justices in Sessions shall do so.

On that section the first question which arises is, whether the office of clerk of the peace had become void, that is, whether the plaintiff had been guilty of a misdemeanour in the office of clerk of the peace, and upon that I own I entertain no doubt. What is a misdemeanour in office is to be found in *Com. Dig. tit. 'Offices,' K 3*. The word "misdemeanour" in this section is not used in a criminal sense; but it means any improper conduct, such as gross negligence or non or bad user of office. Therefore, there can be no doubt that an absolute and contumacious refusal to enter an order of the Court of Quarter Sessions is a misdemeanour in the office of clerk of the peace. I quite agree with Mr. Chambers that an inadvertent omission, or mere delay, or even a strong remonstrance on the part of the clerk of the peace to the Justices against entering an order which appeared to him to be contrary to law, would not be a misdemeanour in his office; but any constant refusal would be otherwise. Suppose the Justices were to make an order which they thought right, and which the clerk of the peace, after remonstrance, had failed to satisfy them was wrong (as, for instance, if he refused to enter a criminal sentence because hard labour was attached to it which he thought illegal, and which the Justices, upon the construction of the 14 & 15 Vict. c. 110. s. 13. should think they had a power to award), I apprehend that would be clearly a misdemeanour in his office. There would be an end of all discipline if such conduct were permitted. The proper course in such a case would be to leave it to the Court of Queen's Bench to determine whether the order was right or not, but not for the clerk of the peace to set himself up as an appeal in error over those which the law has in the administration of justice made his superiors. I certainly think, therefore, that the plaintiff, however properly he may have considered that he was acting in so refusing to proceed on the order of the Justices, was setting himself up as the master of his masters, and was committing a misdemeanour in his office.

Upon this part of the case, I may remark it is not to be assumed that, by

passing it over, I see any objection to the order of the Justices. Apart from what was said by Mr. Chambers, as to a portion of the bill having been improperly incurred, which I lay aside because the plaintiff did not rely upon it at the time, I have yet to learn that the costs incurred in county business have to be paid by the Justices, individually, who actually act, and who represent the county in the litigation. Whatever economy it might be to the county to refuse to pay the costs, it might afterwards find great difficulty in getting people to take up its business; and the case of *The King v. Essex* (4 Term Rep. 591) shews that no such rule exists as the plaintiff appears to have relied on. At all events, it is enough to say that the Justices having determined the question, and the plaintiff, having refused to act on their decision, he laid himself open to proceedings. Then the 6th section refers to the mode in which proceedings are to be instituted, and it says a complaint and charge in writing shall be exhibited against him to the Justices. The section does not deal only with cases of contumacious disobedience. There might be a case in which a clerk of the peace might claim a fee to which he was not entitled, and the person from whom he claimed might institute proceedings by a charge in writing to the Justices. The charge in writing has two objects: first, to give formality to the proceedings, and, secondly, to give the accused notice of what he has to meet. In the case I have just supposed, the charge would come like the charge of a private prosecutor; but there may be cases in which the misdemeanor might affect the Court itself, as in instances of contumacy or contempt of Court. In such cases, I cannot doubt that such a misdemeanor would be equally within the 6th section. How, then, is such a misdemeanor to be prosecuted? Who is to exhibit it? Any person who has an interest in doing so. I should have thought, looking to the course of proceedings under similar statutes, that the Court itself might, of their own motion, call on the clerk to answer, and I refer as an illustration of this to the case *In the matter of Bryant* (4 Term Rep. 716. and 5 Term Rep. 509), where the Court of King's Bench, acting upon the statute 27 Geo. 2. c. 17, appeared, by a rule, to have exercised a jurisdiction analogous to that given to the Quarter Sessions in the present case. Here, however, the Sessions did not so proceed; but the finance committee and the Court of Sessions itself requested the treasurer to bring the matter before the Court. Then arises the most important question in the case, whether the Court was competent to decide on the matter, or whether they were Judges and also parties, and whether the proceedings, therefore, were void. The question was divided into three heads in the argument for the plaintiff. It was said, first, there was a pecuniary interest, on account of some of the Justices being liable for the costs; secondly, their interest as prosecutors in having induced the treasurer to bring the matter forward; and, thirdly, it was said that the judgment was improperly obtained.

As to the third, I am unable to distinguish it from the others. It is not stated that any fraud was committed, nor that any of the members of the Court used any artifice to defeat justice. It was hardly suggested, except that they sat on the Bench and adjudged, and that they had a pecuniary interest or strong bias, that any of the members of the Court were guilty of or acted from corruption. I must therefore dismiss the third head and deal only with the others.

Now, as to the pecuniary interest alleged. It is certain that the Justices had employed Mr. Scudamore in the proceedings on the mandamus. It is then said that they were interested in obtaining the order to pay the costs, otherwise they would be personally liable, and so they were interested in procuring the plaintiff to be discharged from his office because he had not filed that order. On that point I must refer to what I have already said, and, in addition, I must express an opinion that that is not such a pecuniary interest as to make the judgment of the Justices void. I cannot bring myself to the conclusion that the persons whose costs had already been paid had, upon the supposition that the case of *The King v. Essex* (4 Term Rep. 591) would be

overruled, such a pecuniary interest in the matter as to make their judgment void. It may or may not have been wiser that they should not have been there; of that they were the best judges; but it was lawful for them to be there.

As to the other question, whether they were disqualified by being prosecutors, I cannot entertain any doubt. It might equally well be said that a Judge who directs that a particular bill shall be presented to the grand jury, because he thinks that the evidence, according to the depositions, will support the charge, ought to withdraw from the Bench, and send some other person to try the charge, simply because he said that a reasonable case existed for an inquiry. I cannot regard the Justices who suggested that the prosecution should be instituted, as being persons who could be properly called parties to the prosecution. Section 6. gives the appointment of a new clerk of the peace to the Justices on the failure of the Custos Rotulorum to appoint. So that there is no case in which in a proceeding under this act, it may not be said the whole body of the Justices may be interested in removing a clerk of the peace. The remote interests which have been suggested, namely, of the county not paying, and the Justices being, therefore, personally liable for costs, and the bias of those who have directed a prosecution ought not to be compared with the direct interest given by the appointment under this 6th section. If the Justices had been disqualified by interest, what would have been the result? Would the proceedings have been void, or would the Court of Queen's Bench have interfered? The case of *Dimes v. the Proprietors of the Grand Junction Canal* (3 H.L. Cas. 759) is, I think, convincing, that the judgment would not be void, so that it might, at any time thereafter, within six years from any receipt of fees, be questioned by the person discharged after, perhaps, the evidence had been lost, on which the judgment was founded, but voidable only on proper steps being taken to set it aside. That was the opinion of Lord Wensleydale in that case, as shewn by his pointing out what would be the proper course by which to take advantage of such an objection. He said that the proper course would be to bring a writ of error in fact, and to suggest as error that the Judge was interested. Assuming that the judgment stands, what is its effect? It is said that it has no effect except between the Justices and the plaintiff, and that it has no effect upon third parties. Is that the true result of the principles laid down? It is unnecessary to refer to more than the judgment of this Court in the case of *Kemp v. Neville* (10 Com. B. Rep. 523; s. c. 31 Law J. Rep. (n.s.) C.P. 158), in which *Groenvelt's case* (1 Ld. Raym. 454) was cited, where Chief Justice Holt,—after stating that the censors of the College of Physicians, who had punished the plaintiff for bad practice as a physician, had jurisdiction, first, over the person of the plaintiff, because he had practised in London; secondly, over the subject-matter, viz., the unskilful administration of physic; and, thirdly, over the fact for which he was punished, because it was committed within the jurisdiction, viz., in London,—goes on to say that where a man has jurisdiction over another man in all these particulars, it is apparent that whether the matter of fact be such as is alleged or not, it is not traversable, but the plaintiff is concluded. That was adopted by this Court in *Kemp v. Neville* (10 Com. B. Rep. 523; s. c. 31 Law J. Rep. (n.s.) C.P. 158), where the action was against the Vice Chancellor of Cambridge University for locking up a young woman for alleged improper morals. As to the cases which have been cited on behalf of the plaintiff in the present case, I shall refer only to two, because they illustrate all that has been contended for on the part of the plaintiff. First in the case of *Price v. Dewhurst* (8 Sim. 279), which at first sight appears to be an authority for entering into the question whether the Court was properly constituted; but when it comes to be considered, it does not do so. It was a case to enforce the distribution of the testator's property. He having died domiciled in England, the question was, was the English law to be enforced among the parties? It appeared that he had previously lived at the Danish island of St. Croix, where the property to be distributed was. By the Danish law there is what is called a Court of Dealing,

that is, a Court by which it should be determined how assets upon a testate or intestate succession should be distributed, from which Court there is an appeal to the Supreme Court in Denmark. It seems that persons could, by certain proceedings under the Danish law, constitute themselves, although interested in the matter, a Court of Dealing. Certain persons interested under the testator's will in that case did constitute themselves into a Court of Dealing, and awarded that the law of domicile should be disregarded, and the property handed over to themselves. The Vice Chancellor, in dealing with that case, applies the principle to which Mr. Gates referred, but the parties there were more than interested, for the end and beginning of the proceedings were intended to be that the persons who acted as Judges should give the property to themselves. That is what was passing in the mind of the Vice Chancellor, because he says, "I am at liberty to do this, viz., to see whether a judgment obtained abroad has been fraudulently obtained or not, and I apprehend that if the Court finds that certain proceedings abroad have been fraudulent, then it is at liberty to deal with the parties it finds before it and the subject it has to administer, just in the same manner as if the foreign judgment had never taken place."

Now, the only other case relied on by the counsel for the plaintiff to which I shall refer is that of *Doe d. Davy v. Haddon* (3 Dougl. 310), and that case I think comes to nothing more than was suggested by the Court of Queen's Bench in *The Queen v. the Governors of Darlington School* (6 Q.B. Rep. 682; s. c. 14 Law J. Rep. (N.S.) Q.B. 67), where it was held that trustees had power to dismiss the schoolmaster at their discretion, but the Court suggested that corruption or indulging in malicious feelings against the master, or anything to prove that the judgment of the trustees was not a real judgment, might have been shewn. On the whole, therefore, having considered this case as its importance demanded, I am clearly of opinion that the course taken by my Lord at the trial was right, and that the rule ought to be discharged.

BYLES, J.—I am of the same opinion. I should have abstained from adding anything, after what has been said by my Brother Willes, if the case had not been of so great importance to the plaintiff. It cannot be disputed, I think, that the judgment was pronounced by a Court of competent jurisdiction, created for that purpose by the statute. Then are the proceedings good on the face of them? It is said that the charges do not amount to a misdemeanor. But the word "misdemeanor" in the 6th section is to be read in connexion with the 5th. The two expressions, "well demean himself," which is in the 5th section, and "misdemean himself," which is in the 6th section, are correlative expressions, and each interpret the other. "Misdemean himself," I conceive, means nothing more than this, behaving improperly in his office. If then the order be a good order, which the judgment states it to be, and if the plaintiff wilfully refuses to obey it, which this judgment states he did, the judgment is good on the face of it. Then the question is, may it be impeached by extrinsic evidence? Now, I will assume that it may be impeached for fraud practised on the Court, or for corruption in the Court, or for violation of natural justice, as where a man has had no notice of the proceedings. I will also assume that if it could be made out that the Justices were interested, then the judgment might be impeached. Had they then any interest? The only interest was in the order for the payment of the bill of costs. I agree with what my Brother Willes has said on that point. In making this order for the discharge of the plaintiff, the Justices could have had no interest except the power of appointing his successor in the event of the *Custos Rotulorum* failing to do so. The only remaining question is, could the persons who were judges also act as prosecutors? The conduct of the plaintiff was contumacious to the Court itself, and might therefore be prosecuted by the Court.

There is so close an analogy between a prosecution of this nature and proceedings in the nature of contempt, that I am unable to see any difference. With a case of contempt, the Judge suggests himself the offence, and it is

inquired into before him. It would be no disqualification, I apprehend, in the case of a prosecution of an inferior officer of this Court, if the Court suggested the prosecution, and in the event of the success of the prosecution the Court, or some member of it, might have the appointment of the successor. At one time it did occur to me that perhaps some other person might have directed the proceedings; but, on full consideration, I do not think that that would have made any real difference.

MONTAGUE SMITH, J.—I am of the same opinion. It has been scarcely urged by the counsel for the plaintiff that the charges in writing did not disclose matter that amounted to a misdemeanor within the meaning of the statute. Misdemeanor there clearly means only misbehaviour in office, and if so, it can scarcely be contended that the charges alleging a contumacious refusal to record an order of the Court of Quarter Sessions was not a misbehaviour in office by the clerk of the peace within the meaning of the statute. Whether those charges were proved or not, I abstain from giving an opinion; for I think that question is not before us. Generally, all Courts of competent jurisdiction are judges of the facts, and their adjudications as to the facts are conclusive. That, again, was not disputed generally by the counsel for the plaintiff; but they said that the plaintiff might inquire into the validity of the order, because the Court of Quarter Sessions in this case was not properly constituted. The grounds suggested for this are, that the Justices had an interest, and that they were prosecutors. I am, however, at a loss to find what interest they had in the dismissal of the plaintiff from office. The order had been made, and whether drawn up or not, it appears to have been obeyed; so that the pecuniary interest which it is alleged they had, seems to me to be not borne out by the facts. Then it was said that they were both parties and judges. It strikes me that they were not parties unless they had some personal interest in the matter. They may have been prosecutors, but as such they were exercising a public duty as they were when they were acting as judges. The maxim that no man can be a Judge in his own cause, cannot refer to a state of things like the present when, from a relation created by the statute, there is thrown on these Justices the duty of deciding whether there has been a misdemeanor in the office of clerk of the peace. Supposing a clerk of the peace were to falsify the records of the Court, can it be said that the Court has not power to bring him before themselves, and to order that charges shall be made against him in respect of such offence? If so, surely the same principle must apply to other offences by the clerk of a less degree. The Justices in sessions are, I think, not only competent to decide, but they are exclusively the tribunal to determine the question. On these grounds, therefore, it seems to me that my Lord was right in holding upon the facts suggested that it was impossible to inquire into the validity of this order.

ERLE, C.J.—I am still of the same opinion that I had at the trial when I directed the nonsuit. The reasons have been so fully assigned by my learned Brothers, with which I entirely concur, that I have nothing to add.

Rule discharged.

[IN THE COURT OF QUEEN'S BENCH.]

June 13, 1866.

THE QUEEN, *on the prosecution of* CASSELLS, *respondent*, v. HALL, *appellant*.

35 L. J. M.C. 251; L. R. 1 Q.B. 632; 12 Jur. N.S. 892.

Easter Offerings—Meaning of Term "Communicant"—Construction of Terriers—Evidence—Ancient Terriers—Fresh Evidence on Appeal.

ECCLESIASTICAL LAW.—*An ancient terrier contained the following statement as a class of rights belonging to a parish church: "Easter offerings, every*

communicant, 2d.; every cow, 2d.; every plough, 2d.; every foal, 1s.; every hive of bees, 1d.; every house, 3½d.:—Held, first, that the terrier was admissible, and was evidence of a custom sufficient to exclude an alleged common law right to Easter offerings at the rate of 2d. per head for every member of a family of or above the age of sixteen, as this right had never been considered to include some of the items embraced in the statement; secondly, that the word "communicant" did not apply to the second and succeeding items in the statement, but that they were chargeable on all the parishioners, whether communicants or not; thirdly, that houses built since the terrier was made were chargeable; lastly, that there was nothing in the terrier to shew that the term "communicant" applied to persons other than those who actually communed.

Quære—whether Easter offerings are due as of common right.

On the hearing of an appeal to the Quarter Sessions from the decision of the Justices below, it is competent to the respondent to produce evidence in support of his case additional to that given before the Justices.

On appeal to the Quarter Sessions of the West Riding of Yorkshire, held at Pontefract, on the 10th of April, 1865, against an order of two Justices, adjudging the appellant liable to pay to the respondent, as vicar of Batley, the sum of 7½d. for tithes, oblations and obventions arising within the parish of Batley, for the year 1864, and also the sum of 5s. for costs, the Sessions confirmed the order, subject to the opinion of the Court upon the following.

CASE.

The order was made under the 7 & 8 Will. 3. c. 6. s. 2, and the following were the grounds of appeal: First, that there is no legal custom within the parish of Batley for the payment of Easter offerings. Secondly, that there was no legal evidence of any custom for the payment of Easter offerings in the parish of Batley produced at the hearing before the Justices, or of any authority for the respondent to receive any Easter dues or Easter offerings. Thirdly, that there was not any legal terrier or other authority for the respondent to receive Easter dues or offerings within the parish of Batley. Fourthly, that the terrier upon which the claim of the respondent was founded purported to have been made before the appellant's dwelling-house was erected, and no terrier had been made since the erection of his dwelling-house so as to make or establish any claim for Easter dues or Easter offerings in reference thereto. Fifthly, that the appellant was not a communicant of the Church of England. Sixthly, that the order made upon the appellant in other respects was illegal and void.

At the hearing of the appeal the parish clerk was called, and produced a terrier, dated 1825, entitled, "A terrier of the glebe lands and other rights belonging to the parish church of Batley, in the West Riding of the county of York, 1825," and which contained, amongst others, the following note: "13th. Easter offerings, every communicant, 2d.; every cow, 2d.; every plough, 2d.; every foal, 1s.; every hive of bees, 1d.; every house, 3½d." This document did not on the face of it purport to be made by the procurement or direction of the archbishop or of the bishop of the diocese, nor did it appear that the bishop had appointed the persons to make it who had signed it. It concluded with the signature of Matthew Sedgwick, the curate, three churchwardens and eight other persons. It was not signed by Mr. Foxley, the then vicar, nor did it appear whom the churchwardens represented, the vicar or the parish, nor did it appear that the eight other persons who had signed it were inhabitants of the parish at the date of the terrier, nor did it purport to have been taken on the view, nor state how it had been made, nor did it appear to be duly attested by the bishop's registrar.

The parish clerk also produced two other terriers, of the respective dates

of 1781 and 1777, all of which terriers he brought from the parish chest. The counsel for the appellant objected to the admission of the terriers of 1781 and 1777, on the ground that the Court of Quarter Sessions was called upon to decide on the second ground of appeal, whether the order made by the Court below was good and well founded on the evidence then brought before it, and the terrier of 1825 was alone in evidence before the Justices who made the order. That the appeal was against that decision, and that in the absence of any authority under the statute giving the respondent the right to bring forward fresh evidence in support of the original complaint, the Quarter Sessions ought not to allow the respondent to adduce further and better evidence as though this were an original hearing of the complaint. The objection was overruled and the evidence admitted.

The parish clerk further proved that he had held his office for fifty years, and that he had written the terrier dated 1825 and signed it; that he had collected the tithes and Easter offerings throughout the parish both for the last vicar, who died twenty-five years ago, and the present one; that the Easter offerings so collected included a sum of 2*d.* for each communicant and 3½*d.* for every house. He further said that he collected from every parishioner who would pay. On cross-examination he further stated that the Rev. Thomas Foxley was vicar when the terrier of 1825 was made, and that Mr. Sedgwick was then curate; that Mr. Foxley was not at Batley at that time; that neither the bishop nor the chancellor of the diocese, nor any one representing either, was present at the meeting at which the terrier was resolved upon; that he did not take or send any copy of the terrier to the bishop's registry at York; that he did not see or hear from the chancellor of the diocese about the terrier, and that he did not know whether anybody had done so. That formerly the Quakers used to refuse to pay the Easter offerings; they always refused, and other persons had refused lately.

Mr. John Dickens, a clerk in the registry of the Archbishop of York, produced from the registry a number of terriers, dated respectively 1727, 1743, 1748, 1764, 1770, 1777, 1781, 1786, 1802 and 1825, all of which contained the same paragraph as that numbered 13 in the terrier of 1825, and in the same words, the terrier of 1825 from the bishop's registry being a duplicate of that first produced by Chadwick, and in his handwriting.

The counsel for the appellant formally objected to the reception of this evidence, on the ground before mentioned. The Justices admitted it, and reserved the point.

The counsel for the respondent then put in evidence the endowment of the vicarage of Batley, A.D. 1235, from the Archbishop's Roll in the Registry of York, from which it appeared that the vicarage was endowed with "*omnes proventus altarii.*" On behalf of the appellant it was proved that he had been four years minister of the Baptist chapel at Batley; that his parents had never been members of the Established Church; that neither he nor his wife had ever been baptized or confirmed according to the rubric; that they had never been communicants in the Established Church; and that the house in which he lived, and in respect of which the amount of 3½*d.* was claimed, was not built at the date of the last alleged terrier.

On the part of the appellant it was contended, first, that this was not the hearing of an original complaint, but an appeal from the decision of Justices alleged to be wrong on the evidence before them. It might well have been that, on better evidence to warrant the decision of the Court below, there would have been no appeal; that if the fresh evidence were admitted, this was, in fact, a new trial, and not an appeal against the judgment in a former one; that the document produced before the Justices in petty sessions was not shewn to be a valid terrier; that it did not appear by what authority it was made, or that it was made by any, nor did it appear that it was signed by the churchwardens of the parish, nor by any parishioners signifying their assent on behalf of the parish to its correctness; that for anything that appeared, it was

a mere private document written for the benefit of the clergyman, and by his procurement; that it did not appear to have been laid up in the bishop's registry, nor to be an exemplified or examined copy of any terrier placed there. It was, therefore, invalid as a terrier, and not admissible.

Secondly, that assuming the additional evidence to have been rightly admitted, and the copy of the terrier of 1825 to be valid, it could only affect such houses as were built at the time that it was made, and which were fully described in the body of the document, or in the schedule thereunto annexed, as the very object of making these terriers from time to time was to include the additions and alterations made in the lands and tenements which belonged to the vicarage, and that as the appellant's house was not then in existence the terrier did not in any way affect it, nor shew it to be a house belonging to the vicarage or liable to pay Easter dues to the vicar, nor shew whether the house was lying within or out of the parish. The same objection also applied to the antecedent terriers if they were held to be receivable in evidence.

Thirdly, that the appellant and his wife never having been communicants of the Church of England, the customary payment alleged to be due from every communicant could not be due from them as such, neither could it be due to the vicar as an offering for religious services rendered, as none had ever been rendered by him, to the appellant or his wife.

The counsel for the respondent contended that it was the practice of the Court to receive additional evidence on appeals, and that the additional evidence ought to be received; that Easter offerings were due of common right, independent of custom, and even if that were not so, still, the custom being established, it was unnecessary, in order to charge the appellant in respect of the house, that it should be inserted in the schedule of the terrier, any more than it was necessary to insert every fresh plough, or hive of bees, brought into the parish, and that parishioners were liable to Easter or other ecclesiastical dues, although they were not communicants.

If the Court should be of opinion that the respondent was correct in contending that the appellant was liable to Easter offerings, due as of common right, or that, looking at the second ground of appeal, fresh evidence, in addition to what was given before the Justices who made the order, was admissible on the hearing of the appeal, and, also, that neither of the appellant's second or third objections was well founded, the order of Sessions is to be confirmed. But if the Court should think either of the last-mentioned objections well founded, or that the Sessions were wrong in admitting fresh evidence on the hearing of the appeal, their order is to be quashed.

Manisty and Hannay (April 21), for the respondent.—With regard to the first point, it was decided, as long ago as 1795, in *The King v. the Inhabitants of Bromley* (6 Term. Rep. 330) that an appeal to Quarter Sessions from an order of Justices is like a new trial, in which the whole case is re-opened. With regard to the second objection, terriers containing statements corresponding to those in the terriers objected to were duly produced from the registry of the Archbishop of York.

[The COURT intimated that the first two objections need not be argued further.]

There is therefore evidence of a custom to pay the dues which are claimed. But, putting aside this evidence, there is abundant authority to shew that Easter offerings at the rate of 2d. a head for every person above the age of sixteen are due as of common right, though more may be claimed by custom. They were originally a composition for personal tithes. They cited *Lawrence v. Jones* (Bumb. 173; s. c. 2 Gwil. 662; 1 Eag. & Y. 801), *Egerton v. Still* (Bumb. 198), *Carthew v. Edwards* (2 Eag. & Y. 121; s. c. Amb. 72), *Stirling v. King* (3 Wood, 87), *Bennett v. Tocker* (Ibid. 460), *Wright v. Elderton* (1 Ibid. 518), *Swaine v. Perne* (Ibid. 341), *Statute 2 & 3 Edw. 6. c. 13. ss. 7, 10*, *Gibson's Codex*, 705, *Bacon's Abr. tit. 'Tithes,'* (M) *Toller on Tithes*, 48, *Shelford on Tithes*, 306, note (K), *Burn's Ecclesiastical Law*, vol. 3, tit.

'Tithes,' 713, *Ayliffe's Parergon*, 395. The appellant's house is chargeable, although it was not in existence at the time of making the terrier in 1825. The words of the terrier are general, and apply to each one of the parochial houses, whatever may have been the date of its erection.

Cleasby and Campbell Foster, for the appellant.—Easter offerings, as a substitute for personal tithes, are only due by special custom and not of right. These offerings, when they first originated, were voluntary. They cited *Popplewell v. Canby* (2 *Ibid.* 390), *The King v. Reeves* (W. Kelynge, 196; s. c. 2 *Eag. & Y.* 55), 2 *Inst.* 58, 659, *Burn's Ecclesiastical Law*, tit. 'Offerings,' 1, *Gibson's Codex*, 503, *Watson's Clergyman's Law*, 585, *Stephen's Laws of the Clergy*, tit. 'Oblations,' 27 *Hen.* 8. c. 20, 32 *Hen.* 8. c. 7, *Eagle on Tithes*, vol. 1, pp. 413, 414. The word "communicant" applies to the whole statement in the terrier, so as to restrict the claim to actual communicants; and the custom, if it exists, ought not to be unduly extended to houses which were not in existence at the time of the terrier.

Cur. adv. vult.

On the 13th of June, the judgment of the Court (Blackburn, J., Shee, J. and Lush, J.) was delivered by

BLACKBURN, J.—Two questions raised in this case were disposed of in the course of the argument. We held, and to that opinion we adhere, first, that it was competent to the respondent to produce, on the hearing of the appeal, evidence in support of his claim, additional to that which was given before the Justices; and, secondly, that the terriers were admissible in proof of a customary right to the oblations therein mentioned.

The question principally argued before us was, whether a payment of 2*d.* per head for every member of a family of or above the age of sixteen was due of common right as an Easter offering; and several authorities in support of the affirmative of that proposition were cited. As the view we take of this case makes it unnecessary to decide this question, we desire only to say, in reference to it, that when the point arises for judicial decision, we hope it will be in such a form as will admit of an appeal to a Court of error. We are of opinion that in this case there is sufficient evidence of a custom, and such a one as excludes the common law claim, supposing it to exist, because it embraces items to which the common law right does not and never has been considered to extend. That evidence consists of terriers dated respectively 1727, 1743, 1748, 1764, 1770, 1777, 1781, 1786, 1802 and 1825, each of which contains the following statement, as a class of "rights belonging to the parish church at Batley, viz.: Easter offerings—Every communicant, 2*d.*; every cow, 2*d.*; every plough, 2*d.*; every foal, 1*s.*; every hive of bees, 1*d.*; every house, 3½*d.*." The appellant contends that the word "communicant" overrides the whole, and that, unless he is chargeable with the 2*d.* as a communicant he is not chargeable with either of the following items. But we are of opinion that this is not the proper reading of the article. We think that each item is an independent charge, and payable by every parishioner, whether he comes within the denomination of communicant or not. The appellant further contends that only such houses are chargeable as are ancient and were in existence when the terriers were made. Upon this point, also, we are against him, and hold that the custom attaches as soon as a house is built and is occupied. We are therefore of opinion that the assessment of 3½*d.* in respect of the house occupied by the appellant is valid, and ought to be supported. This brings us to the main question, namely, what is the proper meaning to be put on the term "communicant": does it mean every person whom the Church in ancient times regarded as under an obligation to commune, and who was therefore virtually a "communicant," or only those who actually communed? Agreeing, as we do, that the word is capable of the wider sense, we are of opinion that the evidence fails to shew that that is the sense in which it is used in the terriers, and that, in the absence of such evidence, we must attribute to the

word "communicant" its proper and primary meaning, and hold that it is confined to those who actually communed.

We cannot, therefore, answer the questions put to us by the Sessions wholly in favour of either of the parties, and can, therefore, neither quash nor confirm the order, and the case must, if the parties request it, go back to the Sessions; but as neither party has wholly succeeded, and neither can get costs, they will probably consent to let the matter rest.

Case to be remitted to the Sessions.

[IN THE COURT OF COMMON PLEAS.]

May 25, 1866.

HARTLEY v. HINDMARSH.

35 L. J. M.C. 255; 1 H. & R. 607; L. R. 1 C.P. 553; 14 L. T. 795;
14 W. R. 862; 12 Jur. N.S. 502.

See *R. v. Miles*, [1890] E. R. A.; 59 L. J. M.C. 56; 24 Q.B. D. 423; 62 L. T. 572; 38 W. R. 334 (C.C.R.).

See also 7 Ed. 7. c. 17.

Assault, Action for—Previous Conviction—Bad Plea—Insufficient Proof.

CRIMINAL LAW. EVIDENCE.—*To an action for an assault the defendant pleaded that he had been summoned by the plaintiff before a Magistrate, who convicted him in the costs of the complaint and hearing, which the defendant had paid. At the trial, the Magistrate's clerk produced his note-book, by which it appeared that the Magistrate had merely ordered the defendant to enter into his recognizances and pay the expense thereof; the clerk also said in such cases no conviction was ever drawn up:—Held, that the plea was bad, and did not disclose a defence under 24 & 25 Vict. c. 100. s. 45; that it was not proved; and that, even if there were a conviction, the proper proof was not adduced.*

The first count of the declaration was for a common assault, and the third plea to that count alleged that the assault was committed within the jurisdiction of a Metropolitan Police Magistrate; that he, on the complaint of the plaintiff, summoned the defendant, who duly appeared; that such Magistrate having "heard the complaint and charge of the plaintiff, upon the merits adjudged and determined the said complaint and charge, and then ordered the defendant then to pay, and then convicted him, the defendant, in the costs as well as of the said complaint and charge as of the hearing thereof, but did not further order or convict the defendant," and that the said costs were the whole amount which he was adjudged to pay, and that before action he paid them.

In support of this plea, the defendant called the Magistrate's clerk, who produced his note of what had taken place before the Magistrate, from which it appeared that all the Magistrate had done was to order the defendant to enter into recognizances to keep the peace and to pay the costs thereof. The clerk also stated that in such cases it was not the practice to draw up a conviction.

A verdict was found for the plaintiff for 30l., with leave reserved to the defendant to move to enter a verdict for himself on the third plea. A rule nisi was obtained, pursuant to such leave to enter a verdict for the defendant on the third plea, and also for a new trial on the ground that the plea as proved was a good bar to the action.

Parry, Serj. and Woollett shewed cause.—The plea is pleaded under 24 & 25 Vict. c. 100. s. 45, which provides that if a person on complaint (within the three preceding sections) of the person aggrieved obtain a certificate of dismissal, or, being convicted, pay the whole amount adjudged to be paid, or suffer the imprisonment awarded, he shall be released from all further proceedings, civil or criminal, for the same cause. In order to obtain this protection, the Magistrate must either dismiss or convict in a fine or imprisonment; the Magistrate has done neither in this case: he has simply, under his other powers, ordered the defendant to enter into recognizances and pay the costs thereof. Again, this is a plea which must be proved *in omnibus*, which has not been done.

Digby Seymour and Tapping, in support of the rule.—The policy of the statute is to prevent a person being harassed twice. Now here, clearly, there was a hearing and adjudication, and the notes produced were sufficient evidence thereof; for, by 24 & 25 Vict. c. 100. s. 76, the provisions of 11 & 12 Vict. c. 43. are incorporated, and by section 14. of that act a mere note or memorandum may be drawn up, and it is no less a conviction when in that form, and equally efficacious—*Ratt v. Parkinson* (20 Law J. Rep. (N.S.) M.C. 208), *Ex parte Johnson* (3 Best & S. 947; s. c. 32 Law J. Rep. (N.S.) M.C. 193).

ERLE, C.J.—I am of opinion that this rule should be discharged. The plea says that the Magistrate “ordered the defendant to pay, and then convicted him in the costs as well of the said complaint and charge as of the hearing thereof;” this was not proved, for the clerk proved that he was only ordered to pay 2s. for the expenses of the recognizances which he was required to enter into. There was no adjudication within the meaning of the statute, and the plea is bad as not being within the statute. The statute says, that if the person “having been convicted shall have paid the whole amount adjudged to be paid, or suffered the imprisonment awarded,” he shall be released from any future action. But here the plaintiff was not adjudged to pay any money within the meaning of the statute. If any person claims the protection of the statute there must either be a dismissal, which must be proved by a certificate, or a conviction, which must be proved in the ordinary common law way.

WILLES, J.—I am of the same opinion, and for the same reasons.

BYLES, J.—I am also of the same opinion; for, first, the plea is bad and not within the statute; and, secondly, it was not proved. Again, even if there were a conviction, and it were properly pleaded, yet there was no proper proof; for, though it is true that the oral judgment is the conviction, and that even when drawn up it may, on appeal, be amended before being returned to the Sessions, still, before a conviction can be proved, the law requires that there should be one properly drawn up.

MONTAGUE SMITH, J.—I am of the same opinion. The defendant relies on a statutable release, which cannot be effectual unless the statute be complied with. The statute gives a release if there be a dismissal and certificate thereof, or if there be a conviction and the fine paid or imprisonment undergone. Now, here, there was no dismissal and certificate, nor was there a conviction; but the Magistrate exercised his common law power to bind the defendant over to keep the peace, and ordered him to pay the expense of that.

Rule discharged.

WESTBURY, L.C., June 7, 8, July 11, 1865.

TOTTENHAM v. EMMET.

14 W. R. 3; 12 L. T. 838.

Referred to, *Aylesford v. Morris*, [1873] E. R. A.; 42 L. J. Ch. 146; 27 L. T. 753 (V.C.): affirmed, [1873] E. R. A.; 42 L. J. Ch. 546; L. R. 8 Ch. 484; 28 L. T. 541; 21 W. R. 424 (L.C. & L. J.). Referred to, *Beynon v. Cook*, 1875, L. R. 10 Ch. 389; 32 L. T. 353; 23 W. R. 413 (L.JJ.); *Rae v. Joyce*, 1892, 29 L. R. Ir. 500 (C. A.).

Reversion — Dealings with reversioner — Inadequacy of consideration — Mortgage.

FRAUD AND MISREPRESENTATION.—*The plaintiff was entitled to a base fee in certain real estates in Ireland, subject to the life interest of, and the exercise of a power of appointment by, his father, who was upwards of seventy years of age, and a lunatic. He applied to the defendant for a loan of 500l., and agreed to include in the security certain costs, to cover which he was not properly liable, and amounting, with the sum of 500l., to 1,064l. The defendant consented to advance the money on these terms. Accordingly, the plaintiff, who had an independent solicitor, mortgaged his reversion to the defendant to secure 2,000l. in case the plaintiff's father should die within three years after the date of the mortgage, and 4,000l. if he should outlive that period, with interest on the respective sums. The plaintiff's father died four years afterwards and the plaintiff filed a bill to set aside the mortgage.*

Held (affirming the decision of the Master of the Rolls), that the mortgage must stand for a security only for the sum actually advanced, and the costs which the plaintiff was liable to pay with interest, and (the plaintiff having before the filing of the bill offered the defendant better terms than the Court held him entitled to), the defendant was ordered to pay the costs of the suit.

The same principles apply to mortgages, as to sales, by expectant heirs.

The principles of the Court, judging of dealings with expectant heirs, are not affected by the repeal of the usury laws.

This was an appeal from a decision of the Master of the Rolls (reported 13 W. R. 123). The facts were as follows:—

The plaintiff, Mr. Loftus Abraham Tottenham, at the date of the transactions in question, was entitled, under his father's marriage settlement and a disentailing deed, to a base fee in certain freehold estates in Ireland, subject to his father's life interest, and subject to the exercise of a power of appointment by deed or will by his father. In 1836 the father was found lunatic, and was declared to have been of unsound mind since 1830, and Dr. Southey, the physician appointed by the Court, certified him to be an incurable lunatic. He died in 1860, at the age of seventy-six, without having exercised his power of appointment. In 1852 the plaintiff accepted a bill for 500l., as he alleged, for the accommodation of a Mr. Coghlan. This bill was discounted by the defendant Rickards, and ultimately came into the hands of the defendant Emmet, who brought an action against the plaintiff upon it. This action failed through the want of a proper indorsement, and the costs of the plaintiff (the defendant at law), were taxed at 184l. 7s. 6d., and paid by the defendant Rickards, who appeared to be the person really interested in the result of the action. The plaintiff had filed a bill of discovery to obtain evidence in support of his defence to the action, but having succeeded on the point of pleading, he did not proceed with the suit. The costs of the defendant Emmet in the action were said to be 200l., and in the suit 100l., and the costs of the defendant Rickards in the suit were said to be 80l., but no bills of costs were ever produced in respect of these sums. In August, 1856, the plaintiff, being in great want of money, applied to the defendant Emmet for a loan of 500l.

upon a *post obit* security, and agreed to include the above sums for costs in the security. The plaintiff had an independent solicitor, Mr. Fesenmeyer, who acted for him throughout the negotiations. By an indenture dated the 16th of August, 1856, and made between the plaintiff of the one part, and the defendant Emmet of the other part, after reciting, amongst other things, the action, and that the costs of the defendant Emmet in such action amounted to the sum of 200*l.*; and reciting the suit in chancery, and that the costs of the defendant Emmet in the suit amounted to 100*l.*; and reciting that the plaintiff alleged that the said action was defended and the said suit instituted without his authority, and admitted that the defendant Emmet was unjustly put to the said costs in the said action and suit, and was desirous that the same should be repaid to the defendant Emmet; and reciting that the plaintiff, who had then applied to and requested the defendant Emmet to lend and advance him the sum of 500*l.*, and to pay on behalf of him, the plaintiff, unto the defendant Rickards, the sum of 264*l.* (being the amount of certain costs paid by the defendant Rickards in the said action and suit); and that in consideration thereof the plaintiff had proposed and agreed to secure unto the defendant Emmet, by the indenture now in statement, and by judgments both in England and Ireland against the plaintiff, at the suit of the defendant Emmet, the payment, within six calendar months after the decease of the plaintiff's father, but without interest during the life of the plaintiff's father, of the sum of 2,000*l.*, in case the plaintiff's father should not live beyond the period of three years from the day of the date of the indenture; and the payment within six calendar months after the death of the plaintiff's father of the sum of 3,000*l.*, with interest on the sum of 2,000*l.*, part of the said sum of 3,000*l.*, at the rate of 3*l.* 5*s.* per cent. per annum from the end of three years from the day of the date of the said indenture, and up to the day of the death of the plaintiff's father, and on the whole of the said sum of 3,000*l.* at the rate of 5*l.* per cent. per annum from the day of the death of the plaintiff's father, in case he should live beyond the period of three years from the day of the date of the said indenture, which said sum of 2,000*l.* or 3,000*l.* (as the case might be) was to cover the said sums of 500*l.*, 264*l.*, 200*l.*, and 100*l.*, making together the sum of 1,064*l.*, the residue of the said sum of 2,000*l.* or 3,000*l.* (as the case might be) being added to the said sum of 1,064*l.*, as in lieu of interest during the life, or such part as was thereinbefore-mentioned of the life of the plaintiff's father, and in compensation for deferred payment; and reciting the payment by the defendant Emmet to the defendant Rickards of the sum of 264*l.*, it was witnessed that in pursuance of the agreement, and in consideration of the premises, and of the sum of 500*l.* then paid by the defendant Emmet to the plaintiff, the plaintiff conveyed the Irish estates to the defendant Emmet, subject to a proviso for redemption in accordance with the terms of the agreement. The plaintiff also covenanted that he or his issue in tail would, when competent to do so, do all acts necessary to turn the base fee into an absolute fee simple.

At the date of the mortgage the plaintiff was thirty-seven years old; had been married five and a-half years; and had had issue five children, of whom two were then living. No valuations were made prior to the mortgage of the plaintiff's reversionary interest. There was a conflict of evidence as to whether the defendants were fully aware of the hopeless nature of the lunacy of the plaintiff's father. The reversion fell into possession in August, 1860, and shortly afterwards disputes arose with respect to the mortgage. In the course of the correspondence, the plaintiff offered considerably more than the Court ultimately held him liable to pay. On the 18th of March, 1863, the defendant Emmet filed a bill against the plaintiff, praying for the usual foreclosure decree. On the 26th of March, 1863, the plaintiff's solicitors wrote to the defendant Emmet as follows:—

"Sir,—We are instructed by Mr. Tottenham to offer to pay you all the cash which you advanced to him on the execution of the security of the 15th of August, 1856, and all the costs paid by you to Mr. Rickards of the chancery

suit, which Mr. Tottenham was liable to pay, and which are mentioned in the security above referred to, together with interest on such payments at the rate of 6l. per cent. per annum, as also the costs of conveyances and filing the present bill in chancery. It is Mr. Tottenham's intention, if this offer is not accepted, at once to file a cross-bill to set aside the security, and to use this letter as he may be advised."

In a subsequent letter, the plaintiff's solicitors added that the plaintiff "was ready to pay Mr. Emmet his costs of the chancery suit, which Mr. Tottenham might also be liable to pay."

This offer was refused, and the present suit was commenced to set aside the security. Mr. Rickards was made a defendant by amendment, on the ground that he claimed an interest in 264l., part of the money secured, and was a necessary party. It appeared that, at the date of the mortgage, the plaintiff was in receipt of 800l. a-year out of his father's estates, under an order in lunacy. Several actuaries gave evidence as to the insufficiency of the consideration, and no actuary asserted that the plaintiff received the full value. But some stress was laid on the nature of the contingency, by which the plaintiff's interest was liable to be defeated, and it was contended that such a contingency was not capable of valuation. It was also contended that the plaintiff was under a moral if not legal obligation to pay all the costs of the action, and to discharge the bill which he had accepted, that a fresh action might have been brought with success, and that, under all the circumstances of the case, the consideration was ample.

The Master of the Rolls, following his decision in *Bromley v. Smith* (7 W. R. 557; 26 Beav. 644), viz., that, in judging of dealings with expectant heirs, there was no difference between a sale and a mortgage, which was a sale *pro tanto*: held that the mortgage must stand as a security only for the sum of 500l. actually advanced, and such part of the costs as the plaintiff was really liable to pay. And, inasmuch as the defendant Emmet had refused the fair offer of the plaintiff, he ordered him to pay the costs of the suit. From this decision the defendant appealed.

Selwyn, Q.C., and *E. K. Karlake*, appeared for the appellant.—They contended that the rule as to dealings with expectant heirs was a branch of the law of usury, and that since the repeal of the usury laws the rule was, at least, greatly to be relaxed. It was immaterial whether a contract was made in one form or another while it remained essentially the same, and there was no doubt that a contract for repayment of the principal sum advanced, with compound interest at 20l. per cent. on the death of the plaintiff's father, would be a valid contract, and enforceable in this court. That the contract between the parties was much more beneficial to the plaintiff than such a contract would have been, and that, therefore, the plaintiff's bill should fail. In any case the defendant was entitled to a foreclosure decree for as much as was by the plaintiff's bill confessed to have been advanced, with interest, and was entitled to the costs.

They cited—*Earl of Chesterfield v. Janssen* (1 Wh. & Tu. L. C. 428); *Edwards v. Burt* (2 D. M. G. 55); *Perfect v. Lane* (30 Beav. 197).

Southgate, Q.C., and *F. H. Colt*, for the plaintiff, supported the decree of the Master of the Rolls. The rule as to *post obit* securities and contracts as to expectancies was a different rule from those as to usury, and, though the latter have been repealed, the former holds in full force; and this rule is not relaxed because the additional security of a charge on a reversionary interest in real estate is taken by the creditor: the *onus* is still thrown on the creditor to show full consideration given for the bond or other security.

They cited: *Bromley v. Smith* (*ubi sup.*); *Talbot v. Staniforth* (9 W. R. 827; 1 J. & H. 484); *Tottenham v. Green* (32 L. J. Ch. 201); *St. Albyn v. Harding* (27 Beav. 11).

Baggallay, Q.C., and *J. W. Chitty*, for the defendant Rickards.

E. K. Karlake, in reply, referred to *Freeman v. Bishop* (2 Atk. 39).

LORD WESTBURY, L.C., reserved judgment.

July 11.—The following judgment, signed by Lord Westbury and bearing this date, was forwarded to the parties and to the Registrar:—It is the established rule of courts of equity that persons dealing with expectant heirs (under which denomination remaindermen and reversioners are included) must prove that they have given their value for the interest acquired by them. This rule applies to mortgagees as well as purchasers wherever a mortgage is taken from an expectant heir for a sum of money, the amount or full value of which he has not received. The case before me is the same as if Mr. Emmet had bought from Mr. Loftus Abraham Tottenham a reversion of a sum of 2,000*l.*, to be, in a certain event, increased to 3,000*l.*, payable after the death of the father of Mr. Tottenham. I treat these sums as certainly secured, for I cannot attend to the suggestion that possibly by the death of the plaintiff, Tottenham, and his two children, in the lifetime of his father, the mortgage, being the conveyance of a base fee only in the freehold estates, might have perished altogether. At the time of the contract the father had been a lunatic for more than twenty-five years. He was upwards of seventy years of age, and afflicted with paralysis. The son was in his thirty-eighth year; he was married, and had five children born to him during the six years preceding the contract, of whom two were alive. The security, therefore, as to the freeholds, was not subject to any real danger; and as to the leasehold estates, the son was absolutely entitled to them, subject to the father's life interest. The subject of the contract of purchase by Mr. Emmet (for as such I regard it) was the principal sum of 2,000*l.* if the father of Mr. Tottenham died within three years of the date of the contract, and the sum of 3,000*l.* if he survived the period of three years, that is to say, if the father died within three years Mr. Emmet was to receive 2,000*l.*, but if he survived that time by a day only, Mr. Emmet would receive 3,000*l.* The sum that might become payable under this contract was to be repaid to Mr. Emmet within six months after the death of his father, with interest from the death at the rate of three and a quarter per cent. The consideration given for this reversionary sum is next to be considered. To render the nature of the alleged consideration intelligible, it is necessary to state that an action had been brought by or in the name of Mr. Emmet, but on behalf of the defendant Rickards against Mr. Tottenham on a bill of exchange. Mr. Tottenham obtained a verdict on a technical point. The costs incurred by the plaintiff in the action were estimated at 200*l.*, and the defendant, Rickards, had paid to Mr. Tottenham's attorney the sum of 184*l.* 7*s.* 6*d.* as the costs of the defendant. In aid of his defence to that action Mr. Tottenham had filed a bill of discovery against Emmet and Rickards for the costs of which he was liable, and they were computed as to Emmet at 100*l.*, and as to Rickards at 80*l.* In the month of August, 1856, Mr. Tottenham applied for a loan of money to Mr. Rickards, by whom he was introduced to Mr. Emmet, and the latter agreed to advance him the sum of 500*l.*, on the terms that he should include in the security the above-mentioned several sums of 200*l.*, 184*l.* 7*s.* 6*d.*, 100*l.*, and 80*l.* Of these sums Mr. Tottenham was under no liability whatever to pay the sum of 200*l.*, or to repay the sum of 184*l.* 7*s.* 6*d.* Mr. Emmet says that Mr. Tottenham voluntarily offered to include these two last-mentioned sums in the proposed mortgage security. If he did, it is a proof of his distress and pecuniary embarrassment. I cannot reckon either of these two sums as part of the consideration for the mortgage made to Mr. Emmet. With respect to the other two sums of 100*l.* and 80*l.*, they may be taken (although no bills of costs had been delivered) as the amount of the costs payable by Mr. Tottenham in respect of the bill of discovery. The result, therefore, is that the value given to Mr. Tottenham for the mortgage is the sum of 500*l.*, and the two sums of 100*l.* and 80*l.*, making in the whole 680*l.* This is the entire consideration given by Mr. Emmet for the principal sum of 2,000*l.*, payable after the death of the lunatic, if he should die within three years, or for the sum of 3,000*l.*, payable in like manner.

if the lunatic survived the period of three years. There is no evidence on the part of Mr. Emmet, to prove that this sum of 680*l.* was, at the date of the contract, the fair value of either of the two reversionary sums secured by the mortgage. But, on the other hand, there is evidence that even the entire sum of 1,064*l.* was much less than the value of either of the principal sums of 2,000*l.* or 3,000*l.* The terms were such as no one but an embarrassed man would have submitted to, and inasmuch as they were taken from an expectant heir, the transaction is such as, according to the rules of this court, must be deemed unconscionable. The principles of this Court, by which the validity of dealings with expectant heirs is tried (however unwise they may be when examined by the light of jurisprudence and social economy), are not at all affected by the Legislative abolition of the old laws against usury. The value of an expectancy or reversionary interest may be ascertained now as well as it could be when the law against usury was in existence. It was insisted before me that Mr. Emmet might have lent the 500*l.* to Mr. Tottenham at 40*l.* or 50*l.* per cent. interest, and that the loan would have been legal and valid. This may be conceded, but it must be added that if Mr. Emmet took for such a contract with an expectant heir any charge or security affecting his expectancy (in which word I include remainders and reversionary interests), the contract would still have to be tried by the settled rules and principles of this court, and if the terms of it were found to be such as the Court holds to be unconscionable, the transaction would be set aside. It is immaterial that Mr. Tottenham voluntarily proposed to Mr. Emmet to make himself liable for the 200*l.* and 184*l.* The offer was made under the pressure of pecuniary distress, and was a bribe to Mr. Emmet to induce him to lend him the sum of 500*l.* Administering the justice of this Court, I am bound to say that such offer ought not to have been accepted. I am of opinion, therefore, that the decree of his Honour, the Master of the Rolls, is in substance correct, and I am bound to dismiss this appeal with costs.

Wood, V.C., July 15, 1865.

WINDHAM v. COOPER.

14 W. R. 8.

Practice—Cross-bill—Dismissal for want of prosecution.

PRACTICE.—*The pendency of a cross-bill by a different defendant is no answer to a motion to dismiss for want of prosecution by a defendant who is right in point of time.*

This was a motion to dismiss for want of prosecution. The moving defendant was a bare trustee, and the principal defendants (his *cestuiz que trustent*) had filed a cross-bill to impeach the settlement on which the plaintiff's title depended, and were not in a position to move.

E. K. Karlake, for the motion, shewed that the defendant was right in point of time.

Rolt, Q.C., and *Terrel, contra*.—The principal defendant has become bankrupt and his assignees have filed a cross-bill to impeach the settlement. and if that suit proceeds and the settlement is set aside, this suit will be rendered nugatory.

This is a mere ornamental defendant, who has no real interest in getting rid of the suit.

Karslake, in reply.—A person who files a bill must proceed with his suit whether there is a cross-bill filed or not.

Wood, V.C.—Liberty to amend was given two months ago on the application of the plaintiff.

When the bill was originally filed an answer was put in by this defendant saying that the suit ought not to proceed to a hearing till a cross bill had been filed. If the matter had stayed there I would not have received a motion to dismiss, made without any previous notice requiring the plaintiff to proceed; but the plaintiff did not stay proceedings on the answer coming in, but, on the contrary, applied for leave to amend; this reduces the matter to the simple question whether, when a cross bill is filed by one defendant, every other defendant is obliged to wait till it sues that one to bring his cross bill to a hearing, or till the plaintiff chooses to force him on; I can see no reason for holding any such doctrine; the suit must be taken, for this purpose, as a separate suit against each defendant, and in the absence of any special circumstances connecting any two defendants together, each defendant is entitled to require the plaintiff to proceed against him with the same expedition as if he alone was a party to the suit.

I make the common order in this case.

Wood, V.C., June 26, 1865.

WOODS v. SOWERBY.

14 W. R. 9.

Practice—Account—Real estate—Creditors' suit.

EXECUTOR AND ADMINISTRATOR.—*Though an account of real estate can only be had at suit of a creditor in a bill on behalf of all creditors, still, if in a suit not so entitled, it becomes expedient to take such an account, the Court will, at the hearing, direct the bill to be taken as a bill on behalf of creditors. There is no objection to a bill for an account of the estates of two testators who are joint debtors.*

This was a bill against the executors of two testators of the name of Hyde.

It appeared that these persons were jointly indebted to the plaintiff on simple contract, and the bill prayed for administration of both estates, and that the plaintiff's debt might be paid out of either or both.

The bill was not filed "on behalf of himself and all other creditors," &c., and the persons beneficially entitled to the real estate of the testators were not parties thereto. The usual administration decree was taken against the estates of both testators, and it appeared that the personal estate was insufficient to satisfy the plaintiff's debt.

The cause now came to be spoken to on minutes of this decree.

Rolt, Q.C., and Bury, for the plaintiff, asked for an account of the real estate, and that the same might be administered in the usual manner.

E. K. Karslake, for the defendant, objected that they could not have an account of the real estate of two testators in the same suit, unless it was a creditor's suit on behalf of all the creditors of each. The right of administering real estate is not given to a plaintiff, except in a bill on behalf of all creditors. Even a creditor cannot have a decree at all affecting real estate except in a suit on behalf of all creditors.

Rolt, Q.C., in reply.—The objection is too late. The decree has been already taken against both. We have a lien on the property of both, and want thereupon to get at both estates. When you have got trustees with power to sell and give receipts you do not want the *cestes que trustent* for the purpose of enforcing a lien against the property.

WOOD, V.C.—The right form will be to direct that the bill should be taken as on behalf of all the creditors of A. and R. Hyde, deceased, respectively. Then take an account of the two estates, and if they are insufficient, decree a sale of the real estate.

Then there will be the usual administration decree of the real and personal estate of two testators, and an account of what is due to the plaintiff under the decree, and then reserve further consideration.

There is no substantial difficulty in the case of the trustees, you do not want two sets of defendants; all persons must come in to have the account taken, each for his own estate.

LORDS JUSTICES, Nov. 4, 1865.

Re ADAM'S TRUSTS.

14 W. R. 18; 13 L. T. 347; 11 Jur. N.S. 961.

Will—Death—Life estate—“In the event of death,” and “at the death” construed as referring to death at any time.

WILL.—Bequest to A., “and in the event of her death” over, followed by codicil reciting the bequest to A., giving legacies, and proceeding—“at A.’s death I wish all remaining to be for the benefit” of B. and C.

Held, that upon the will and codicil, taken together, A. took a life interest, with remainder to B. and C.

This was an appeal from an order made on petition by the Master of the Rolls for payment out of court of a sum paid in under the Trustee Relief Act.

Robert Adam, by his will dated the 21st November, 1854, devised and bequeathed as follows:—“I give, devise, and bequeath all my effects, both real and personal, to my wife Phœbe Adam, and, in the event of her death, to the children of my deceased brother, James Adam, to be equally divided between them.”

The testator made a codicil to his will dated the 23rd November, 1854, which was in the following words:—“I hereby, as before stated, leave all I possess to my wife, Phœbe Adam, wishing her to continue the allowance of 30*l.* per annum to Mrs. James Adam; I also wish 20*l.* to be given to each of Henry Cox’s children at their wedding, and the sum of 20*l.* to each of Mrs. James Adam’s children on their wedding-day; also 50*l.* to be given to William Cox, my wife’s brother; at my wife’s death I wish all remaining to be for the benefit of Mrs. James Sarah Adam and her children.”

The testator died in 1858, and his wife in 1862. The executor of the testator, in 1864, paid into court part of the estate, and upon the petition of Phœbe Adam’s executors, the Master of the Rolls made an order for payment out of court of the fund to them. Against this order the present appeal was brought by Mrs. J. S. Adam and her children, who insisted that the gift to the testator’s widow was for life only, with remainder to themselves.

L. Bird and H. J. Bird for the appellants.

Whitehorne for the respondents, the executors of Phœbe Adam, cited Pushman v. Filliter (3 Ves. 7); Wilson v. Major (11 Ves. 205); Re Mortlock’s Trusts (5 W. R. 748; 3 K. & J. 456); Bowes v. Goslett (6 W. R. 8; 27 L. J. Ch. 249); Holmes v. Godson (4 W. R. 415; 8 D. M. G. 152); Re Yalden (1 D. M. G. 53); Barton v. Barton (3 K. & J. 512).

Cole, Q.C., for the trustee of the will, asked for his costs.

L. Bird in reply.

KNIGHT BRUCE, L.J., said that the words used in the will in this case, in reference to the death of the testator's wife, were, properly speaking, flexible; they might either mean death in the testator's lifetime, or death whenever it might happen. The interpretation to be put upon these words must depend upon the context in which they were found, and the codicil must, for this purpose, be read with the will.

The words "as before stated" in the codicil seemed to leave the matter as it was left by the will, if it were not for the other parts of the codicil. In this particular case his Lordship thought that on the true construction of this will and codicil, the words, "at my wife's death I wish all remaining to be for the benefit of Mrs. James Sarah Adam and her children," indicated an intention to reduce the gift to the testator's wife to a tenancy for life; the words, "all remaining" were to be construed as meaning all which should remain, not after any expenditure by the testator's wife, but after payment of the legacies given by the codicil. His Lordship gave no opinion on the words of the will taken alone, but thought that, taking the codicil with the will, the testator's wife must be held to take as tenant for life, with remainder to Mrs. James Sarah Adam and her children.

TURNER, L.J., said that this was a difficult case, but that on the first disposition in the will, he entertained no doubt. It was clear that an absolute gift to A., followed by an absolute gift to B. on A.'s death, was, in the absence of any controlling context, a gift to B. in the event of A.'s death in the lifetime of the testator. But these words might bear a different import according to the context in which they were found. His Lordship thought that nothing could be found in the codicil to affect the construction of the will until the words, "At my wife's death, I wish, &c." These words must be carefully considered. To construe the words "at my wife's death" as referring to death in the testator's lifetime, would be to put a forced and unnatural construction upon them, they must mean "on my wife's death." Then, as to the words, "I wish," his Lordship thought that the authorities cited by Mr. Whitehorne, in his very lucid and concise argument, did not bear upon the present case; but it seemed clear, on looking at the rest of the codicil, and especially at the gift of the legacies, that those words were there used as words of bequest; the testator then had said—"On my wife's death I give and bequeath all remaining"—and these last words must mean, all that may remain after the previous dispositions, and not all which might be undisposed of by the testator's wife. His Lordship therefore concurred with his learned brother in thinking that an order should be made on the footing of a tenancy for life in the wife, with remainder to Mrs. James Sarah Adam and her children.

KINDERSLEY, V.C., Nov. 3, 1865.

Re THE BRITISH AND FOREIGN CORK COMPANY (LIMITED).

Ex parte LEIFCHILD.

14 W. R. 22; L. R. 1 Eq. 231; L. T. 267; 11 Jur. N.S. 941.

See *In re Baglan Hall Colliery Co.*, [1870] E. R. A.; 39 L. J. Ch. 591; L. R. 5 Ch. 346; 23 L. T. 60; 18 W. R. 499 (L. J.).

Joint-stock company — Winding-up — Contributory — Paid-up shares — Creditors—Power to purchase.

COMPANY.—*Messrs. C., assignees of a patent, agreed with certain persons, proposing to form a limited company, to sell all their interest with the stock plant and machinery, Messrs. C. to have 840 shares in the company, of £5*

each, to be treated as paid-up. An assignment was accordingly executed, stating the consideration to be ten shillings, and a memorandum and articles of association, framed, stating the objects of the company and the title to the 840 shares, describing them as paid up. Messrs. C. subsequently transferred 329 of the shares to L., as a trustee for them, and both on the printed certificates and in the book the shares were designated as "paid-up." The company being subsequently ordered to be wound up upon petition, and an official liquidator appointed, he sought to put L. on the list of contributories, on the ground that although the shares were treated as, and stated to be, paid up, no money or goods passed, which was a fraud on creditors.

Held,—That the statement in the articles of the objects of the company included a power to purchase. That the fact of L. being a trustee did not protect him if he was otherwise a contributory. That a nominal consideration in a deed was not inconsistent with a real valuable one actually existing, and that unless a fraud being charged against L. he was not liable as a contributory, and that the creditors could not raise a case of fraud but by bill. Costs of the official liquidator and L. out of the estate.

This was an adjourned summons on the question whether George Leifchild was liable to be placed upon the list of contributories in the winding up of this company. On the 5th of November, 1852, Robert B. Cousins obtained a patent for improved machinery for the cutting and dressing of cork, and that patent became ultimately vested in Messrs. J. L. & R. M. Claypole, who, in the Spring of 1860, agreed by parol with certain persons to sell to them their interest in the patent, together with the leasehold premises in Esher-street, London, with the stock, plant, and machinery. The object of the proposed purchasers was to form a joint-stock company (limited) for the purpose of working the patent, and this was accordingly done, and articles and a memorandum of association framed, dated the 1st May, 1860, which set forth that the object was to work the patent, but contained no specific power to purchase it, and there was a statement that J. L. Claypole was entitled to 840 paid-up preference shares. The letters patent being at the time vested in Messrs. Claypole, the stock-in-trade and debts of the concern were sold to the persons forming the company for £750 in cash, and by an indenture of even date with the articles of association, the patent and machinery were assigned to a trustee for the company for ten shillings consideration, and then there was the parol agreement for the delivery of 980 paid-up shares of £5 each to the Messrs. Claypole, as a consideration for the plant and machinery, and the certificates were delivered, but there was no entry in the books specially mentioning the consideration for the shares, but they were stated simply as paid-up. Previously to August, 1861, the Messrs. Claypole transferred 329 of these shares to Mr. Leifchild, and a resolution was passed at a meeting on the 17th of that month that all the paid-up preference shares should be turned into paid-up ordinary shares, and, amongst other shareholders, Mr. Leifchild's name was specially mentioned as the holder of 329 paid-up preference shares. On the 29th of November, 1862, Leifchild, by the direction of J. L. Claypole, transferred 180 shares of the 329 to R. M. Claypole, leaving 149 in his name. Subsequently the old certificates were given up and cancelled and new ones issued, including the 149 shares, then paid-up ordinary shares. The 3rd clause of the articles of association stated the object of the company to be "the purchasing and selling and cutting of cork by improved machinery." The company was registered in June following and several meetings held, at which various alterations were made in the articles, but the statement with regard to the 840 shares, in connection with J. L. Claypole, and the 3rd clause, remained untouched, and both in the printed certificates and the entries in the book the shares were stated as "paid up." The company was to have a nominal capital of £20,000 in 4,000 shares of £5 each, and was started and carried on business until July, 1864,

when a petition was presented by John Butterworth, the representative of a shareholder, and it was ordered to be wound up, and an official liquidator appointed under the Companies' Act of 1862 (25 & 26 Vict. c. 89). In the books an entry appeared of £12,600, as the total received for calls, whereas the only money which actually passed were sums of £1,500, £500, £500, and £500, and this appeared in evidence with reference to the books; the result of the meetings being, in fact, an arrangement by the shareholders among themselves. In the proceedings under the winding-up in chambers, a call being in prospect, a question was raised whether Mr. Leifchild was not liable in respect of his 149 shares, in consequence of their being not in reality paid up, though so represented, and this involved the same question as to the remainder of the 840 shares held by Messrs. Claypole, and the chief clerk considered that that question had better be disposed of in court, and adjourned the matter accordingly, and it now came on upon the usual summons to be argued.

Glasse, Q.C., and *Fry*, for the official manager, contended that Mr. Leifchild held himself out to the world—what in fact he was not—a paid-up shareholder. The effect of the sale was that no money or money's worth passed, and however good and binding that might be as between the shareholders, it was a fraud against the creditors. Leifchild was a member either in respect of paid-up or not paid-up shares, and if they were not paid-up, he must pay up (20 & 21 Vict. c. 78, s. 61). Payment must be by money passing from one party to another, or an equivalent in goods; here there was nothing of the kind, but even in that case all parties must agree, and here the creditors were not bound. On the deed nothing but 10s. consideration appeared: *Peacock v. Monk* (1 Ves Sen. 127); *Ex parte Daniell* (1 De G. & J. 372).

Jessel, Q.C., and *W. W. Mackeson*, for Mr. Leifchild, argued that he was a bare trustee, and there was no contract between him and the company. No new contract could be made; but if there was, Leifchild must be a party to it. Parol evidence was admissible to prove something *dehors* the deed. Let it be admitted that the directors and shareholders of a limited company could not, among themselves, agree that certain paid-up shares should be delivered to a particular shareholder without consideration, which would be a fraud under the Act; the question here was whether there was *bond fide* consideration, and on that question there was an affidavit un-contradicted of the *bond fide* value of the patent and machinery (25 & 26 Vict. c. 89, s. 64); *Clifford v. Turrell* (1 Y. & Coll. 138, 9 Jur. 633), in which Lord Lyndhurst disapproved of *Peacock v. Monk*; *Maxwell v. Port Tennant, &c., Company* (24 Beav. 495); *Ex parte Currie* (11 W. R. 46).

Glasse, Q.C., in reply, referred to *Official Manager of the Athenæum, &c., Company v. Pooley* (7 W. R. 168; 3 De G. & J. 284); Taylor on Evidence 898 (citing *Peacock v. Monk*); *Gale v. Williamson* (8 M. & W. 408).

KINDERSLEY, V.C. (stated the facts, and referred to the 3rd clause of the articles of association).—It is justly said that this clause does not specify the purchase of the patent, but if, in order to work it, it was necessary or expedient to purchase it, it appears to me to be within the objects specified by this clause, although, no doubt, a privilege for exclusive use only might have been reserved. The agreement to purchase on the terms proposed was not only made, but it formed a part of the articles of association, which were the foundation of the partnership, and specifying the footing upon which the joint-stock company (limited) was to be carried on. The transfer to Leifchild could not, I presume, be made without the concurrence of the directors, because they always reserve a veto. The fact that he was a mere trustee is no reason why he should not be liable, because the company were not bound to regard a trust, and therefore if he has made himself otherwise liable to be put on the list, the being a trustee will not exonerate him, but the question is, whether, if he had taken a voluntary transfer for his own benefit, he would

be liable as a contributory. About the facts there is no doubt, but it is said the 840 shares cannot be considered as paid-up, because the consideration for them was the transfer of the patent by a deed only specifying ten shillings consideration, and the Court must shut its eyes to the arrangement on which, in fact, one of the clauses of the articles was founded, and *Peacock v. Monk* (*supra*) was cited as an authority that you were precluded from shewing that there was any other consideration than that stated in the deed. *Clifford v. Turrell* was also cited to shew that Lord Lyndhurst hesitated to accede to that, observing it was a mere *dictum*, but this, it appears to me, at all events, may justly be considered to be a rule, viz., that supposing Lord Hardwick's *dicta* right, that must be where the real consideration, such as natural love and affection or pecuniary consideration, would be said to be inconsistent with that expressed in the deed. Here there is only a nominal consideration, namely, ten shillings, and I think it is scarcely inconsistent with it to allege natural love and affection or money, or money's worth; and, therefore, assuming that Lord Hardwicke's *dictum* is law, it appears to me it would not apply to the case of a nominal consideration, which was originally introduced to raise an use, and for no other purpose, and is, in fact, no consideration at all. The question here is, not whether the deed is to be upheld or set aside, but whether or not the shares were given as a consideration for the patent, and, if so, it is immaterial whether this deed is invalid or not; and I have only to consider whether I am precluded from looking at the facts, there being no suggestion of fraud or trick by which the shareholders were deluded; indeed, as far as I can see, it was all perfectly fair. The question is whether, as against Leifchild or the Claypoles, I can say that the shares are not to be treated as paid up, and that they are not to have the benefit of the consideration given in lieu of the £5 per share for the shares. It appears to me that there is no reason why Mr. Leifchild should be put upon the list, unless, according to the terms of the Act, he is liable to contribute to the assets." What do those words mean? Why, that he is liable with other persons to pay a certain contribution to make good the liabilities; no one in this case having a right to say he is bound to assist in paying the debts. But it is said that does not extend to creditors. Now, under the original Act, the Court did not concern itself with creditors; but they are now taken into account; that is to say, by means of contribution the Court is to make up the means of paying them. But unless you can say that it is a fraudulent transaction, they can have no remedy anywhere; and if they had, how is that to be decided on a question whether a party is to be put on the list of contributories or not? They must do it by filing a bill. Leifchild was guilty of no fraud, but was merely in the position of a person taking shares represented by the articles of association to be paid up, and he takes them as the company represented them in their articles, namely, as paid-up shares. It appears to me that Mr. Leifchild ought not to be put upon the list. The official liquidator has only done his duty in coming here, and therefore he must have his costs out of the assets, and pay Mr. Leifchild's costs, adding them to his own.

STUART, V.C., Nov. 7, 8, 1865.

ACKROYD v. BRIGGS.

14 W. R. 25; 13 L. T. 521.

Practice—Parties—Tenants in common.

PRACTICE.—Where three out of forty-seven tenants in common filed a bill for an injunction to restrain the digging of stone on the common property, objection for want of parties not allowed.

The plaintiffs in this suit were three tenants in common, each being entitled to one undivided sixth part of a farm and land at Clayton, in Yorkshire.

The title was derived from one William Ackroyd, who devised the property in question to his six children as tenants in common. At the time when the bill was filed the shares of these six children had, by transmission of interest, become vested in forty-seven persons in all. Of these the plaintiffs were together entitled to a half of the property, and the other half was divided between the other forty-four tenants, some of whom were out of the jurisdiction, and whose shares, in some instances, amounted to no more than a 360th part of the property.

The plaintiffs filed a bill in their own names only, for an injunction to restrain the digging by the defendants of stone on the common property.

Malin, Q.C., and *Wright*, for the plaintiffs.

Cole, Q.C., and *J. Pearson*, for the defendants, took the objection that the tenants in common, other than the plaintiffs, ought to have been parties.

STUART, V.C., disallowed the objection for want of parties, and granted the injunction, directing that of the sum arranged to be paid for stone already dug, one-half should be paid to the plaintiffs at once, and the other half paid to them on their producing a release from the other tenants in common.

KINDERSLEY, V.C., Nov. 8, 1865.

In re THE XERES WINE COMPANY (LIMITED).

14 W. R. 43; 13 L. T. 269.

Practice—Joint-stock Company—Winding-up—Adjourned summons to restrain sale.

COMPANY.—The Court will not, upon an adjourned summons, give any direction to the official liquidator which will operate as an injunction to restrain a sale by a creditor holding securities of the company.

This company being in the course of being wound up under the Companies Act of 1862 (25 & 26 Vict. c. 89), this was an application by the official liquidator on an adjourned summons, to restrain the Alliance Bank from selling wines, of which the bank held the dock warrants as a deposit, to the value of £9,000. The sale had been advertised for that day (Nov. 8).

Druce, in support of the application, stated that a Mr. Duckworth represented the wine company in this country, and he entered into an agreement with a M. Leon, abroad, by which the wine company were bound to ship wines to this country to be sold by the company, M. Leon drawing bills up to £75 per cent. of the value of the consignments, but there was a stipulation that the wines were not to be sold at a sacrifice. Bills were drawn against the wine company, and the company deposited with the Alliance Bank dock warrants to enable them, through means of the bank, to provide for the bills which M. Leon had drawn, but there was the same condition at the time of the deposit that the wines were not to be sold at a sacrifice. About £1,000 worth of the wines had been sold, and the sale of these wines was not now called in question, but it was alleged that the banking company was aware of the circumstances.

Baily, Q.C.—No they were not.

Druce.—The company were factors for the shipper and the party with

whom the dock warrants had been deposited had no right to sell, although it was the custom of merchants often to do so and to disregard the law. The parties holding the goods had come in and proved their debt, and the official liquidator was in a position to call upon them as creditors. The wines were subject to the provisions of the Winding-up Acts, and the official liquidator now asked for the direction of the Court. The sale was advertised as wines in bond, duty paid—the whole without reserve. The official liquidator having received notice that this sale would be attempted, sent to the consignor abroad, and received for answer that he would not consent to the wine being sold at a sacrifice. The bank had thrown together these wines and others of an inferior quality, but of the same brand, the only object of the bank being of course to realize enough to cover their security. The consignor, moreover, stated that he should hold the estate responsible for any loss, and what was now asked was that some direction should be given as to the sale of the wines, and that it should be subject to the approbation of the Court; and the official liquidator submitted to concur in any sale which did not contravene the orders of the consignor.

Baily, Q.C., and *Karslake*, who opposed the application, were not called upon.

KINDERSLEY, V.C.—I do not see how I can assume jurisdiction on this summons. If a bill were filed of course I could go into the case. You are asking in fact an injunction to restrain the sale without filing a bill; and I do not see how I can possibly do it. If you came to the judge in chambers for his direction, the consequence would be that you could do that without bringing the Alliance Bank before the Court. All I can do is to refuse the application with costs, without prejudice to any application to be made to the judge in chambers.

STUART, V.C., Nov. 9, 1885.

CAMPBELL v. ATTORNEY-GENERAL.

14 W. R. 45; 13 L. T. 356; 11 Jur. N.S. 922.

Practice—Examination of witnesses de bene esse.

EVIDENCE.—*A commission may issue to examine witnesses de bene esse, although the defendants have not appeared.*

This was a bill filed by Lieutenant Donald Campbell, the claimant to the earldom and estates of Breadalbane for the purpose of perpetuating the testimony of certain witnesses resident in Scotland, who were all of a great age and in a precarious state of health. The bill prayed that the persons named might be examined *in perpetuam rei memoriam*, relative to the pedigree of the plaintiff, and that their evidence might be recorded and perpetuated, and that a commission might be issued for their examination in Scotland.

The bill was filed on the 16th of September.

The Attorney-General had appeared, but neither of the other defendants (the rival claimants to the earldom), both of whom were out of the jurisdiction, had done so; Mr. Nicholson, solicitor, of Lime-street, had accepted service for one of the defendants on the 22nd September, but had refused to enter an appearance, and the other defendant could not be found. The theory of the plaintiff was that the defendants were purposely keeping away in order to protract the proceedings in hopes that witnesses material to the plaintiff's case might die in the meantime.

Downing Bruce, for the plaintiff, moved for leave to have a commission

issued for the purpose of examining these witnesses. He cited *Coveny v. Athill* (1 Dick. 355); *Frere v. Green* (19 Ves. 319); *Lancaster v. Lancaster* (6 Sim. 439; 5 & 6 Vict. c. 69); *Earl of Belfast v. Chichester* (2 J. & W. 439).

Wickens, for the Attorney-General, objected on the ground that the application was irregular, that the other defendants had not appeared, and that replication had not been filed.

STUART, V.C., said that he could not make the order in the terms of the prayer of the bill, but he would make the usual order for examination *de bene esse*. As the witnesses were all over seventy years of age, the commission must issue at once.

STUART, V.C., Nov. 13, 14, 1865.

DOWLING v. DOWLING.

14 W. R. 47; L. R. 1 Eq. 442; 13 L. T. 553; 11 Jur. N.S. 1033: reversed [1866] E. R. A.; 14 W. R. 1003; L. R. 1 Ch. 612; 15 L. T. 152; 12 Jur. N.S. 720 (L. JJ.).

Construction of will—Gift to children by implication.

WILL.—*A gift of the interest of a residue to the four sons of a testator, "and at the decease of either, without lawful issue, such share to revert to the remainder then living, or their child or children."*

Held, to confer only life interests on the four sons, and that their respective children took vested interests in the capital.

This suit was instituted for the administration of the estate of Richard Dowling, deceased, formerly of Plumstead, in Kent.

The testator, by his will, dated the 18th of November, 1859, gave the whole of his real and residuary personal estate to trustees, upon trust for conversion and investment; and the will contained the following clause: "The interest therefrom to be divided half-yearly between my four sons above-named; and at the decease of either without lawful issue, such share to revert to the remainder then living, or their child or children."

The testator left five sons living at his death, and some questions were raised as to which of his sons were referred to in the above bequest.

The principal question in the suit was as to the construction of the gift to the sons. It was urged by the four sons that they were absolutely entitled in equal shares to the capital of the invested fund. And on behalf of the children of one of them (who had been served with notice of the decree), that the parents took life interests only, with a gift in remainder by implication to their children, while it was contended by the heir at law and next of kin of the testator that the gift was void of uncertainty, and that the testator died intestate as to his real and residuary personal estate.

Malins, Q.C., and *Cracknall* for plaintiff, S. H. Dowling, one of the four sons of the testator.—There was no gift by implication to the children of the testator's sons. This gift to them was merely substitutionary. It was clear that the gift of "the interest" was equivalent to an absolute gift of the capital. Then a gift like the present would, under the old law before the Wills Act, have given the testator's sons absolute interests, but the gift over would have been void for remoteness. Since the Wills Act the words "die without issue" would mean "without leaving issue," and the gift over would be good; but the testator's sons would retain absolute interests, subject to the contingent executory gift over.

Osborne, Q.C., and *Speed*, for parties in the same interest.

The following cases were cited to show that a gift of the interest carried the principal: *Philipps v. Chamberlaine* (4 Ves. 50); *Haig v. Swiney* (1 S. & S. 487); *Humphrey v. Humphrey* (1 S. N. S. 536); *Page v. Leapingwell* (18 Ves. 463); *Wheel v. Ollive* (32 Beav. 421); and on the question of implication: *Salisbury v. Petty* (3 Hare, 86); *Forth v. Chapman* (1 P. W. 663); *Lee v. Busk* (14 Beav. 459); *Lee v. Busk* (2 D. M. & G. 810); *Ranelagh v. Ranelagh* (12 Beav. 200); *Sparks v. Restal* (24 Beav. 218); *Cooper v. Pitcher* (4 Hare, 485); *Andree v. Ward* (1 Russ. 260); *Webster v. Parr* (26 Beav. 236); *Neighbour v. Thurlow* (28 Beav. 33).

Aikin, for the children of one of the testator's sons, who had been served with the decree, cited *Ex parte Rogers* (2 Mad. 449); *Wetherell v. Wetherell* (10 W. R. 818 4 Giff. 51).

Bacon, Q.C., Greene, Q.C., Waller, Wellington Cooper, and Schomberg, appeared for various parties interested.

STUART, V.C., said that the question raised in the case whether the testator's sons took absolutely, or whether the capital was given to their respective children after their death, was so perplexed by reason of the weight of authority on both sides that it was very difficult to deal with it. The case of *Ex parte Rogers* was a decision of very great authority. The decision in that case was not followed by Lord Longdale in the case of *Ranelagh v. Ranelagh*, and in the case of *Lee v. Buck* Lord Cranworth is reported to have said that he doubted it. These eminent judges appeared to have forgotten that that case was decided by Sir T. Plumer on the authority of Lord Thurlow's decision in the case of *Harman v. Dickenson* (1 B. C. C. 91). The Master of the Rolls, however, in the case of *Ranelagh v. Ranelagh* professed himself to be unable to answer the question proposed by Sir T. Plumer in *Ex parte Rogers*, why the children were named in the gift over. The reasoning in that case was that it was difficult to see why the testator should have made the gift over to take effect on the first and others dying without issue unless he intended some benefit to the issue. That reasoning applied still more forcibly in the present case, as the testator, by mentioning the children of his sons in the gift over, clearly showed that they were the objects of his bounty. The gift over was "to the remainder then living or their child or children. The observation of Sir T. Plumer, therefore, bore very strongly on this case. He (the Vice-Chancellor) found the Court of Appeal divided in opinion, and he was, therefore, compelled to decide the question by the reason of the case, and he must come to the conclusion that the children of the testator's sons took by implication, and that the testator's sons were only entitled to life interests in the residue.

Wood, V.C., Nov. 10, 13, 14, 15, 1865.

DAW v. ELEY.

14 W. R. 48; L. R. 1 Eq. 38; 13 L. T. 390.

See now Patents and Designs Act, 1907 (7 Edw. VII. c. 29).

Patent Law Amendment Act, 1852—Statute 15 & 16 Vict. c. 83—Admission of evidence—Trial of a patent—Practice—Hearing of counsel.

PATENT.—On the trial of a patent case by the Court, without a jury, the defendants tendered evidence of a prior use not specified in their particulars of objections delivered to the plaintiff in pursuance of statute 15 & 16 Vict. c. 83, s. 41. They alleged that this evidence was unknown to them till after the case was in the paper.

Held, that the evidence could not be then received, but might be made the subject of a special motion.

When the Court is sitting as a jury, the practice as to hearing counsel is the same as at common law, but, on points of law occurring in the same case, counsel will be heard according to the ordinary practice of the Court.

This was a suit to restrain the alleged infringement by the defendants of the plaintiff's patent for the manufacture of central fire breach-loading cartridges. The defendants resisted the patent on the ground of want of novelty in the alleged invention, and they also denied infringement. In the particulars of objections which the defendants had, under the provisions of the statute 15 & 16 Vict. c. 83, s. 41, delivered to the plaintiff, they stated that the matters claimed as inventions in the specification were in common knowledge of men in trade for the manufacture or sale of cartridges previously to the date of the plaintiff's patent, and as instances the defendants named themselves, Mr. Robert Adams, and Mr. C. W. Lancaster, and also that the alleged invention was used prior to the date of the letters patent in the following manner, that is to say, that the defendants had manufactured at their premises, and sold, previous to the date of the patent, cartridges so made as to act in a precisely similar manner to those described in the plaintiff's specification. During the examination of one of the witnesses for the defence, it was proposed to ask him questions with a view of showing a prior knowledge of something equivalent to the plaintiff's alleged invention in Belgium, this not having been stated in the particulars of objections.

Rolt, Q.C., Hindmarch, Q.C., Boyle, and T. Aston for the plaintiff, objected. If evidence relating to other places than those mentioned in the particulars of objection were to be admitted, it would really be an evasion of the statute. The objections ought to state exactly what case the plaintiff has to meet, that he may either be prepared with evidence to meet it, or, being satisfied that the objection is a valid one, may be saved the cost of any further proceedings. They referred to *Curtis v. Platt* (8 L. T. N. S. 657).

Daniell, Q.C., Bushby, and A. G. Langley, for the defendants.—This evidence did not become known to the defendants till the 6th November, after the cause had come into the paper, and, therefore, the matters which it referred to could not have been included in the particulars. The same course ought to be taken as was taken in *Renard v. Levinstein* (13 W. R. 229), and, if necessary, the defendants should have leave to serve a notice of motion. The Court will not allow an accident to interfere with the justice of the case, but, in admitting, or not admitting, the evidence will only be guided by its materiality, and if there be inconvenience to the other party, the Court can impose such terms as it thinks fit to meet this. In *Renard v. Levinstein* it was said that the defendant might, with ordinary diligence, have discovered the evidence. This was not so here.

Wood, V.C.—A suit in chancery concludes the right, and, in this respect, differs from an action at law. Moreover, on appeal, the new evidence might be introduced.

Hindmarch, Q.C., in reply.—On an appeal time would be given to the plaintiff to meet the new evidence. At any rate the defendants were aware of the proposed evidence ten days ago, and they should at once have moved to have it admitted.

Wood, V.C.—The evidence cannot be admitted at present. The question is by no means a technical one, but a very vital and substantial one, and for this reason the Legislature took the course it did in requiring a specific statement of the place where the alleged prior use took place. (His Honour here read the words of statute 15 & 16 Vict. c. 83, s. 41.) This provision was intended for the benefit of both parties, that either they might be prepared

to meet the case set up, or submit at once on finding the truth of what the particulars stated. As to the argument that truth might be excluded by this provision, it was possible that truth might be purchased too dearly for the suitor. If this witness could be heard to say what he saw in Belgium, another might be heard to say what he saw in Pekin, and the case would have to be postponed to bring witnesses from thence, and meanwhile the patent would be running out. This shows the wisdom of the enactment. The evidence must be shut out now, but with leave to the defendants to make such motion in relation thereto as they may be advised.

A further question was raised as to the proper course to be taken in hearing the addresses of counsel in a case of this nature, when the Court was trying questions of fact as a jury, as well as deciding questions of law in the ordinary way.

Wood, V.C., said, that as far as the questions of fact were concerned, he should follow the practice at common law. One of the plaintiff's counsel would open the plaintiff's case; then the plaintiff's witnesses would be called and examined; then one of the defendant's counsel would open his case, and the defendant's witnesses would be called and examined; after this one of the defendant's counsel would sum up the evidence, and one of the plaintiff's counsel would reply on the whole case. On any question of law he should hear counsel on both sides, according to the ordinary practice of this Court.

Accordingly, after the evidence was closed, and the summing up and reply had been heard, counsel were heard in the ordinary way on the questions of law.

[IN THE COMMON PLEAS.]

Nov. 3, 1865.

HADLEY v. TAYLOR AND OTHERS.

14 W. R. 59; L. R. 1 C.P. 53; 13 L. T. 368; 11 Jur. N.S. 979.

Negligence—Unfenced hole near a highway—Public nuisance—Liability of occupier.

NEGLIGENCE.—The defendant temporarily stored his goods in the ground floor of an unfinished warehouse still in the builders' hands, and paid the landlord for so doing. Between the warehouse and a highway, and fourteen inches from the latter was an unfenced hole, which had been made by the landlord. The plaintiff slipped on the highway, and fell into this hole.

Held, that the hole, though not actually adjoining the highway, was a public nuisance, and that the defendant was sufficiently in occupation of the premises to render him liable to the plaintiff for the injuries caused by his fall into the hole.

Declaration for that the defendants were the occupiers and possessed of a certain warehouse and hoisthole, vault, or cellar, immediately adjoining a public highway, and wrongfully suffered the said hoisthole, vault, or cellar, to be open to the said highway, without any light, railing, fence, or protection, and so as to be dangerous to persons lawfully passing along the said highway during the hours of darkness; and the plaintiff while lawfully passing along the said highway during the hours of darkness, fell into the said hoisthole, vault, or cellar, whereby, &c.

Plea—Not guilty, and issue thereon.

The action was tried before Byles, J., at Worcester, when the plaintiff obtained a verdict for 250*l*. The material facts of the case were as follows:—

The defendants were merchants in Manchester, and in February last, while their own warehouse was being pulled down, they made arrangements with a Mr. Jeffreys to allow them to put their goods into a warehouse which was being built for him. In pursuance of this agreement they entered, and deposited their goods in the ground floor of the new warehouse, and made a payment on account of rent. At the back of this warehouse ran a street, with a footpath on each side of it, and between the footpath nearest to the warehouse and the warehouse itself there was a small space of ground, in which had been dug a hoisthole, to be used for the business of the warehouse. This hole was about six feet in length and depth, and three and a-half feet in width, and was fourteen inches from the footpath; it was not in any way fenced from the street, but it was intended to be enclosed by an iron railing. At the time of the accident, and for some time previous, a night watchman had been employed by the landlord to look after these and adjoining premises. About a week after the defendants had taken possession, and while the warehouse was still in the builders' hands, under the superintendence of an architect, the plaintiff, as he was walking along the footpath after dark, slipped into the hole, and sustained the injuries complained of. The learned judge told the jury that, if they thought the defendants were in occupation, and that the place was dangerous to persons lawfully passing along the highway, they should (subject to a question of contributory negligence) find for the plaintiff; and this they did.

Powell, Q.C., now moved to set aside the verdict for the plaintiff, and to enter a nonsuit. 1. Though the defendants occupied one of the floors, they had no such possession as to throw on them the duty of fencing off this hole from the street. They could only use the premises for the purpose for which they were let to them, and therefore had no power to interfere. [*BYLES, J.*—They had paid some rent, and were tenants from year to year, and not merely at will.] Either the proprietor who employed the builder, or the builder, or both, were liable. 2. There was no public nuisance. In *Barnes v. Ward* (9 C. B. 392), the hole came flush up to the footpath; here it was fourteen inches within defendant's premises. That distinguishes the two cases, and is the only point at which the line can be drawn. [*WILLES, J.*—I remember my brother Blackburn drawing a distinction between such a hole as a man could fall into off a highway, and a hole which he must wander off the highway before he could fall into.]

ERLE, C.J.—I am of opinion that there should be no rule. This was an action for injuries caused by falling into a hole, which was not on the highway, but within fourteen inches of it. The occupier is liable for that hole as a nuisance, if a passenger using the highway would, by an ordinary accident, be liable to be injured thereby. The plaintiff was using the highway when he fell into this unfenced area, and on the authority of *Barnes v. Ward* I think the defendants were liable for the nuisance. It is said that the buildings were unfinished, that the landlord put the hole there, and that the defendants had only taken a temporary occupation for warehouse room. That, I am of opinion, is no defence. The party responsible for a nuisance is, as a general rule, the party in occupation of the premises, and to him the public have a right to look, though they may have a right to look to some one else besides.

WILLES, KEATING, and BYLES, JJ., concurred.

Rule refused.

STUART, V.C., Nov. 16, 1865.

BROWN v. THOMPSON.

BROWN v. BEWICK.

14 W. R. 76; 13 L. T. 395; 11 Jur. N.S. 922.

VESTED, CONTINGENT AND FUTURE INTERESTS.—*A gift of a life interest in residue to testator's three children during their respective natural lives, and after their decease respectively to their child or children, with a gift over in case they should all die without issue, to L.,*

Held, that on the death of any of the three children without issue, his share became divisible among the children of the others then in esse per capita.

This suit was instituted for the administration of the estate of William Thompson, and to determine a question of construction which arose on the wording of his will.

The testator, by will dated 9th July, 1816, gave his real and personal estate to trustees on trusts for conversion and investment of the personal estate, and to pay and apply the interest thereof, and of his real estate, equally between his son Joseph and his daughters Jane and Mary, in equal shares, in such sums and at such times as the trustees in their discretion shall think fit, to his said daughters until they should severally attain their respective ages of twenty-one years; and after that period by equal half-yearly payments during their *respective* natural lives, and to his said son by equal weekly payments during his natural life. The will then proceeded as follows:—“From and immediately after the decease of my said three last-mentioned children *respectively*, I give and bequeath one equal third part or share of the said residue of my said real and personal estates unto such of *their* children as shall be then living, and the child or children of such of them as shall be then dead, his, or their heirs, executors, administrators, and assigns, in equal shares and proportions. And in case they shall all of them die without lawful issue, I give, devise, and bequeath all such residue of my said real and personal estates unto my son Leonard Thompson, his heirs, executors, administrators, and assigns for ever.

The testator's four children, Joseph, Jane, Mary, and Leonard, all survived him.

Joseph died without issue in April, 1826. Jane married W. Brown, and died in September, 1854, leaving eight children, who are all still alive. Mary married the defendant Bewick, and died without issue in April, 1860. Leonard was the testator's eldest son and heir at law, and died in June, 1859, and the defendant Bewick claimed through him. At the death of Joseph there were four children of Jane *in esse*.

Malins, Q.C., and Bird, for the plaintiffs, who were some of the children of Jane Brown, contended that on the death of Joseph his one-third became divisible between the four children of Jane, then *in esse*. If Mary had had children, or if he, Joseph, had had children then living, Joseph's share would have been divisible between the children of all three *per capita*. The same reasoning applied to Jane's share and Mary's. As Jane was the only one of the three who had had children, those children were entitled to the whole.

Dickinson, for parties in the same interest.

Bacon, Q.C., for defendant, Bewick, who claimed under Leonard, urged that the context showed that the word “their” must mean “their respective;” and that on Joseph's death, without issue, his one-third went as on an intestacy. The same reasoning applied to Mary's one-third. He cited *Ayscough v. Savage* (13 W. R. 373).

STUART, V.C., said that he could not agree that the word "their" should be construed as "his or her." The testator had spoken of his three children, and the word "their" must mean all the children of these three. It was said that the Court would look to the context, and the Court was asked to do so, and to put a forced construction on the word "their" for the purpose of creating an intestacy; and the only argument urged was that the testator had used the word "respectively." Now, this word was used by him with reference to the event of the death of his three children, and it was sought to construe it in quite a different manner, as turning "their," which was a plural word, into a single one. There must be a declaration that the four children of Jane, who were *in esse* at Joseph's death, were entitled in equal fourths to his share, and that the shares of Jane and Mary were divisible equally between the eight children of Jane.

Wood, V.C., Nov. 9, 15, 1865.

LINGWOOD v. THE STOWMARKET PAPER MAKING COMPANY.

14 W. R. 78; L. R. 1 Eq. 77, 336; 13 L. T. 540; 11 Jur. N.S. 993.

Injunction—Pollution of stream—Form of order.

INJUNCTION. WATER.—*The order restraining the defendants from polluting a stream should restrain them from such pollution as would be to the injury of the plaintiff.*

This was a suit for the purpose of restraining the pollution by the defendants of a stream passing through the plaintiff's land. An interlocutory injunction had been granted, and the defendants afterwards submitted to have it made perpetual. A question, however, arose as to the extent to which the pollution ought to be restrained.

Phear, for the plaintiff, contended that the defendants ought to be restrained from polluting the stream at all.

Eddis, for the defendant, argued that the injunction should only be against polluting to the damage or injury of the plaintiff.

Nov. 15.—Wood, V.C.—The only question in this case is as to the insertion of the words "to the damage or injury of the plaintiff." There does not seem to be any regular course of authority on the point. In *Dawson v. Paver* (5 Hare, 415), the defendants were restrained from using a new drain for the purpose of draining into the plaintiff's ancient drain in such a way as to obstruct the plaintiff's former enjoyment of his ancient drain. In *Bidder v. Richards* I made an order in the terms given in Seton on Decrees, 3 ed. p. 894, restraining the passage of sewage into a river to the injury of the plaintiff. This is a very similar case to the present, and I shall adopt the same course. There may be ways of letting the matter complained of into the stream so as to avoid any injury to the plaintiff. The decree will, therefore, be in this form: "restrain the defendants from discharging from their works into the river or stream in the bill mentioned, so as to cause it to flow to the plaintiff's lands in a state less pure than that in which it flowed there previously to the establishment of the defendant's works, and to the plaintiff's injury, any such refuse as they discharged into it previously to the filing of the bill, or any other noxious fluid or foul matter whatsoever." I do not wish to encourage applications to the Court for every trifling matter, but the plaintiff is entitled to be protected from injury.

The order was finally drawn up in the following form:—

"This Court doth order that a perpetual injunction be awarded against

the Defendants, the Stowmarket Company, to restrain the said Defendants, their servants, agents and workmen, from discharging from their works in the Plaintiff's bill mentioned, into the river or stream in the said bill also mentioned, so as to cause it to flow to the Plaintiff's land, messuage, and mills, therein also mentioned, in a state less pure than that in which it flowed there previously to the establishment of the said works, to the injury of the Plaintiff, any such refuse or other matter as was discharged by the Defendants from the same works into the said river or stream previously to the filing of the said bill, or any noxious fluids or other foul matters whatsoever,"

Wood, V.C., Nov. 16, 1865.

NICHOLL v. JONES.

14 W. R. 79; 13 L. T. 498.

Practice—Motion to dismiss bill for want of prosecution—Acquiescence of defendant in delay caused by a co-defendant.

PRACTICE.—A defendant is not bound to wait while the plaintiff is endeavouring to obtain admissions from a co-defendant, though he is bound to wait while the plaintiff is using the ordinary process of the Court to prove his case against a co-defendant. A defendant is, however, bound by his own acquiescence in delay caused by a co-defendant; but as soon as that acquiescence is at end, he has a right to move to dismiss the plaintiff's bill for want of prosecution.

This was a motion on the part of Mary Hughes, one of the defendants, to dismiss the plaintiff's bill for want of prosecution. The bill was filed on the 19th January, 1863, and amended on the 16th June, 1863. The defendant Hughes's answer was filed on the 26th October, 1863, the other defendants' answers having been previously filed. The plaintiff desired to obtain one set of admissions from all the defendants, and with this view a long correspondence took place between his solicitors and the solicitors of the different defendants, but great difficulty was experienced in settling the proposed admissions with the solicitors of the defendant Jones. During the course of this negotiation, the solicitors of the defendant Hughes several times threatened to move to dismiss the bill for want of prosecution, but ultimately they approved of the draft of the proposed admissions on the 2nd May, 1865. The admissions were not, however, actually signed by them until the 18th October, 1865. No admissions having been obtained from Jones's solicitors, and no step having been taken by the plaintiff to prove the case against Jones, the defendant Hughes, on the 2nd November, 1865, gave notice to the plaintiff of his intention to move to dismiss the bill for want of prosecution.

Swanston now moved accordingly. The defendant Hughes has nothing to do with the delay which has been caused by another set of defendants. If the plaintiff could not obtain the admission of what he required from them, he ought to have proceeded to prove his case in the ordinary way.

E. R. Turner, for the plaintiff.—The delay has been entirely caused by the defendant Jones, and the defendant Hughes was fully aware of this. The cause of delay being a just one, and the defendant having been fully informed of it, he can only move to dismiss at the risk of costs: *Ingle v. Partridge* (12 W. R. 65, 33 Beav. 287).

Wood, V.C.—The only question is as to acquiescence in the delay by the defendant Hughes.

Swanston, in reply.—The plaintiff had the remedy in his own hands.

Wood, V.C.—The plaintiff might at any time have stopped this delay by availing himself of the ordinary process of the Court in order to prove his case; and this is the course which a plaintiff is bound to take when a defendant refuses to enter into admissions. In this case the defendant Hughes must be taken to have acquiesced in the delay down to the 18th October, 1865, but I do not think I can assume acquiescence to any later date. It would, perhaps, have been the more proper course to have written to the plaintiffs' solicitors before giving notice of the motion, but it was quite clear, from what had already taken place, that this course would have produced no result. No defendant is obliged to wait for the obtaining of admissions from a co-defendant, though he must, of course, wait during the ordinary process of the Court. On the 18th October the defendant Hughes was entitled to terminate the existing state of things by such a letter as I have alluded to, and, no doubt, he had a perfect right to move to dismiss the plaintiff's bill. There must, therefore, be the usual order to speed the cause, and I must give the defendant the costs of this motion; and the plaintiffs must, within fourteen days from now, elect whether they will give notice of motion for decree or file replication.

KINDERSLEY, V.C., Nov. 24, 1865.

Re LAWRENCE'S TRUST.

14 W. R. 93; 13 L. T. 580.

Practice—Trustee—Service.

TRUST AND TRUSTEE.—Where a trustee pays money into court, and, in his affidavit, appoints a place for service on him of any legal proceedings, and he is not there to receive service, the Court will not deem such service good unless he cannot be found elsewhere on search made.

This was the petition of a *cestui que trust*, who was entitled to the income of the trust fund, to have the dividends paid to him. It appeared that one of the trustees was a solicitor, a partner in a firm, having offices at No. 12, Watling-street, and that such trustee, having paid the fund into court, in his affidavit had named the above place as that at which he was to be served in any legal proceedings of which it was necessary to give him notice. This petition being presented, was served upon him at No. 12, Watling-street, but he was not resident there, although his partner was, and service could not be effected upon him personally there.

Under these circumstances,

Schomberg now said that the Registrar (Mr. Milne) doubted whether the service could be deemed good. In support of the service he referred to *Ex parte Baugham* (16 Jur. 325).

KINDERSLEY, V.C.—The case referred to is where the party cannot be found; but it does not appear in this case that any search has been made for him. I think if on being searched for he cannot be found, perhaps the service may be deemed good; but you had better have such search made. The Court always requires trustees to be served, that they may have the opportunity of appearing if they think fit, and then they are bound; and therefore there must be service upon the individual ordinarily speaking. There is nothing to lead to the supposition that this notice will come to his hands. It is the duty of the party serving the notice to find the party to be served; if he cannot be found, the place indicated may be a sufficient address.

KINDERSLEY, V.C., Nov. 24, 1865.

Re LUNTLEY.

14 W. R. 93; 13 L. T. 490.

Railway company—Void lease—Reversion.

COMPULSORY PURCHASE.—*A railway company took leasehold houses which had been improved by the tenant, and paid into court 2,200l. as representing his interest. It turned out that the lease was void, and the Court directed an inquiry as to the increase of pecuniary value by the lessee's outlay, such increase to be paid to him. The reversioner having then declined to intervene, the company had the fee simple value assessed at 4,000l., and paid that into court; and the reversioner, by petition, asked a declaration that he was entitled to the whole 4,000l., or to such part as to the Court should appear just; and for all proper inquiries, investment, and payment of the dividends to the tenant for life.*

Held, that a second inquiry must be directed as in the former order, and an interim investment.

This was a petition presented by the reversioner of certain property at Long-alley, Norton Folgate, under these circumstances:—George Cooper was the lessee of the property in question, where he carried on business as a cabinet maker, and alleged that he had laid out considerable sums in improvements. The North London Railway Company took a portion of the property and paid 2,200l. as the clear amount representing his interest, and compensation for damage to his trade. A question was then raised as to the validity of the lease, and on argument this Court decided that such lease and another of adjoining property were absolutely void (*vide* 13 W. R. 364, 492). A reference had been ordered to ascertain the value of the property at the date of the lease, and when the railway company took possession, and when so ascertained to apportion it between the reversioner and Cooper, who was declared entitled to so much as should represent the increase of value due to his outlay and improvements. That inquiry was still pending, the chief clerk not having made his certificate, and meantime the value of the fee simple and inheritance had been ascertained by two surveyors under the Lands Clauses Act, who had found it to amount, free from incumbrances, to 4,000l., which sum the company had paid into court under the Act, so that both sums, 2,200l. and 4,000l., were now in court to distinct accounts. This petition was presented by the reversioner, Mr. John Luntley, for a declaration that he was entitled to the whole 4,000l., or such part as to the Court should appear just; and praying that all necessary and proper inquiries might be directed for ascertaining the amount, and that such sum, until invested under the provisions of the Lands Clauses Act, might be invested in Consols, and the dividends paid to Mrs. Taylor, the tenant for life. A correspondence had taken place between the solicitor of the company and the owner of the fee simple, the former contending that the reversioner was bound by what had taken place. It was now submitted for him that he was not, and was entitled to the declaration asked.

Fry, for the petition.

Rodwell, for the company, submitted that this application was premature, and a useless expense. The company had paid a certain proportion as representing the leaseholder's interest, and could not be called upon to pay more. The petitioner ought, therefore, to have access to the evidence, and then, when the chief clerk had made his certificate, it would be time to apply.

KINDERSLEY, V.C., said it was clear that because there happened to be a lessee and reversioner, the company ought not on that ground to pay more to the latter than the fee simple value; which was what belonged to the reversioner, *minus* the fair amount to which the lessees were entitled. That was plain

justice. The only question was, how, under the peculiar circumstances, that was to be worked out. A question existing between the lessee and the company as to what was the value of the interest of the lessee, the reversioner might have come in to be heard at the same time, and after ascertainment of the value of the lessee's interest, claimed that whatever remained belonged to him. Perhaps he was not unwise in declining to do so; but he could not claim the value of the fee. The inquiry, then, was between the lessee and the company. Now, the company had paid into court 4,000*l.* as the value of the fee, to the whole of which it was admitted the reversioner was not entitled—in short, whatever was the value of Cooper's interest, that must be deducted from the 4,000*l.* It was said that the case was, on the former occasion, fairly decided, and that the reversioner was bound by the result of the inquiry between the company and the lessee, to which he was no party. The reversioner said, "I do not know that the company have sufficiently purchased out the interest as against Cooper;" and he was right, and the company were right also, in these positions; so that the matter could not be disposed of *uno actu*, although one inquiry was cheaper. The Court could not compel the reversioner to be a party to an inquiry ordered in his absence, and there must be a separate one on this petition; but all unnecessary expense should be prevented.

Let there be an inquiry what the value of the lessee's interest was, in the same terms as in *Cooper's case*, with liberty to admit any evidence already taken, and to cross-examine upon it. There must be an *interim* investment, and a declaration that the reversioner was entitled to the whole 4,000*l.*, minus what, on this inquiry, should be found to represent the lessee's interest. Costs according to the Act.

STUART, V.C., Nov. 18, 20, 21, 1865.

DABBS v. NUGENT.

14 W. R. 94; 13 L. T. 396; 11 Jur. N.S. 943.

Account—Jurisdiction—Effect of conduct of parties.

ACCOUNTS AND INQUIRIES.—*The Court will endeavour to assume jurisdiction in matters of account where its doing so will promote substantial justice between the parties.*

Where three actions at law have been brought by the plaintiff against the defendant in matters relating to the employment of the plaintiff by the defendant, and these actions are consolidated by an order obtained by the defendant, the Court, if it assumes jurisdiction over any of the actions, will assume jurisdiction over all.

Misconduct on the part of the plaintiff, though insufficient to disentitle him to relief or to fix him at once with payment of costs up to the hearing, may be proper ground for a special reservation of the costs up to the hearing, to be dealt with when the cause is heard on further consideration.

This bill was filed by Thomas Dabbs, a builder, against G. W. Nugent, for an account of sums due to plaintiff under two building contracts. The first contract, which we shall call "The Eastbourne Contract," was made by an indenture dated 4th of August, 1862. between the defendant of the one part, and the plaintiff of the other part; and was an agreement to build six houses at Eastbourne, under the superintendence of Mr. McCalla, architect, to be completed by 30th April, 1863. This indenture contained the usual stipulations, making the architect sole judge of what alterations, &c., were to be made, and provided for the payment of the contract price (6,150*l.*) by instalments, on

McCalla's certificate, and that the balance not so paid should be paid within three months after the whole of the said buildings and other works should be completed to the entire satisfaction of McCalla, and *should have been inspected and certified to defendant by McCalla*. And the said indenture contained a proviso that the decision of McCalla, with respect to the amount, state, and condition of the work actually executed, and with respect to every question that might arise concerning the construction of the said contract, or the drawings, specifications, and conditions for the execution of the works thereby contracted for, or any other thing relating to the same, should be final and binding on all parties.

The second contract, which we shall call "the Penge Contract," was made in the early part of 1863, and by it the plaintiff contracted with the defendant to complete the building of a house at Penge. On this contract it appeared that the certificate of McCalla was *not* necessary to enable the plaintiff to sue for breach of it at law.

The time for the completion of the Eastbourne contract was afterwards extended to the 24th of June, 1863. During the progress of the works considerable reductions were made by McCalla's directions in the contract, and the plaintiff received sums amounting in the whole to about 3,970*l.* on account; but a considerable balance remained due to him on the Eastbourne contract, assuming the terms of the specification to have been complied with.

The evidence showed that bill transactions had taken place between the plaintiff and defendant and McCalla, and that McCalla had been in the habit while the works were going on, of accepting bills for the plaintiff's accommodation. McCalla, in his cross-examination, said that these bills had been given in respect of what was coming to the plaintiff from the defendant, but not otherwise, at the request or for the accommodation of the bankrupt. Other bills had been accepted by McCalla, as to which the plaintiff and McCalla alleged that they had been accepted for the defendant's accommodation. This, however, was denied by the defendant; but the evidence shewed that they had been paid by the defendant when they fell due.

The evidence further shewed that on the 20th of June, 1863, the plaintiff obtained from McCalla a letter in the form of a certificate addressed to himself, which certified that 1,200*l.* was due to him on the Eastbourne contract. This letter was admitted on both sides not to be a formal certificate which would enable the plaintiff to sue at law on the Eastbourne contract. McCalla in his cross-examination, said, "The certificate was given addressed to plaintiff, in order that he might produce it to his bankers, to show that he was entitled to a sum of money. The plaintiff knew that I did not know what he was entitled to exactly, though I believe he was entitled to more than 1,200*l.* Mr. Nugent had at that time paid him more money than I was aware of." The plaintiff, on his cross-examination, said "I believe McCalla did not intend the certificate to be used against the defendant. I asked for a certificate to show my bankers."

On the 22nd of September, 1863, the plaintiff's solicitor, by his directions, wrote a letter to the defendant in which he stated that he held McCalla's certificate for 1,200*l.*, and that he would be glad to know when the defendant would be prepared to pay the money. The defendant's solicitor, in reply, expressed his surprise at McCalla's signing any certificate after a notice which had been sent to him claiming deductions and allowances for departures from the specification, in which notice McCalla had been told that the defendant suspected unfair collusion between him and the plaintiff, and that sundry bill transactions had taken place between them. In the same letter the defendant's solicitor stated that those suspicions had become a certainty, and that defendant had instructed an eminent surveyor to go over the works and estimate the deductions which ought to be made.

It was alleged by the bill that, on the refusal of the defendant to pay the 1,200*l.*, the plaintiff applied to McCalla, to make a formal certificate, and that McCalla was willing to comply with plaintiff's request, but that it was necessary, in order that he should do so, that he should have the original contract and

specification, and the notes and memoranda which he had made on them; and that defendant, with a view to preventing McCalla from ascertaining and certifying the amount due to plaintiff, and thereby to obstruct plaintiff's legal right, took the contract, specifications, and memoranda away from McCalla, and refused to allow him to refer to them for the purpose of making a certificate. The evidence on this point was also conflicting, and it appeared that McCalla had a copy of the original contract. The defendant, however, acknowledged that he altogether refused to be bound by any certificate that McCalla might make.

On the 8th of October, 1863, the plaintiff commenced two actions in the Court of Exchequer against the defendant to recover the sums alleged to be due on the Eastbourne contract and on another alleged contract not material to be here mentioned.

On the 15th October, 1863, the plaintiff commenced an action against the defendant on the Penge contract.

On the 27th of October, 1863, the defendant obtained a judge's order to consolidate all three actions; and on the same day the defendant commenced an action against the plaintiff for alleged breaches of the contract of the 14th of August, 1862.

On the 17th of November, 1863, McCalla wrote to the defendant asking for the original contract, and all the papers.

On the 18th of November, 1863, defendant's solicitor wrote to McCalla that he was no longer defendant's architect; that the buildings had been examined with the specification by an eminent surveyor, whose report led to the inference that such numerous breaches would not have occurred unless McCalla had been in collusion with plaintiff, and requesting him to abstain from giving a valueless certificate.

On the 21st of November, 1863, defendant executed a deed purporting to revoke McCalla's appointment as architect, and served a copy of it on the plaintiff and McCalla.

The plaintiff was advised that he could not safely proceed in his actions at law for want of McCalla's certificate, and he therefore obtained a rule to discontinue such actions.

The bill prayed for an account of what was due to the plaintiff from the defendant on the Eastbourne and Penge contracts, or, in the alternative, that defendant might be decreed to deliver up the original contract and memoranda to McCalla to enable him to certify the amount due to plaintiff; and for an injunction to restrain the defendant from proceeding at law.

Malins, Q.C., and *Bevir*, for plaintiff.—It is well known that this Court will grant relief where the architect's or engineer's certificate cannot be obtained: *Kemp v. Rose*, 1 Giff. 258; *Pawley v. Turnbull*, 3 Giff. 70. And the case is still stronger where, as in this case, the architect is prevented giving a certificate by defendant's misconduct. In *Scott v. The Corporation of Liverpool* (1 Giff. 216, 6 W. R. 136) it was not shown that the architect had refused or was incapacitated to act. The defendant could not object to the jurisdiction on the ground that the plaintiff could sue at law on the Penge contract, as the defendant had himself obtained an order to consolidate the actions. There was no imputation on the plaintiff's conduct which would be a ground for refusing him relief. They also quoted Sir J. Wigram's observations in the case of *Waring v. The Manchester, &c., Railway Company*, p. 493, commencing "If, however, the judge:" *Macintosh v. Great Western Railway Company* (3 Sm. & G. 146).

Jessel, Q.C., and *Smart*, for defendant, argued, 1.—That there was no jurisdiction as to the Penge contract, inasmuch as there was nothing which would have prevented the plaintiff declaring in the action on that contract and abandoning the other actions, even after the actions had been consolidated. 2. Assuming the plaintiff's case to be made out, his conduct disentitled him to relief. His collusion with McCalla was clearly proved (a) by the bill transactions between them, (b) by their conduct in respect of the certificate of the

20th June, 1863, (c) by the report of the architect who had been employed by the defendant to survey the works, which showed such gross violation of the terms of the contract as could only be explained by collusion between plaintiff and McCalla. No misconduct had been proved on defendant's part, and all the cases quoted had proceeded on the ground of such misconduct. At any rate, the plaintiff, if he obtained a decree, should pay costs up to the hearing.

STUART, V.C., said that this was a bill of a kind which had occurred in these courts only in modern times, although, no doubt, in *The Duke of Marlborough's case* (reported on appeal, 1 B. P. C. 178) a bill had been filed on the equity side of the Court of Exchequer to recover the amount due on a building contract. He thought that it must be held that with reference to contracts for building and for the execution of large works, courts of law and equity had concurrent jurisdiction. In the case of *The Taff Vale Railway Company v. Nixon* (1 Ho. of Lds. Cas. 111), the House of Lords decided that cases of complicated account, arising out of a contract to execute works, were cognizable in a court of law by means of a reference to arbitration, although in that particular instance a court of equity was the proper tribunal.

The history of the cases showed that the view taken in that case by the House of Lords was an unfortunate one as it left suitors in doubt to what jurisdiction they should resort. An instance of this might be seen in the case of *Phillips v. Phillips* (9 Hare 473). Lord Cottenham's judgment in *The North-Eastern Railway Company v. Martin* (2 Ph. 758); shewed that the question of convenience must to a great extent determine which court should have jurisdiction. The tendency of modern legislation had been, not to drive suitors from one court to another, but to do justice as speedily as possible between the parties.

In the present case the plaintiff had tried to obtain relief by three separate actions at law, and there were also two actions pending by the defendant against the plaintiff. This was a deplorable state of things, and it was the duty of the Court not to shut its doors in such a case, where the proceedings at law would clearly fail to do justice between the parties. It was said, and with perfect truth, although it was a theory admitting some qualification, that at law, in cases of this kind, where the certificate of the engineer was a condition precedent to the payment, the want of such certificate was a fatal objection to the plaintiff's right to recover. He (the Vice-Chancellor) was not prepared to say that in all cases where neither party was to blame the absence of such certificate would be a bar to relief. However, for the purposes of this case, it was of no practical importance. The defendant had urged that the Court should refuse the plaintiff relief because his inability to recover at law arose from his own misconduct, and he had further urged that even if the Court gave the plaintiff a decree it should make him pay costs up to the hearing. But the evidence was conflicting as to the defendant's own conduct, and he (the Vice-Chancellor) did not think that the evidence showed anything to disentitle the plaintiff to relief or fix him then with costs, whatever might be decided as to costs at a subsequent stage of the proceedings. As to the objection to the Court's entertaining jurisdiction on the Penge contract, assuming that there was nothing to prevent the plaintiff recovering at law on it, yet where there were demands on three separate contracts, arising in the course of the plaintiff's employment by the defendant, it would be disgraceful if the Court could not consolidate the contracts, as was done in the case of *Marintosh v. Great Western Railway Company*, and in one suit do justice between the parties.

There must be an inquiry whether anything and what is due to the plaintiff in respect of works executed and materials supplied or otherwise, having regard to the circumstances under which the works were carried on. And an inquiry whether anything and what is due to the defendant from the plaintiff in respect of breaches of contract, without prejudice to any question of waiver. The costs would be dealt with on further consideration.

STUART, V.C., Nov. 24, 1865.

In re WARD'S SETTLEMENT.

14 W. R. 96; 13 L. T. 494.

S. 30 of the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), was repealed by s. 51 of the Trustee Act, 1893 (56 & 57 Vict. c. 53).

TRUST AND TRUSTEE.—*The Court will make an order under the 22 & 23 Vict. c. 35, s. 30, on the petition of a cestui que trust.*

This was a petition presented by Mrs. Ward under the provisions of the 22 & 23 Vict. c. 35 s. 30. to obtain the direction of the Court.

By the settlement on the marriage of Mr. and Mrs. Ward, certain sums of bank annuities were vested in trustees upon trust for the separate use of Mrs. Ward during the coverture, with remainder to the survivor of Mr. and Mrs. Ward for life, with remainder to the children of the marriage as therein mentioned. And the settlement contained a power of sale and re-investment of the trust fund with the joint consent in writing of Mr. and Mrs. Ward.

It appeared that Mr. Ward had become bankrupt, and had been divorced from Mrs. Ward, and had married again. Mrs. Ward was desirous of changing the investment of the trust funds.

Hughes for the petitioner.

Vincent, for the trustees, submitted whether the Court had jurisdiction to make an order on the petition of a *cestui que trust*.

STUART, V.C., said he had no doubt as to the jurisdiction of the Court, and directed that the trustees were to be at liberty to exercise the power of sale and re-investment without the consent of Mr. Ward.

STUART, V.C., Nov. 25, 1865.

RANTZEN v. ROTHSCHILD.

14 W. R. 96; 13 L. T. 399.

INJUNCTION.—*A defendant, whose servant has committed a breach of an injunction of the Court, but to whom personally no blame attaches, is liable to pay the costs of a motion for committal.*

Jemmett moved for a writ of sequestration against such of the defendants as were members of Parliament, and for the committal of the others for disobeying an injunction of the Court.

It appeared that the injunction, which was to restrain the defendants, their servants, agents, and workmen, from pulling down a party-wall adjoining the plaintiff's house, was granted on the 30th of October last, and notice thereof was served about four p.m. on that day on the foreman who was superintending the plaintiff's works. The foreman could not read, but asked a policeman who was passing to read the notice, which he did, and also advised the foreman to disregard it. The foreman accordingly continued his work. The defendants had no notice of the injunction till the 31st October; and at once, on being served with such notice, took proceedings to stop the works.

Malins, Q.C., and *Everitt*, against the motion.—It is in evidence that, at the time the injunction was applied for, there were not more than two-and-a-half feet of the wall remaining. The injunction was therefore improperly obtained;

and that should be taken into consideration on a motion like this: *Drewry v. Thacker* (3 Sw. 546). Besides, the defendants were not responsible for the acts of a person employed by their architect. It was clear that this was merely a motion for costs, and, under the circumstances, the Court would exercise its discretion and refuse them.

STUART, V.C., said that the question was one of costs merely, as no blame could attach to the defendants, who had taken steps to obey the injunction as soon as it was served on them. They had, however, been unfortunate enough to employ a servant who had been guilty of a gross contempt of Court, and they must bear the consequences. There would be no order but that the defendants pay the costs of the motion.

WOOD, V.C., Nov. 18, 1865.

In re VARLEY'S TRUST ESTATE.

14 W. R. 98.

Evidence—Petition—Affidavits sworn before presentation.

Affidavits in support of a petition for payment of money out of Court, sworn before the petition is presented, but after the payment into Court, will be admitted as evidence.

This was a petition for payment out of Court of a sum of money paid in by the Metropolitan Board of Works.

The affidavits in support of it were sworn before the petition was presented, but after the payment into Court; and they were headed with the title of the account into which the money had been paid. The deponents resided in Jersey.

Edward Cutler, for the petitioners, mentioned the irregularity to the Court.

C. Hall, for the Board of Works, offered no opposition.

WOOD, V.C., said that as the affidavits were sworn after the payment into court, and were headed with the title of the account into which it had been paid, they might be admitted as evidence.

[IN THE COURT OF EXCHEQUER.]

Nov. 16, 18, 1865.

MILLER *v.* BIDDLE.

14 W. R. 110; 13 L. T. 334; 11 Jur. N.S. 980.

Promissory note—3 & 4 Ann, c. 9—Days of grace.

BILLS OF EXCHANGE. A. *A note was made in favour of A. B. simply, and not either to order or bearer. It was payable by instalments, the whole amount to become payable upon default in payment of the first instalment.*

Held (per BRAMWELL, CHANNELL, and PIGOTT, BB., POLLOCK, C.B., dissentiente), that the note was a promissory note within the statute of Ann, and that days of grace must be allowed upon the first instalment.

This was an action upon a note, and was tried in the Mayor's Court before the Recorder of London. The note was in the following form:—

“ 260l.

London, 22nd January, 1865.

“ We jointly and severally promise to pay to Henry Miller, Esq., the sum of 260l. by the following instalments, namely, 130l. on the 22nd day of May, 1865, and the sum of 130l. on the 22nd day of August, 1865. In default of payment of the first instalment the whole amount payable under this note to become due and payable.

“ C. MADDER.

“ W. BIDDLE.”

The writ in the action was issued on the 23rd of May, for the whole amount of the note. The Recorder directed a verdict for the defendants, on the ground that they were entitled to three days of grace from the 22nd of May; but reserved leave to move to enter a verdict for the plaintiff, if the Court should be of opinion that days of grace ought not to be allowed.

Philbrick in this term obtained a rule *nisi* accordingly.

Warton now showed cause.—The defendants are entitled to days of grace on each instalment. It makes no difference that the note is not payable to order or bearer: *Smith v. Kendal* (6 T. R. 123); nor that it is payable by instalments: *Oridge v. Sherborne* (11 M. & W. 374); nor that the whole becomes due on default: *Carlow v. Kinealy*, (12 M. & W. 139). Even if this be not so, and the whole amount became payable by default on the 22nd of May, the defendants are then entitled to days of grace upon the whole. He cited also *Rawlinson v. Stone* (3 Wils. 4); *Bentley v. Northouse*, (M. & M. 66); *Milne v. Graham* (1 B. & C. 192); *Hill v. Lewis* (1 Salk. 132); *Brown v. Harradan* (4 T. R. 148); *Byles on Bills*, (191n.).

Keane, Q.C. (*Philbrick* with him), in reply.—This is not a promissory note within the statute. A promissory note must be for the payment of a sum certain; and this is not so, but a promise to pay one of two different sums according to circumstances: *Carlos v. Fancourt* (5 T. R. 482).

Cur. adv. vult.

Nov. 18.—*POLLOCK, C.B.*, now delivered the judgment of the Court.*—This case was tried before the Recorder of London, when a verdict was found for the defendants. The question arose upon a promissory note, not made payable to bearer or to order, but simply to Miller; which note was to be paid by instalments, with the condition that if any instalment was not paid upon the day when it was due, the whole should immediately become payable. The Court granted a rule to show cause in ignorance that there is a case of *Carlow v. Kinealy* (*ubi supra*), which, in their opinion, decides the express point. That decided that a promissory note payable by instalments, subject to a condition that on default being made in payment of the first instalment, the whole amount should become immediately payable, is within the statute of Ann, and negotiable. A prior case (*Oridge v. Sherborne, ubi supra*) had decided that a promissory note, payable by instalments, is within the statute, and that the maker is entitled to days of grace, where the note is negotiable. Upon the authority of these cases the majority of the Court are of opinion that this rule should be discharged. As I dissent from this view, I think it my duty to express my dissent for the purpose of giving the parties a right to appeal. The statute of Ann, in my opinion, applies to negotiable instruments only, and I think there is a great difference between holding that a negotiable instrument falls within the provisions of that statute, and holding that the same rule applies to an instrument not negotiable. Moreover, I observe that the Court, in *Carlow v. Kinealy*, considered that the point before them had been decided by *Oridge v. Sherborne*; but I am of opinion that

* *Pollock, C.B., Bramwell, Channell and Pigott, BB.*

that was not so. If it had been I think those cases would have been binding, but in my opinion we are not justified in deciding on the authority of those cases. I am very much inclined to believe that the opinion of Lord Kenyon (*Smith v. Kendal, ubi supra*) is the correct one, and that this is a mere contract, and that the statute applies only to negotiable instruments. Then we have been referred to the custom of merchants, but the custom of merchants has nothing to do with a mere contract; if it had, every case would have to be decided according to it. But I doubt whether there is any custom of merchants relating to a bill drawn in such a way that upon default in payment of one instalment the whole becomes due. The statute of Ann was passed to apply the custom of merchants to promissory notes; but in such a case there is no custom to apply. For these reasons I dissent from the opinion of the Court. That dissent will not operate, but I do my duty in expressing that dissent, and having done so I pronounce the judgment of the Court that this rule be discharged.

Rule discharged.

[BANKRUPTCY.]

Nov. 11, 19, 1865.

Ex parte LAMB; *Re* ROUSE.

14 W. R. 112; 13 L. T. 337.

See now Bankruptcy Act, 1883, (46 & 47 Vict. c. 52) s. 44.

Bankrupt Law Consolidation Act, 1849, s. 125—Order and Disposition.

BANKRUPTCY.—*A piano being in the possession of R., with the consent of L., the true owner, was seized by the sheriff under a writ of fi. fa. issued against the goods of R., and remained in his custody until the time of the bankruptcy of R., without any notice from L.*

Upon application being made by L. for the delivery to him of the piano,

Held, that the wrongful seizure by the sheriff did not take the property out of the possession of R., and that the piano being in the possession of R. at the time of his bankruptcy, with the consent of the true owner, formed part of the bankrupt's estate.

This was a special case agreed upon between the parties with respect to the right to a piano.

From the case the following facts appeared:—Mr. Lamb, the father of the bankrupt's wife, at her request, about four years before the bankruptcy, lent her piano, which had ever since remained in the bankrupt's house. Mr. Lamb swore that the piano was lent to his daughter, and not given, but he admitted that he probably would never have made any claim to it but that he saw that his daughter was likely now to be deprived of it. Shortly before the bankruptcy the sheriff seized all the bankrupt's furniture under a writ of *fi. fa.*, and in consequence thereof the bankrupt presented a petition for adjudication against himself and was declared bankrupt thereon. Mr. Lamb never heard of the seizure by the sheriff until after the bankruptcy, but when he did so he took steps for the recovery of his piano. The assignees now claimed the piano as having been in possession of the bankrupt at the time of the bankruptcy with the consent of the true owner.

R. Griffiths for the assignees.

Doria, for Mr. Lamb, did not deny that the piano was in the possession

of the bankrupt, with his consent, until the time of the seizure by the sheriff, but he contended that after such seizure it was in the custody of the law and could not be said to have been in the possession, order, or disposition of the bankrupt. He likened this case to *Ex parte Foss, Re Baldwin* (6 W. R. 417; 2 De G. & J. 238), in which certain mortgaged goods were seized and held by the sheriff at the time of the bankruptcy, and it was decided that they did not pass to the assignees.

WINSLOW, Comr., after stating the facts, said the first point raised by the counsel for Mr. Lamb was expressly decided in *Barrow v. Bell* (4 W. R. 16; 5 El. & Bl. 540), where the Court of Queen's Bench held that the wrongful seizure by the sheriff under an execution against B. of the property of A., which was in the house of B., did not take such property out of the possession of B., and the sheriff was a wrongdoer, and his claim to take the goods made no difference as regarded the respective rights of A., the true owner, and his assignees. As to the second point it appeared to him that *Ex parte Foss, Re Baldwin*, very materially differed from the present case, because the mortgagees, who were the true owners, hearing of the seizure, gave notice before the bankruptcy to the sheriff of their security, and required him to withdraw. Such notice was clear evidence that they no longer consented to the possession by the bankrupt. Now, if Mr. Lamb had heard of the bankrupt's difficulties on the seizure by the sheriff, and had asserted his claim to the piano before the bankruptcy, the case would have been altered; but, unfortunately for him, he did not do so until afterwards, and the bankruptcy being the time at which the rights of the parties must be determined the Court must hold that at that time the piano was in the possession, order, or disposition of the bankrupt with the consent of Mr. Lamb, and that the assignees were entitled to an order for its sale for the benefit of the creditors.

LORDS JUSTICES, Nov. 24, 1865.

DE HAVILLAND v. DE SAUMAREZ.

DE HAVILLAND v. BINGHAM.

14 W. R. 118.

Articles—Settlement—Executory instruments.

TRUST AND TRUSTEE.—Where an instrument, executed previously to a marriage under the name of "articles of agreement," appears on the face of it finally to declare the intention of the parties, and does not point to a future instrument as necessary to complete the contract, it will not be treated as executory, though, in order to give full effect to its provisions, a future act may remain to be done after its execution.

This was an appeal from an order made by Vice-Chancellor Stuart on a petition presented in the above suits.

Previously to the marriage of Charles De Havilland and Martha Saumarez, an agreement was entered into between their respective fathers and themselves which began as follows:—"Articles of agreement had, made, concluded, and agreed upon the 6th of October, 1819;" by this agreement Richard Saumarez, the father of Martha Saumarez, engaged to transfer a sum of 6,208*l.* Consols and Three and a-half per Cents. into the names of certain trustees, and it was agreed between the parties that the above-mentioned sum should continue upon certain trusts for the benefit of the intended wife, of the children of the marriage, and of certain persons in default of such issue.

The Vice-Chancellor had held that certain of the *cestes que trustent* took under this agreement as tenants in common, on the ground that the agreement was executory. Hence the present appeal.

Baily, Q.C., and *Martineau*, for the appellants, contended that, for the purposes of construction, the agreement must be taken to be a complete and not merely an executory instrument.

Chapman Barber, and *Dickins*, for defendants in the same interest.

Craig, Q.C., and *W. Rudall*, for the respondents, insisted that this agreement was executory, and must be construed accordingly.

Baily, Q.C., in reply.

KNIGHT-BRUCE, L.J., said that had the instrument in question pointed, on a proper construction of its contents, to a future instrument as necessary to complete the contract between the parties, Mr. Craig's claim might have been acceded to. But there was nothing in the instrument pointing to a future instrument, and the mere circumstance that it related to marriage, and operated only in equity, could not have the consequence of rendering a future instrument necessary to its completion. His Lordship thought that this instrument must be taken finally to have declared the intention of the parties, and the circumstance of possible inconvenience could not affect its construction. [His Lordship then proceeded to give judgment on the question of construction.]

TURNER, L.J., entirely agreed with the opinion of his learned Brother. The instrument must be construed as a settlement; the fact that a future act remained to be done after its execution probably led to its being called "articles," but the trusts were perfect on the instrument as it stood.

ROMILLY, M.R., Dec. 4, 1865.

TOMLINSON v. LEIGH.

14 W. R. 121; 13 L. T. 516; 11 Jur. N.S. 962.

Rectification of settlement—Mistake—Evidence.

SETTLEMENT.—*A marriage settlement gave a life interest to the husband, determinable on bankruptcy, &c. A power of maintenance of the children was given to the trustees, exerciseable after the death of the husband. There had been no written instructions for the settlement. The settlement was, on the affidavits of the husband and the solicitor who prepared it, rectified so as to make the power exerciseable after the bankruptcy, &c. of the husband as well as after his death.*

This was a suit for rectification of the settlement made on the marriage of James Walter Tomlinson with Mary Livesey. In the event of the husband surviving the wife, he was to receive the income of the trust fund during his life, or until he should become a bankrupt, make a composition with his creditors, &c. The settlement then gave a power of appointment to the wife, and in default of appointment, the fund went to the children of the marriage on attaining majority or (if females) marrying. A power of maintenance was given to the trustees, which was made to arise after the death of the husband.

Mrs. Tomlinson died in 1860, without having exercised the power of appointment; and there was only one child of the marriage, the plaintiff, John Livesey Tomlinson, an infant.

Mr. J. W. Tomlinson, in May, 1864, executed a deed of arrangement with his creditors, whereby he forfeited his life interest.

The plaintiff, by his father as next friend, now filed his bill against the trustees, alleging that it was the intention and agreement of the parties to the settlement that the power of maintenance should be exerciseable after the determination of the husband's life interest in his lifetime, as well as after his death, and praying that the settlement might be rectified accordingly. The trustees offered no opposition.

There had been no written instructions for the settlement, and the only evidence in support of the application consisted of affidavits by the husband and the solicitor who prepared the settlement, to the effect that it was the intention of the parties and the solicitor that the deed should, and their impression that it did, give the power on the determination in any manner of the husband's life interest.

Baggallay, Q.C., and *G. B. Finch*, for the plaintiff, referred to *Lackersteen v. Lackersteen* (6 Jur. N.S. 1111).

Humber for the trustees.

ROMILLY, M.R., said that, although the evidence was somewhat slight, he would make the order. The words "or the sooner determination of the interest hereinbefore given to him" should be inserted after the words "after his death," in the power of maintenance. The costs must come out of the dividends, not the *corpus*, of the fund.

STUART, V.C., Nov. 21, 22, 23, 1865.

ROBERTS v. ROBERTS.

14 W. R. 123; 13 L. T. 492; 11 Jur. N.S. 992.

Incomplete gift—Parol declaration of trust—Uncertainty of object.

GIFT.—Where a woman signed a cheque in favour of her son's wife, drawn on her son, who held funds belonging to her, and retained the cheque, but subsequently told her son to take it and invest the amount for the benefit of his wife and children, and the son took the cheque, and, after his mother's death, invested the amount in the joint names of himself and his wife.

Held, that the mother had not made a complete gift by the cheque nor a valid declaration of trust of the amount, by reason of the uncertainty of the objects.

This suit was instituted by Thomas Roberts, one of the executors of the will of Margaret Roberts, deceased, formerly of Hubberston in Pembrokeshire, against John Davies Roberts, the other executor of the same will, for administration of her estate.

The plaintiff and defendant were both sons of the testatrix.

The principal question raised in the suit had reference to a certain sum of 500*l.*, which the plaintiff claimed for the benefit of his wife and children, by virtue of a gift or parol declaration of trust by the testatrix previous to her death, the defendant contending that the transaction upon which the plaintiff rested his claim was incomplete, and that the 500*l.* formed part of the estate of the testatrix at the time of her decease.

The facts relied upon by the plaintiff, and substantially admitted by the defendant, were as follows:—

On the 5th of June, 1862, the testatrix made a codicil to her will, the

effect of which codicil was to bequeath 500*l.* for the benefit of the defendant for life, and after his death, of his wife, Fanny, for life, with remainder to a daughter of the testatrix in case of her surviving the defendant and his wife, and if not, with remainder to the defendant absolutely. When about to execute this codicil the testatrix remarked to her solicitor that he had omitted one thing which she desired, and that was to give to her daughter-in-law, Jane (referring to the wife of the plaintiff), the same as she had given to Fanny. The solicitor said that he could not alter the codicil without preparing it afresh, and the testatrix reluctantly executed the codicil without alteration.

Two or three days afterwards the testatrix, being then in bed, and in her last illness, called the plaintiff to her bedside, and in the presence of two or three persons (including the defendant) desired him (the plaintiff) to draw a cheque on her bankers in favour of the plaintiff's wife, Jane, for 500*l.* The plaintiff told the testatrix that he believed that she had not so much money at her bankers, and when she expressed herself anxious that the matter should be arranged in some way, he suggested that, as he had funds in his own hands belonging to her, she might draw a cheque on him for the amount. She accordingly signed a cheque drawn on the plaintiff for 500*l.* in favour of the plaintiff's wife, Jane Roberts.

The plaintiff retained this cheque in his possession during a few days, and then placed it by the direction of the testatrix in a box which contained her will, codicil, and some other papers. A short time subsequently the testatrix sent for the plaintiff and requested him to remove the cheque, and to take it into his own possession, directing him to invest the amount and pay the interest of it to his wife during her life, and after her death to divide the principal amongst her children. The plaintiff then removed the cheque and made an entry in pencil in his books debiting the amount to the testatrix, and after her death invested the sum of 500*l.* in the names of himself and his wife, in pursuance of the directions of the testatrix.

There were certain points in the evidence of the defendant at conflict with the above statement of facts; but, inasmuch as the Vice-Chancellor's decision proceeded upon the plaintiff's own showing, such discrepancies are immaterial here.

In the course of the hearing it was arranged that the bill should be amended by making the wife and infant children of the plaintiff parties to the suit.

Greene, Q.C., and *Dickinson*, for the plaintiff and his wife and children, contended that the gift made by the testatrix was valid and complete: *Fortescue v. Barnett* (3 Myl. & K. 36); *Sloane v. Cadogan* (Sugd. Vend. & Pur. 11 ed. App. No. 24). At any rate, the fund being in the hands of the plaintiff, an order upon him for the amount constituted him a trustee, and was a valid declaration of trust: *Wheatley v. Purr* (1 Keen, 551).

Malins, Q.C., and *Bevir*, for the defendant.—The gift was not complete. The mere delivery of the cheque was not sufficient. The cheque was not acted upon, and the death of the testatrix was a countermand. Moreover, the objects of this gift or declaration of trust were wholly uncertain. They cited *Dillon v. Coppin* (4 M. & C. 647); *Antrobus v. Smith* (12 Ves. Jun. 29); *Edwards v. Jones* (1 M. & C. 226); *Dipple v. Corles* (1 W. R. 47; 11 Hare, 183); *Bayley v. Boulcott* (4 Russ. 345); *Tate v. Hilbert* (2 Ves. Jun. 111); *Hughes v. Stubbs* (1 Hare, 476); *Wheatley v. Purr* (loc. cit.); and the case of *Jones v. Lock*, decided by Lord Chancellor Cranworth, November 22nd. 1865.

Greene, Q.C., in reply, cited *Vance v. Vance* (1 Beav. 605), and *Kiddill v. Farnell* (5 W. R. 324; 3 Sm. & G. 428).

STUART, V.C., said that he had carefully considered the cases bearing upon the point in question, which was one of great difficulty. It had been argued that a valid gift was effected by the testatrix by means of the order

drawn on her son, the plaintiff, in the form of a direction to pay to his wife or her order the sum of 500*l.* out of money belonging to the testatrix in the hands of the plaintiff, but under the circumstances of the case it was impossible to treat this transaction as a complete and effectual gift. The law on this subject was most clearly laid down by Lord Eldon in the case of *Ex parte Pye*, *Ex parte Dubost* (18 Ves. 140), to which decision his Honour referred. A person claiming in such manner as did the present plaintiff was undoubtedly a volunteer, and to make effectual a gift to a volunteer the subject of the gift must be completely disposed of and be no longer under the control of the donor. [His Honour referred on this point to *Gaskell v. Gaskell* (2 Y. & J. 502)]. Could it be said that the testatrix in this case parted with all control over the property which the order signed by her purported to affect? She retained the cheque in her possession at the time, and the plaintiff alleged that she afterwards delivered it to him, directing him to invest the amount for the benefit of his wife and children. It is most essentially necessary that the object of a gift, such as that which the plaintiff was attempting to support, should be definitely ascertained; but here, by the plaintiff's own showing, the cheque or order was drawn in favour of the plaintiff's wife, indeed, in favour of the plaintiff himself in his marital right, and when it was alleged to have passed from the possession of the testatrix, she is said to have directed an investment of the amount for the benefit of the wife and children. It was impossible to get over such an inconsistency, and upon the ground of a gift the plaintiff's contention could not succeed. It had at one time during the argument appeared to his Honour that the transaction might take effect as a declaration of trust; and if, as was the case, such an effect was attributed to a power of attorney in *Ex parte Pye*, *Ex parte Dubost*, it was difficult to say that the order in the present case did not impress a trust upon that portion of the assets of the testatrix with reference to which it was drawn. But the matter did not rest there. If his Honour were prepared to hold that the order was in itself a declaration of trust, still there existed the insuperable discrepancy which had been already referred to. Was there a declaration of trust for the wife, or the wife and children, or for the plaintiff, his wife, and children, and other persons in remainder, in analogy to the trusts of the codicil executed by the testatrix? All this was veiled in perfect obscurity, the plaintiff himself being unable to state certainly and consistently who were to be the objects of the testatrix's bounty. On these grounds the declaration sought by the plaintiff could not be made.

STUART, V.C., Nov. 23, 1865.

TAYLOR v. SPARROW.

14 W. R. 124; 13 L. T. 494: reversed, [1866] E. R. A.; 14 W. R. 881;
15 L. T. 150; 12 Jur. N.S. 593 (L. JJ.).

Will—Construction.

WILL.—*Bequest, after a life interest to S., to testator's twelve nephews and nieces, with a gift over in case any of them should depart this life before the period of distribution, leaving issue, and such issue should die before twenty-one, to the survivors.*

Held, not to imply a gift to the survivor except in the exact event specified by the testator.

The above suit had been instituted for the administration of the estate of George Taylor, who, by his will, dated the 16th of March, 1857, devised

his residuary real and personal estate to trustees, upon trust to pay the rents and interest to Matilda Sparrow for life, and after her decease to distribute the capital among his twelve nephews and nieces named in his will equally, share and share alike. And the testator directed that in case any of them should depart this life before the distribution of his estate and effects, his trustees should invest the share of him or her so dying as therein mentioned, and apply the rents, interest, and proceeds thereof for all and every the children by their first marriage of any of his said nephews and nieces who should have departed this life, if more than one, equally, share and share alike. as and when they severally and respectively attained their several and respective age or ages of twenty-one years, and if but one, then to such one child only. And he thereby declared that "in case any of his said nephews and nieces should depart this life before the distribution of his estate and effects, leaving issue, and such issue should die before attaining the age of twenty-one years," then that the share or shares of him or her so dying, and to which they would have become entitled had they or either of them survived, should be equally divided amongst his said nephews and nieces surviving, share and share alike.

Matilda Sparrow survived the testator, and on her death a question arose on the construction of the testator's will, as to who was entitled to the capital of the residue, to determine which this petition was presented.

John Taylor, one of the testator's nephews, died in his lifetime, leaving issue.

George Taylor, another of the testator's nephews, died in his lifetime, without issue.

Jacob Taylor, a third nephew, survived the testator and died, without issue, in the lifetime of Matilda Sparrow.

All the other nephews and nieces of the testator survived both him and Matilda Sparrow.

Bacon, Q.C., and *Pearson*, for the surviving nephews and nieces, claimed the entire fund by implication.

O. Morgan, for the representative of Jacob Taylor.

The following cases were cited: *Meadows v. Parry* (1 V. & B. 124); *Murray v. Jones* (2 V. & B. 318); *Aiton v. Brooks* (7 Sim. 204); *Hannam v. Sims* (6 W. R. 347; 2 De G. & J. 151).

STUART, V.C., said that the gift to the testator's nephews and nieces was in such terms as to give them an absolute interest, unless such interest were afterwards cut down. Two of the nephews had died in the testator's lifetime, and there was no expression to show that this event had been contemplated by the testator. As to these shares, therefore, there was clearly a lapse. It had been argued that the expressions used in the will as to issue were enough to show that the issue were to take by substitution, but it was clear that issue could not take in substitution for persons whose shares lapsed, and who themselves took nothing. As to the ten who survived the testator, he was asked to imply, although the words of gift to them were absolute, that if one of them died before the time of distribution those who survived that period were to take his share. Now, this could not be so, as the testator had clearly specified the event in which the survivors were to take. The judgment of Sir W. Grant, in *Murray v. Jones* (*supra*), was a masterly and subtle piece of reasoning, whether it was satisfactory or not to the common sense of mankind; but he did not consider that it applied to the present case. The fund must be divided into twelfths, nine-twelfths to be paid to the petitioners, one-twelfth to the personal representative of Jacob Taylor, and the remaining two-twelfths to the testator's next of kin, according to the Statutes of Distribution.

STUART, V.C., Nov. 24, 1865.

Re DORNING'S SETTLED ESTATES.

14 W. R. 125; 13 L. T. 494.

Settled Estates Act—Leasing Power—Practice.

SETTLED LAND.—*The Court will grant an order under the 19 & 20 Vict. c. 120, s. 10, and the 27 & 28 Vict. c. 45, s. 2, vesting in trustees powers of granting mining leases, without inserting in such order a clause requiring a form of lease to be settled in chambers.*

This was a petition under the 19 & 20 Vict. c. 120, and the 27 & 28 Vict. c. 45, for an order vesting in trustees powers of granting mining leases without the insertion of a clause requiring a form of lease to be settled in chambers.

Bedwell, for the petitioners, said that in *Re Dugdale's Settled Estates*, which was an unreported case before Vice-Chancellor Wood, an order had been passed and entered before the passing of the 27 & 28 Vict. c. 45, vesting in trustees the power of granting building leases, with the consent of the tenant for life for the time being, or other the person or persons entitled to the rents, or if they were infants, with the consent of their guardians, and at the discretion of the trustees, and containing a clause directing the form of lease to be settled in chambers; and that the Court had, on petition, after the passing of the Act, ordered that clause to be expunged.

STUART, V.C., said that he did not see any difference between building leases and mining leases. There must be an order like that in *Re Dugdale*, after the clause requiring the lease to be settled at chambers was expunged. The costs to come out of the three-fourths of the profits which the Act directed to be set apart for the inheritance.

WOOD, V.C., Nov. 10, 13, 14, 15, 24, 1865.

DAW v. ELEY.

14 W. R. 126; 11 Jur. N.S. 923.

Patent—Specification—Sufficiency.

PATENT.—*Where a specification in the first instance describes the invention in too general terms; but afterwards, in describing the method of performing the invention, refers to certain figures in drawings annexed thereto, and the claim made is for the manufacture of the invention described with reference to those figures, the specification is sufficient.*

This was a suit to restrain the infringement by the defendants of a patent granted to one Schneider, for the invention of an improved kind of central fire breech-loading cartridges—the plaintiff being the assignee of an interest in the patent. The defendants disputed the novelty of the alleged invention, and also asserted that they had not infringed it. On these points a great deal of evidence was adduced on both sides, but in this respect the case does not seem to call for any report. There was, however, another ground upon which the defendants relied, viz.—that Schneider had, by his specification, made too extensive a claim, not defining, with enough precision, what he claimed as his invention, and that the specification was therefore void on the ground of insufficiency.

Schneider's provisional specification was dated the 4th of September, 1861, and was stated to be for the invention of "Improvements in cartridges for breech-loading firearms, and in the machinery for manufacturing the same." So far as the cartridges themselves were concerned (and they alone were in question in this suit), he declared the nature of the invention to be as follows:—

"I make my improved cartridges with the percussion cap placed in the centre of the same, and about level with the end of the cartridge. This percussion cap itself I manufacture in two ways, the first with a spreading top or flanch, the detonating powder occupying an annular space within the said flanch; and the second with an internal metallic gudgeon or anvil, which, on the cap being struck, offers the required amount of resistance for effectually igniting the same. For the first description of cap I manufacture a cartridge with a metallic head, particularly countersunk, to receive the flanch cap; and for the second description of cap I manufacture a cartridge with a metallic base for the anvil to rest against during the explosion."

The final specification, which was dated the 4th March, 1862, repeated the above statement. Having thus stated the nature of the invention, he proceeded more fully to describe the manner of performing the same, by means of a description of some drawings annexed to the specification. The only parts of these drawings which relate to the cartridges in question in this suit are the figures which are therein distinguished as figs. 3, 4, and 3*; and with reference to these figures the specification proceeded as follows:—

"Figs. 3 and 4 shew the sections of two cases for cartridges, suitably constructed for receiving and being discharged by percussion caps similar in form to those ordinary employed on the nipples of firearms, such caps being placed on gudgeons or anvils with grooves formed in them, which, together with the caps, are introduced into the holes or recesses formed at the rear ends of the cartridges. *a a* are the cylindrical cases of paper or other suitable material, that at fig. 3 having a metal hat or cover, *b*, over its end, and an internal metal base or lining to the hole or chamber, *f*, to receive the anvil and cap, whilst that at fig. 4 has a disc of metal, *b*, formed with a screwed tube, which screws into the socket, *c*, which may be of metal or other suitable material. The anvil used in these cartridges is, by preference, of a cylindrical form, and has longitudinal grooves in it, by which the fire of the percussion powder may readily pass from the percussion cap to and through the opening at the fore end of the chamber or recess in which the anvil and percussion cap are received. Fig. 3* shews the form of the anvil, and also the percussion cap used therewith. It is not essential that the anvil should be cylindrical, or that it should have four longitudinal cuts or grooves formed in it, as shewn at fig. 3*, as it may be formed with a greater or less number of cuts or grooves, and be formed of other transverse sections, so long as it is made to fill, as nearly as may be, the cap, and has cuts or grooves formed in it." And (after a description of the machinery) the specification proceeded to state (*inter alia*). "I claim the manufacture of cartridges described with reference to figs. 3, 4, and 3*."

It appeared from the evidence that a central fire breech-loading cartridge, invented by a Frenchman named Pottet, was known and in use in England prior to the date of Schneider's patent. This cartridge, too, had an internal gudgeon or anvil; but this anvil, instead of being, like Schneider's, of cylindrical shape, and formed out of a piece of cylindrical wire, consisted of a thin plate of metal, pointed at one end; and, instead of as nearly as possible filling the chamber in which it was placed, Pottet's anvil occupied as small a space as possible within that chamber consistently with the requisite rigidity of the anvil. There were other differences between the two cartridges, but these were the most material.

Daniel, Q. C., Bushby, and A. G. Langley, for the defendants.—The internal chamber, the moveable anvil, that anvil being pointed at the end so

as to receive the impact for the purpose of igniting the powder, and the anvil for communicating the flame; all these were included in Pottet's invention, and were, after it had been published, common to all the world. The language of Schneider's specification precisely describes Pottet's invention. The object of a specification is to ascertain the invention, and to shew the public what they are not to do. Pottet's cartridge is so completely included in the terms of this specification, that, supposing it had been subsequent in date to the specification, no person could have been safely advised to manufacture it. Schneider ought to have stated that central fire cartridges were well known, and what were the defects which he proposed to remedy, and how he proposed to do so. They cited *Williams v. Brodie* (Dav. P. C. 97); *Foxwell v. Bostock* (12 W. R. 723).

Rolt, Q.C., Hindmarch, Q.C., Boyle, and T. Aston, for the plaintiff.—The specification only claims the manufacture of cartridges as in figs. 3, 4, and 3*. A patentee is entitled to protection for anything new and material, and is not bound to disclaim everything that is old. The language of the specification is, however, enough to distinguish between the old and the new. In *Foxwell v. Bostock* what was claimed was a new combination of old parts, not, as here, the manufacture of the whole thing according to certain drawings. The drawings must be included as a part of the specification, and the claim must be cut down by reference to them—*Russell v. Cowley* (1 Cr. M. & R. 864). In *Lister v. Leather* (5 W. R. 603, 3 Jur. N.S. 811), all the elements were old, but that did not invalidate the patent. In *Seed v. Higgins* (6 Jur. N.S. 1264), a disclaimer was held to limit a general claim, and leave the patent good to that extent.

Daniel, Q.C., in reply.

Nov. 24.—Wood, V.C. (after discussing the evidence, and deciding against the defendants on the questions of fact), said that the only point of difficulty in the case was the question whether the specification was too extensive in its terms, so as to include Pottet's invention; for, if so, it would be bad, and the patent would be rendered void. No doubt the first part of the description would include Pottet's cartridge. But when Schneider came afterwards to describe the method of performing his invention, he referred to very definite figures, and what he put forth as his claim was the manufacture of cartridges described with reference to those figures. There he limited his claim, though, of course, this must be taken as subject to those prior words which made a larger claim, where he said that it was not essential that the anvil should be cylindrical, and so on. What he said really amounted to this, "I claim the whole invention, and I have shewn what I consider the best way of performing it. It may, however, be made in other ways, but the anvil must be made to fill as nearly as possible the cap." Schneider was aware of Pottet's invention though that was not in common use in England. Therefore it might be that he thought it worth while to make a claim sufficiently extensive to include the principle of Pottet, though it clearly did not include Pottet's actual cartridge. Pottet's anvil was a thin plate of metal; whereas Schneider said that whatever the transverse section of the anvil might be, it must, as nearly as possible, fill the cap, and must have longitudinal grooves in it. Clearly this was not Pottet's anvil. But it was argued by Mr. Daniel that the way to try the thing was this, would Pottet's cartridge, supposing it to have been made after the date of Schneider's patent, have differed from his only colourably, so that it must have been held to have been an infringement of his patent. This opened quite another question, namely, how far a clumsy way of doing a thing, not fulfilling the conditions of the patent, but anterior to the date of the patent, and which, if done after that date, would have been held to be an infringement of the patent, must, if done before, render the specification bad. He did not think this was at all a necessary conclusion. Of course it might have been more in good faith to disclaim Pottet's invention distinctly, but

it was held, in *Seed v. Higgins*, that a claim must be deemed a limited claim when it is limited by the terms of the specification, and it is not necessary for the patentee to say what parts are new and what old. What was claimed here was the manufacture of cartridges described with reference to certain figures, and he must therefore hold the specification sufficient.

WOOD, V.C., Dec. 5, 1865.

TANGYE v. STOTT.

14 W. R. 128; 13 L. T. 430.

Jury—Alleged Fraud.

Circumstances under which a question fixed to be tried by the Court without a jury, was, on the application of one of the parties, ordered to be tried before a jury.

This was a suit for the purpose of restraining an alleged infringement by the defendant of the plaintiff's patent. The cause was specially fixed for this day, to be tried by the Court without a jury.

Grove, Q.C., for the plaintiffs, opened the case, and stated that he should be able to prove certain specific fraudulent acts on the part of the defendants.

Willcock, Q.C., for the defendants, said that these charges were not raised in the pleadings. He therefore asked to have the case tried by a jury.

Grove, Q.C., said that this would be a very inconvenient course. He had, on the faith of the cause being now before the Court as a jury, so opened his case as to put the defendants in possession of what he meant to prove. At *Nisi Prius* he need not have done this, but might have kept these facts to come out in the evidence as a surplus to the defendants.

Willcock, Q.C., in reply.

WOOD, V.C., said that he could not, under the circumstances, refuse a jury when one of the parties asked for it. The cause must therefore stand over for that purpose.

[BANKRUPTCY.]

Nov. 23, 1865.

THE EUROPEAN AND AMERICAN FINANCE CORPORATION v.
—, M.P.

14 W. R. 195; 13 L. T. 447.

Bankruptcy Act, 1861, s. 76—Judgment debtor summons—Privilege of Parliament.

PARLIAMENT.—*A judgment debtor summons under the 76th section of the Bankruptcy Act, 1861, cannot properly be issued against a member of the House of Commons.*

This was a judgment debtor summons issued under the 76th section of the Bankruptcy Act, 1861, at the suit of the European & American Finance

Association, calling upon the defendant, who was a member of the House of Commons, to appear and be examined respecting his ability to satisfy a debt of 8,000*l.* due to the plaintiff.

Sargood in support of the summons.

Ivimey (solicitor), for the defendant, referred to the Bankruptcy Act, s. 76. He contended that a writ of *ca. sa.* could not properly be issued against a member of Parliament, and that therefore the present summons would not lie.

Sargood, in reply, contended that the Act of Parliament being in favour of creditors, should be so construed, and that there was a clear distinction between the suing out a writ of *ca. sa.*, as might be done in the present case, and the charging a debtor in execution. [Mr. Commissioner WINSLOW.—*Cassidy v. Stewart*, M.P. (10 L. J. C.P. 57) decides that you have no right to issue the writ of *ca. sa.*]. He apprehended that the object of the statute was to provide a test whether a conclusive judgment existed, and not whether by any privilege the defendant was exempted from arrest; not whether the defendant was liable to execution, but whether the creditor was in such a position as to sue out a writ of *ca. sa.*; whether he was in such a position as established beyond all doubt a legal liability on the part of the debtor. There were cases in which, although a creditor might have obtained judgment, such a delay had occurred as would not entitle him to sue out the writ, or a rule for a new trial might be pending in the cause. Therefore the existence of the judgment was not conclusive evidence of the debt sought to be recovered, unless the judgment was in itself in that undisturbed and unimpeachable state which entitled the creditor to sue out a writ of *ca. sa.* The fact of privilege in this case was not disclosed in the affidavit, and even if it were that would not be the proper test. There was no evidence that the defendant had been sworn in as a member. [WINSLOW, Commr.—Does the privilege depend upon the circumstance of the member being sworn in?] He had not looked into the cases upon that point, but he contended that in any case privilege from arrest could only be a matter of public convenience in respect of the particular member, and that the privilege could not extend to the exemption from the payment of just debts or the distribution of available assets.

WINSLOW, Commr.—In this case I think it will be conceded that the defendant is a member of Parliament, having privilege of Parliament; and the question for my determination is, whether a person so circumstanced is liable to a summons under the 76th section of the Bankruptcy Act, 1861. Now it has been decided with regard to trader debtor summonses, that where the statute lays down certain rules they must be strictly complied with in order to support a bankruptcy. The present summons is grounded on the 76th section of the Bankruptcy Act, 1861. [His Honour read the section.] Is then a member of Parliament a person against whom a writ of *ca. sa.* can properly be issued? *Cassidy v. Stewart*, M.P., decides that he is not, and my brothers Holroyd and Goulburn have followed that decision, in which I also quite concur. The summons must be dismissed with costs.

[IN THE EXCHEQUER CHAMBER.]

Nov. 27, 1865.

JEFFRIES v. ONIONS AND ANOTHER.*

14 W. R. 145; 13 L. T. 606.

See Bankruptcy and Deeds of Arrangement Act, 1913 (3 & 4 Geo. V. c. 34), s. 28.

Bankruptcy—Arrangement—Certificate under 12 & 13 Vict. c. 106. s. 221—Dispensation from performance of proposal.

BANKRUPTCY.—*The certificate of a commissioner in bankruptcy, under 12 & 13 Vict. c. 106, s. 221, is not conclusive evidence that the resolution therein mentioned has been carried into effect, and that the creditors have been satisfied; and where those facts are disproved, will not operate as a bar to an action by a creditor.*

In an action by a creditor, wherein the defendant pleaded a discharge by virtue of a certificate under the 221st section above, evidence was given on behalf of the defendant that before the second sitting mentioned in section 216, the plaintiff refused to accept any composition, and told the defendant that he need not trouble himself to offer him any.

Held, that it was, nevertheless, the duty of the defendant to pay or tender the composition to the plaintiff after the second sitting, and that the evidence did not show any dispensation from that duty.

Appeal against a decision of the Queen's Bench refusing a rule *nisi* to set aside the verdict for the plaintiff or for a new trial. The cause had been tried before Channell, B., at the Shrewsbury Assizes, 1862, when a verdict was returned for the plaintiff for 398l. 18s. 4d.

Declaration by the plaintiff, as drawer, against the defendants, as acceptors of a bill of exchange, and for price of goods sold, and money due on accounts stated.

The defendants pleaded that the plaintiff ought not further to maintain the action because the defendants, after the accruing, &c., being traders within the Bankrupt Law Consolidation Act, 1849, were also indebted to divers other persons, and unable to meet their engagements, and thereupon made an arrangement with their creditors, under the superintendence and control of the Courts of Chancery, in pursuance of the said Act, and filed such petition, and did all such things as are required by the Act, and such sittings were appointed and held, and such notices given, and all things done as required, and that three-fifths in number and value of the creditors who had proved their debts to the amount of 10l. and upwards did, at the second sitting, agree to the proposal made by the defendants at the first sitting; that such proposal was then reduced into writing and signed by the said creditors, and afterwards the said Court of Bankruptcy approved and confirmed the said proposal and caused it to be filed and entered of record, and afterwards, and after the commencement of this action, the said Court of Bankruptcy, in pursuance of the said Act, granted to the defendants such certificate as in the said Act mentioned, setting forth therein the filing of the said petition, the said agreement of the creditors, and that the said agreement had been fully carried into effect; that all things had been done, &c., to render the certificate valid and effectual to discharge the defendants from their debts owing at the time of filing the petition, and that nothing had been done or had happened or existed to prevent the said certificate from being a bar to the claims in the declaration mentioned; and that by virtue of the said

* Before Erle, C.J., Pollock, C.B., Willes, J., Bramwell, B., Channell, B., Byles, J., Keating, J. and Pigott, B.

certificate and by force of the said statute, the defendants, upon the granting of the said certificate, were discharged from the said debts and claims; that the said petition was filed before the passing of the Bankruptcy Act, 1861, and that at the time of the passing of that Act, the said petition and proceedings were pending; that the debt and claim in the declaration mentioned were not contracted, either wholly or in part, by reason of any manner of fraud or breach of trust, or without reasonable probability of the defendants being able to pay the same, or by reason of any of the other matters in the said first-mentioned Act in that behalf mentioned and excepted.

The plaintiff took issue on the plea.

The questions which arose were upon 12 & 13 Vict. c. 106, s. 221, and were: whether the defendants gave sufficient *prima facie* proof that the proposal agreed to by the creditors had been carried into effect, and, if not, whether it was necessary to give such proof.

To prove that the proposal had been carried into effect, they proposed to show, not that the composition had been actually paid, but that the defendants were ready and willing to pay, and that the plaintiff had refused to accept the composition, and dispensed with a tender.

By the arrangement proposed and accepted by the creditors, a composition of five shillings in the pound was payable by two instalments, the first within fourteen days after the confirmation of the proposal, the second within six months from the last-named day; and it was arranged that the defendants should, within fourteen days from such confirmation, pay to, or tender for acceptance to, or forward by a registered post letter directed to their creditors at their last known place of abode or business, two shillings and sixpence in the pound in cash upon the amount of their debts, and also, at the same time, deliver or tender for acceptance to all the creditors, or forward through the post by a registered letter directed as aforesaid, joint and several promissory notes, payable to the order of the several creditors, for the amount of another instalment.

The defendants also proposed and stipulated that the payment or tender of the first instalment, and the payment of the promissory notes so tendered or delivered, should be deemed a carrying into effect of the resolutions to be founded on their proposal, so as to entitle them to certificates under section 221 of 12 & 13 Vict. c. 106.

The first meeting of creditors was on the 15th of February, 1861; the second, at which the proposal was confirmed and accepted, was on the 15th March, 1861. The plaintiff was not present at either. The certificate ultimately granted, issued upon an affidavit by the defendants that they had, within fourteen days after the confirmation, paid or tendered to every creditor the cash for one instalment, and the promissory notes for the other in accordance with the proposal.

The defendants had accepted two other bills drawn by the plaintiff. These, when the petition was presented, were in the hands of indorsees unknown to the defendants, and, for that reason, the defendants had been unable to give them notice, and in the schedule the defendants had inserted the plaintiff as creditor on them.

On the day of the first meeting the defendants were served with a writ by the holders of one of those bills; and, under these circumstances, the defendant James and one Stokes had interviews with the plaintiff after the first meeting and before the second, when the proposal was confirmed and accepted. The defendant James stated that at such interviews he informed the plaintiff of the proposed composition payable as aforesaid, and pressed him to accept it, but that the plaintiff refused to accept any composition at all, or anything short of payment in full; and stated that the plaintiff said the defendants need not take the trouble to come and offer him the proposed composition, as he would never take it, nor any composition at all; he would have his debt in full. The defendant James also stated that he had never paid or tendered the composition or any part of it, after the second meeting.

The defendants were about to call Stokes to give further evidence to prove the dispensation, when the judge interposed and asked the defendants' counsel if he had any evidence of anything to show a dispensation after the meeting, at which the proposal was confirmed and accepted, and whether Stokes could do more than corroborate James, and, on the defendants' counsel answering in the negative, held that nothing which had been proved as taking place before such meeting operated as a dispensation with a tender of the composition, because, until the second meeting, there was no final agreement of the creditors, or any of them, to accept such composition, and that a dispensation with a tender could only be after such final agreement.

The defendants' counsel then contended that it was unnecessary for them to prove that the resolution or agreement accepting the proposal had been carried into effect, because, as they contended, the granting of the certificate was conclusive; but the judge held that it was not conclusive, and that, in order to entitle the defendants to a verdict it was necessary to prove the facts substantially, and, on the above grounds, directed the jury that the plea was not proved.

In Easter Term, 1862, the rule *nisi* was granted on the grounds—1. That the judge was wrong in point of law in ruling that there had been no dispensation by the circumstances occurring before the second meeting; 2. That he was wrong in ruling that, in order to entitle the defendants to a verdict, they must prove substantially that the resolution or agreement, accepting the proposal, had been carried into effect. This was an appeal against the refusal of that rule.

Gray, Q.C., for the appellants, the defendants.—The questions in this case turn upon the 221st section of the Bankrupt Law Consolidation Act, 1849, and are—first, whether the certificate mentioned in that section is conclusive of the facts recited in it, viz., that the resolution or agreement has been fully carried into effect; and, secondly, whether, supposing the Court is against the defendant upon that point, whether the facts appearing in evidence at the trial show a dispensation by the plaintiff of the defendant from the performance of the agreement. It is admitted on the part of the defendant that *Allcard v. Wesson* (7 Exch. 753, affirmed in error, 8 Exch. 260), is against him on the first point; but, as the decision of that case in error does not rest upon the ground of the decision in the court below, that case is not binding upon this Court.

He then argued that upon the true construction of the Act of 1849 that case should be overruled; that the commissioner's jurisdiction was to inquire whether the creditors had been satisfied, and to decide one way or the other: and that, although there might be an appeal under the 12th section of the Act, if that were not done the certificate was conclusive in a suit that the creditors had been satisfied. He referred to the arrangement clauses, sections 211, 213, 215, 216, 221, and sections 6 and 13, and, as to the effect of a certificate of conformity, to sections 198, 199, 201, and 205. The 221st section enacts that the certificate in that section mentioned shall operate to all intents and purposes as fully as a certificate of conformity, except as therein provided; and those exceptions are negatived by the plea in this case.

As to the second point it is not averred by the plea that the composition was in fact either paid or tendered, but the evidence of what took place before the second sitting (see sections 215 and 216) shows that the plaintiff refused to accept the composition, and dispensed with the necessity for any payment or tender. A refusal by one creditor under such circumstances does not affect the validity of the certificate: *Tindall v. Hibberd* (5 W. R. 566; 2 C. B. N.S. 199). [CHANNELL, B.—Whether there was a dispensation or not you cannot contend that it puts the defendants higher than if there had been a tender, and in that case the money must have been paid into court.] By the general law, independently of a statute, as in the case of tendering amends, it is submitted that it is not necessary that the sum tendered should be paid into court. In

Hochster v. De la Tour (1 W. R. 469; 2 E. & B. 678), where the defendant had agreed to employ the plaintiff as courier, it was held that a party to an executory agreement may, before the time for executing it, break the agreement by renouncing it; and that, upon such dispensation, an action would lie for the breach before the time for the fulfilment of the agreement.

H. Mathews, contra, was not called on.

ERLE, C.J.—The point last argued was that the bankrupt had shown, by his evidence at the trial, but the proposal agreed to by the creditors had been carried into effect; but I do not think the facts relied on establish that allegation. The proposal is assented to at the first sitting, and is confirmed at the second meeting; and, after that meeting the composition was a debt due to the creditors. That which is relied on for the defendant is that after the first meeting, and before the second meeting, the creditor refused to accept any compensation, and said that the defendants need not trouble themselves to offer him the proposed compensation as he would never take any. Is that a standing dispensation from the payment of the composition, and a satisfaction of the creditor. I say that it is not; and that it was the clear duty of the bankrupt, after the second meeting, to perform and carry into effect the proposal. The case is quite different, and has no analogy to that of a contract, where, in case one of the parties says that he would not perform it, the other party may, if he chooses, commence an action. There the rights of the parties exist. The bankrupt was bound after the second meeting to give the plaintiff an opportunity of taking the compensation.

As to the other point, having decided that the proposal was not carried into effect, and that the creditors were not satisfied (see section 221), I am of opinion that there is nothing in the statute which makes the certificate conclusive evidence of those facts. The remedy by appeal would not be a satisfactory remedy; and there are no words in the statute which say that the certificate shall be conclusive. The commissioner has power to grant the certificate if the facts show that the agreement has been carried into effect, and the creditors shall have been satisfied. We think that those facts did not exist.

The rest of the Court concurred.

WOOD, V.C., Dec. 7, 1865.

MAIR v. THE HIMALAYAN TEA COMPANY (LIMITED).

14 W. R. 165; L. R. 1 Eq. 411; 13 L. T. 586; 11 Jur. N.S. 1013.

Injunction—Contract for personal service—Agent—Wrongful dismissal.

INJUNCTION. PRINCIPAL AND AGENT.—*In the case of a contract for personal service, even when an agent has been wrongfully dismissed by his employers, this Court, having no power to compel the agent to fulfill his duties, cannot interfere, by way of injunction, in his favour.*

The articles of association of the Himalayan Tea Company (Limited), (a company formed under the Companies Act, 1862, and being the principal defendants in this suit) recited (*inter alia*) that upon the treaty for the formation of the company, it was agreed that, as soon as practicable, after the formation of the company, one half of the shares in the nominal capital of the company, viz., 2,000 shares of 25*l.* each, should be issued by the directors, and that of those shares one-fifth in number should be allotted to, and accepted by, the plaintiff, on the following conditions, viz., that until

the remaining four-fifths in number and value of those shares should have been fully paid up, the plaintiffs should not be liable to pay to the company any principal moneys on account either of the first payment or of any subsequent call in respect of any of the shares so allotted to him, but that, so soon as the remaining four-fifths in number and value of those shares should have been fully paid up, then the plaintiff should be liable to pay to the company the full amount of all the shares so allotted to him; and that in the meantime he should pay to the company interest at 5l. per cent. per annum on all principal moneys which would have been payable by him from time to time in respect of the shares so allotted to him in case this special agreement had not been made. And, after similar provisions with respect to the remaining one-half of the shares in the company, when and as they should be issued, it was provided that, in case at any time and from any cause the land and plant of the company should be depreciated in value below the paid up amounts thereof respectively, the plaintiff should pay to the company such principal moneys then unpaid by him on account of all or any of the shares then allotted to him, as the directors from time to time should think requisite for the protection of the interests of the other shareholders in the company, and should call upon him to pay, and he should pay, the same in each case within the space of one calendar month after such call should have been made.

Then followed a recital that the several persons, whose names were thereunto subscribed, had resolved to adopt the above-mentioned agreement, and to carry the same into effect, and to adopt the rules and regulations thereunder written, for the government of the said company; and it was thereupon agreed in manner therein following.

Then came a number of clauses, of which the only material ones are the 69th, which provided that the directors might, from time to time, appoint, employ, and remove all such managers, secretaries, clerks, agents, and other officers and servants, as they might consider necessary for the purpose of the company, and might pay them such salaries as they might think requisite; and the 95th, which provided that the plaintiff's firm of Messrs. Mair & Co., of Calcutta, should be the agents of the company in India at the remuneration therein mentioned, and that produce of the estate to be sold in England should be consigned to the plaintiff's English firm of Messrs. D. K. Mair & Co., who should be entitled to the usual merchant's commission in respect thereof. These articles of association were signed by the plaintiff, and by other shareholders in the company. The plaintiff alleged that he consented to take the said shares, and to incur the said liabilities in respect thereof, solely on the express agreement and condition that the said appointments of his said firms were to be permanent and lasting appointments; and in proof of this he relied upon the printed prospectus of the company, and a printed letter, which were circulated together when the company was being got up. These, he said, amounted to such an express agreement. It is, however, unnecessary to state them here, because the decision of this case did not turn in any way upon them. The plaintiff's said firm of Mair & Co. carried on the agency of the company in India from the formation of the company until the month of August, 1865. On the 12th July, 1865, at a meeting of the directors, at which the plaintiff was present, Mr. Bazley, one of the directors, on their behalf, strongly urged the plaintiff, on behalf of his said firms, to resign the said appointments. The plaintiff objected, but Mr. Bazley then proposed that the plaintiff should be relieved from all liabilities in respect of the said shares, and relinquish all claim to the said shares if he would resign. This proposal the plaintiff afterwards accepted, and accordingly resigned, and his resignation was accepted by the directors, and they appointed another agent for the company in India in his stead. The directors were subsequently advised that the proposal so made by them to the plaintiff was one which they could not legally make, and they accordingly wrote to the plaintiff informing him of this, and, at the same time applying to him for the payment of interest on

account of the said shares. Some correspondence ensued, and, ultimately, the company commenced an action at law against the plaintiff for the recovery of 945*l.* 14*s.* 10*d.*, interest upon the said shares. The plaintiff thereupon filed his bill in this court, and thereby prayed (*inter alia*) for an injunction to restrain the company from appointing or retaining any person other than the plaintiff's firm of Mair & Co., as agent of the company in India, and from consigning any produce of the estates of the company to any person other than the plaintiff's firm of D. K. Mair & Co., and from prosecuting the said action, and from carrying on any other proceedings at law against the plaintiff in respect of the said shares.

Giffard, Q.C., and *Bristowe*, for the plaintiff, now moved for an injunction, and contended that the directors had no power to dismiss the plaintiff without the sanction of a general meeting of the shareholders. The 95th clause of the articles of association contained an express appointment of the plaintiff's firm to be agents of the company in India, and that the clause was in no respect altered by the former 69th clause. The dismissal of the plaintiff would therefore involve the alteration of one of the articles of association, and this, by virtue of the Companies' Act, 1862, could only be done by a general meeting of shareholders. The plaintiff's resignation could not be taken advantage of to oust him from his office, without at the same time releasing him from his liabilities. His salary was fixed by virtue of an agreement between him and the company, for which he had given valuable consideration. Some of the shareholders had sworn that they had taken their shares upon the faith of Mair & Co. being the agents of the company. [Wood, V.C.—This Court cannot compel an agent to fulfil his duties.] The plaintiff could not sustain an action against the company for wrongful dismissal, because of his resignation, which was really only intended to be a conditional one.

Rolt, Q.C., and *Archibald Smith*, for the defendants, disclaimed any intention of relying on the resignation, and were not otherwise called upon.

Wood, V.C., said that he could not see his way to giving the plaintiff any relief in this Court. His remedy (if any) must be at law. The plaintiff's case must rest entirely on the articles of association, there being no case raised by the bill that they did not represent the true agreement between the plaintiff and the company. Taking the matter in the most favourable way for the plaintiff, and assuming that he was to be irremovable from the agency except by a general meeting of the shareholders, or that he was to be freed from all his liabilities if removed, in what way could this Court interfere? It had no power to enforce the fulfilment of the agreement upon the agent; he must therefore be left to his remedy at law. As, however, the plaintiff had, as it was alleged, resigned, upon the faith of an agreement that he should be released from his liabilities on his shares, the defendants must undertake not to set up that resignation in any proceeding which the plaintiff might commence at law, and there would be no order upon the motion.

STUART, V.C., Dec. 4, 1865.

PATCH v. WARD.

14 W. R. 166; L. R. 1 Eq. 436; 13 L. T. 496; 12 Jur. N.S. 2.

Solicitor and client—Production of documents.

MORTGAGE.—*Where a solicitor has acted for both mortgagor and mortgagee in the preparation of a mortgage, and he afterwards acquires a right to the money thereby secured, and a decree is made in a suit to foreclose the mortgage, the mortgagor is entitled, in a suit instituted by him to impeach that decree, to call*

for the production of the mortgage deed against a person holding it as trustee for the solicitor, although no fraud is alleged in the preparation of the deed.

A mortgagor is always entitled to inspect the mortgage deed, although not the other title deeds in the hands of his mortgagee.

This was a summons adjourned from chambers, that the defendants should produce, amongst other documents, three indentures, dated respectively 3rd May, 1845; 5th May, 1845; and 1st December, 1848.

The suit was instituted for the purpose of impeaching the validity of a foreclosure decree.

By indenture, dated the 4th November, 1844, the plaintiff mortgaged certain leasehold premises to the defendant Ward, to secure 3,000*l.*, and further advances up to 5,500*l.*

By the indentures of 3rd May, 1845, and 5th May, 1845, indorsed on the indenture of 4th November, 1844, and which recited that the 5,500*l.* was due on the security of that indenture, the mortgage was transferred to Ward, Baily, and Leaf.

On the 10th September, 1845, the same premises were mortgaged by plaintiff to defendant Vulliamy for 1,000*l.*

The defendant Ward acted as solicitor for the plaintiff and mortgagees in the preparation of these indentures, and he is still solicitor for the defendant Vulliamy. In March, 1847, Ward ceased to act as the plaintiff's solicitor. In May, 1847, a suit was instituted by Ward, in the name of the transferees, against the plaintiff for foreclosure, to which suit Vulliamy was not originally a party, but was made so by amendment. In May, 1848, a decree of foreclosure was made in this suit.

On the 1st December, 1848, the premises were assigned to Vulliamy by an indenture of that date which showed that Ward had paid off the transferees, and that, except as to the 1,000*l.* advanced by Vulliamy, the foreclosure suit would be for Ward's benefit.

On the 16th March, 1849, the foreclosure decree was made absolute.

The grounds on which the decree was impeached were, that the accounts, on the footing of which it had been made, were wrong, and that the defendant Ward's position as plaintiff's solicitor had given him an undue advantage over the plaintiff.

Malins, Q.C., and *Nalder*, for the motion.—The mortgages were prepared by the defendant Ward, who acted as solicitor for mortgagor and mortgagee. The defendant Ward therefore cannot, as against plaintiff, protect himself from their production. They quoted *Balch v. Symes* (T. & R. 87), *Crisp v. Platel* (8 Beav. 62), *Davis v. Parry* (27 L. J. Ch. 294).

Greene, Q.C., and *Bevir*, against it.—There is no allegation here of fraud by defendant, Ward, in the preparation of the deeds; and it is not disputed that the sums expressed to be secured by them were *bonâ fide* paid to plaintiff. These deeds are evidence of the title of the defendant, and the plaintiff has not shown that their production would assist him in making out his title. They quoted *Gill v. Eyton* (7 Beav. 155), *Greenwood v. Rothwell* (7 Beav. 291). The deed of 1st December, 1848, only carried out the foreclosure decree so far as Vulliamy was concerned, and there was no ground to call on him to produce that deed.

STUART, V.C., said that no one doubted the rule, that, as against the mortgagor, the mortgagee had a right to resist the production of any deeds which evidenced his title; but this rule did not extend to the mortgage deed itself. A mortgage deed contained a proviso for redemption on payment of principal and interest, and was the evidence of the mortgagor's title to the equity of redemption, and on that account the mortgagor was entitled to its production. Mr. Powell, in his learned work, vol. 2, p. 935, says, "It is understood that a mortgagee is not compellable to produce the title deeds before he has received his money, for otherwise, under pretence of repayment, the mortgagor may look

into the deeds with a view to discover faults and impeach the security; but the mortgage deed itself, which puts him in the character of mortgagee, must be always open to the inspection of the mortgagor, that he may know his right to redeem." He (the Vice-Chancellor) considered that such was the doctrine of the Court. In the present case a further question arose. If a mortgagor and mortgagee, or any other grantor and grantee, employed the same solicitor, and he subsequently became owner of a right purporting to be conveyed by the deed, there were strong grounds for saying that if the mortgagor sought inspection of the deed, the solicitor did not stand in the position of transferee of a right acquired in the usual way. The mortgagor in this case sought the production of the deeds of 3rd and 5th November, 1845, to evidence his title. He was of opinion that he was entitled to such production, but not to production of the deed of 1st December, 1848. That deed could not assist the plaintiff in impeaching the foreclosure account as against the defendant Ward. As it was indorsed on the other mortgage deed the defendant Vulliamy would be at liberty to cover it up.

STUART, V.C., Dec. 4, 1865.

BARNETT v. LEUCHARS.

14 W. R. 166; 13 L. T. 495.

Injunction—Trade mark—Label—Fraud on the public.

TRADE AND TRADE NAME.—*Defendant restrained from selling, or exposing for sale, fireworks, not manufactured or sold by the plaintiff, in boxes bearing the plaintiff's labels.*

The plaintiffs in this case, Frederic Barnett and Charles Albert Roussille, were the inventors of a new firework called "Pharaoh's serpent."

A French patent had been obtained for the invention, and also provisional protection in the United Kingdom under the Patent Law Amendment Act, 1852; but in the present suit no question with regard to the patent arose.

The bill sought to restrain the defendant (a toy dealer in Cheapside), his servants and agents, from selling or exposing for sale, or procuring to be sold in boxes bearing the label of the plaintiffs, any "serpents" or other similar articles which had not been manufactured or sold by the plaintiffs; and also asked an account of all "serpents" or other similar articles so sold.

It appeared by the evidence that the plaintiff's fireworks were made in the form of a small cone covered with tinfoil, and were always sold in paper boxes bearing a particular label, each of such boxes containing a single serpent.

The plaintiffs asserted that in the early part of November last they discovered that the defendant was selling boxes bearing their label and containing "serpents" not of their manufacture, and thereby deceiving the public with a spurious article.

The evidence adduced on behalf of the defendant went to prove that customers had occasionally asked for more than one of the plaintiff's "serpents;" and to avoid the trouble of carrying several boxes, had requested that all the cones purchased might be put in one box. That thus several empty boxes bearing the plaintiff's label came to be lying about the defendant's shop; and it was admitted that four of these boxes had, at different times, been filled for the convenience of customers, with "serpent's eggs" not manufactured by the plaintiffs, and consisting of small pieces of a white substance wholly different from the cones manufactured by the plaintiffs.

The cause now came on, on motion for an injunction which was, by consent, treated as a motion for decree.

Malins, Q.C. (W. S. Owen with him), for the plaintiffs.

W. Morris, for the defendant, contended that there was no proof of the public being deceived, the plaintiff Barnett and his agent being the only persons produced as having been supplied with the so-called spurious articles in the plaintiff's boxes. He cited Welch v. Knott (4 K. & J. 747).

STUART, V.C., said that the plaintiffs had shown an exclusive right to a label designed by them, and placed upon boxes used in the sale of fireworks of their own invention. An argument had been founded upon the fact that the witnesses produced to show the fraud practised on the public could not have been deceived, as they already knew the facts of the case, but his Honour could not see the force of such argument. The using of boxes bearing the plaintiff's label for packing up fireworks, not of the plaintiff's manufacture, was plainly an infringement of the plaintiff's right. His Honour granted the injunction prayed by the bill, stating that it was ridiculous to direct an account, and refused to make an order as to costs, as the defendant had acted fairly in the transaction, and had desisted from the practice complained of immediately upon notice of motion being served upon him. His Honour, in refusing costs to the plaintiff, expressed himself as disinclined to encourage cases of this description.

STUART, V.C., Dec. 5, 1865.

DEANE v. HAMBER.

14 W. R. 167; 13 L. T. 522.

Practice—Motion to dismiss—Costs.

EXECUTOR AND ADMINISTRATOR.—*Where the plaintiff has sued the defendant at law as administratrix for a debt owing by the testator to the plaintiff, and has also instituted a creditor's suit in chancery in respect of the debt, and the defendant has obtained an order dismissing the action at law on payment of the debt and costs at law, the Court, on motion by the defendant, will make an order staying the chancery proceedings on payment by the defendant to the plaintiff of such costs as it considers reasonable.*

This was a motion by Hamber and Pearse, two of the defendants to the suit, that the plaintiff's bill might be dismissed as against them with costs.

The following were the material facts of the case:—

Mr. T. Pearse died in 1858 indebted to the plaintiff, as rector of St. Martin's Outwich, in the sum of 22l. 10s. for rent of premises held by him. He left a will under which the moving defendants were tenants for life of a small piece of land, with remainder to the testator's children, the defendants Samuel and Elizabeth Pearse. The executor named in the will disclaimed, and administration to the testator's effects was taken out by the defendant Hamber. All the defendants were persons in very poor circumstances. The plaintiff repeatedly applied to the defendant Hamber for payment of the 22l. 10s., and at last, on the 26th of October, 1864, brought an action in the Lord Mayor's Court to recover that amount.

The defendant Hamber did not, at first, put in an appearance in the action, and the plaintiff did not prosecute it, being advised by counsel that he would fail, as the covenant by Mr. Pearse to pay the rent did not bind his heirs.

On the 27th of May, 1865, the plaintiff filed a bill on behalf of himself

and all other the creditors of the testator, against the moving defendants and the testator's heir at law, and other devisees, for administration of the testator's estate. Interrogatories were filed on the 16th of June, 1865, but leave was from time to time granted to the defendants extending their time for answering.

On the 2nd August, 1865, the defendant Hamber entered an appearance in the action in the Lord Mayor's Court, and on the 3rd August obtained an order dismissing the action on payment of the 22l. 10s. and costs.

On this order being made the defendants' solicitor wrote to the plaintiff's solicitor that there was no need for further proceedings in Chancery, and asked the amount of plaintiff's costs. The plaintiff's solicitor replied that his costs were 68l. 10s., and that he was willing to have them taxed, if desired, and his bill dismissed on their being paid. He, at the same time, offered to take thirty guineas at once in discharge of his claim. The defendant's solicitor, in reply, offered to pay him 20l., which he refused and wrote requiring the defendants to answer.

Malins, Q.C., and Ellis, for the motion.—The institution of the chancery suit was vexatious. The plaintiff was bound to elect to proceed either at law or in equity. The quoted *Hogue v. Curteis* (1 J. & W. 449).

Bacon, Q.C., and Karslake, contra.—The motion is irregular in point of form. The proper motion would have been by plaintiff to stay all proceedings on payment by defendant of taxed costs: *North v. Great Northern Railway Company* (2 Giff. 64). Apart from this, we are clearly entitled to our costs in equity. We had a right to file the bill, and it is the defendant's own delay in paying the debt which has brought these proceedings on him.

STUART, V.C., said that the motion was certainly wrong in form, but it was clear that the suit could not be allowed to go on, and the only question was on what terms the proceedings should be stayed. It was impossible to say that the bill was improperly filed, whether it was necessary or not was another question. The proper time for discontinuing the chancery proceedings was when the order to dismiss the action in the Lord Mayor's Court was obtained. But no steps were then taken with that object, and that suit remained as before, and the defendant was bound to answer. He (the Vice Chancellor) thought that the defendants' offer of 20l. for plaintiff's costs was a reasonable one and should have been accepted. He should order that the defendants moving pay to the plaintiff the sum of 20l., and that thereupon all proceedings should be stayed till further order against the defendants moving.

[BANKRUPTCY.]

Nov. 21, 1865.

Ex parte HOPCRAFT.

Re FLAVELL.

14 W. R. 168.

See, *Pulbrook v. Ashby*, [1887] E. R. A.; 56 L. J. Q.B. 376; 35 W. R. 779 (Q.B. D.).

See now Bills of Sale Act, 1878 (41 & 42 Vict. c. 31) s. 4, and Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43) s. 8.

Bills of Sale Act, 17 & 18 Vict. c. 36—*Non-registration under—Bankruptcy.*

BILLS OF SALE.—*A brewer's lease, which contains a licence and authority*

to the lessor, in case of default being made in payment of such sum of money as should be due and owing to him from the lessee "on the balance of the account current," to take possession of the stock-in-trade and effects of the lessee must be registered under the 17 & 18 Vict. c. 36, otherwise it becomes void as against assignees in bankruptcy.

This was a special case stated for the opinion of the Court between Alfred Hopcraft, a creditor of Frederick Flavell, and Thomas Marshall, the creditors' assignee of the estate of Frederick Flavell.

The bankrupt previously to, and at the time of his bankruptcy, occupied an inn at Bramston, in the county of Northampton, as tenant to the creditor, who is a brewer, under a lease dated 28th August, 1864, for one year, and thence from year to year. This lease was not registered under the Bills of Sale Act.

On the 5th June, 1865, the bankrupt, being indebted to the creditor in the sum of 11l. 15s. for rent, and also in the sum of 52l. 0s. 4d. for articles supplied to him in accordance with the terms of the lease. The creditor distrained upon the bankrupt's goods for the rent, and pursuant to the power contained in the lease in that behalf, the bailiff who distrained also took possession of the goods of the bankrupt for recovery of the debt of 52l. 0s. 4d. None of the goods were sold or removed from the bankrupt's premises, but the bailiff remained in possession in the house. The bankrupt and his family also remained in the house and carried on the business as before until the 8th of June, 1865, when the bankrupt signed a declaration of insolvency, and was thereupon adjudged bankrupt on his own petition.

No act of bankruptcy had been committed prior to the 8th June, 1865.

The assignee paid the rent distrained for, but disputed the right of the creditor to sell the goods, &c., seized under the deed; and in order to save the cost of litigation it was agreed between the parties that the matter in difference should be left to the determination of the commissioner acting in the bankruptcy.

The whole of the goods were sold by the assignee with the consent of the creditor, and the decision of the Commissioner was requested—whether the creditor was entitled to his debt of 52l. 0s. 4d., and costs in full out of the proceeds of the sale, or was entitled only to his dividend with the other creditors, and also by whom the costs attending the present application were to be paid.

The lease contained a covenant by the lessee to pay all and every sum, and sums of money which should be due and owing on the balance of the account current. Then followed this proviso:—

"And further that in case default shall be made in payment of the same moneys, or any part thereof in manner aforesaid, it shall be lawful for, and the said Frederick Flavell doth for himself, his heirs, executors, and administrators, hereby give and grant unto the said Alfred Hopcraft, his executors, administrators, and assigns, full and free liberty, leave, license, and authority to seize and take into his or their possession all and every the present and future, or any after-acquired goods, stock-in-trade, and effects for the time being belonging to the said Frederick Flavell, and whether the same shall be upon the said demised premises or elsewhere, without any let, suit, trouble, or impeachment whatsoever, and the goods and chattels so seized, be taken to sell and dispose of either, upon the premises where they may be found, or after removing the same for such price and in such manner as he or they may think proper, and to receive and take the money to arise from such sale and give receipts and discharges for the same, and after paying all expenses incurred or paid by him to retain all and every sum and sums of money which shall be then due and owing from the said Frederick Flavell on the balance of his said account current, and then to pay the surplus, if any, unto the said Frederick Flavell, his executors, administrators, or assigns, and in case of any action being brought for such seizure by any

person or persons whomsoever, these presents may be used as conclusive evidence of leave and license for such seizure, and all matters to be complained of in such action or other proceedings."

Bagley, for the assignees, referred to the 133rd section of the Bankrupt Law Consolidation Act, 1849, which provided for seizure and sale before the date of the fiat, in order to support an execution against the effects of the person becoming a bankrupt. He also cited the 184th section of the same Act, and contended that the creditor in this case could not be in a better position than if he had levied an execution which had not been completed by a sale, and that, therefore, he had no right to the property against the assignees. 2. The deed was in contravention of 17 & 18 Vict. c. 36, ss. 1 and 7. He was then stopped by the Court.

Sargood for the creditor.—It was very doubtful whether the lease required registration under the Bills of Sale Act, there being no conveyance of chattels contained in it. The cases go to this extent, that bills of sale are not void for want of registration as between the parties, but only as against creditors: *Hills v. Shepherd* (1 F. & F. 191); *Barker v. Anson* (Id. 192, Shelford's Bankruptcy, 3 ed. 701).

Bagley was not called upon to reply.

HOLROYD, Commr.—I think this case may be decided upon the point which has been raised with regard to the non-registration. It is quite clear that the case contained a license or authority to take possession of chattels, and, as such, required registration under the Bills of Sale Act. It is unnecessary for me to consider the question of order and disposition, though I think upon that point also the case of the creditor would fail. The order will be, therefore, that the assignees are entitled to the goods seized by the creditor.

Sargood asked for his costs out of the proceeds.

HOLROYD, Commr.—The case is so clear that I cannot make any order as to your costs.

ROMILLY, M.R., Dec. 18, 1865.

MAYES v. MAYES.

14 W. R. 169; 13 L. T. 549; 11 Jur. N.S. 1033.

Practice—Evidence—Affidavits—Time for filing.

EVIDENCE.—*A party to a cause will not be allowed to file affidavits after he has cross-examined witnesses on the other side.*

Semble, he may do so under very special circumstances.

This was an application adjourned from chambers, on the part of the plaintiff in an administration suit for further time to put in affidavits.

The plaintiff, who was the residuary legatee of the testator in the cause, had taken out this summons on the 7th instant, to enlarge the time for closing evidence in order to enable him to file further affidavits to rebut the evidence of Sarah Fisher, who claimed as a creditor against the estate of the testator the sum of 1,250*l.*, alleged to be due to her on account of wages owing to her under an agreement with the testator, by which, although she was merely a farm servant, he had agreed to pay her wages at the rate first of 50*l.* and afterwards of 100*l.* per annum. Before this summons was taken out the plaintiff had served the claimant with a subpoena to attend before the examiner

to be cross-examined, and an appointment had been made for such cross-examination on the 9th instant. The plaintiff had been ordered to file his affidavits by the 7th inst., but wishing to enlarge this time he wrote to the claimant's solicitors to ask their consent to allow him to postpone the time for closing his evidence upon certain terms, one of which was that he would forfeit his appointment before the examiner for the cross-examination of the claimant on the 9th inst., and would take, instead thereof, the first appointment that he could obtain in January next. His Honour's chief clerk had endorsed this letter, "I think this is reasonable," but the claimant's solicitors had refused the plaintiff's request, and accordingly the plaintiff had proceeded with the cross-examination of the claimant on the 9th inst.

F. C. J. Millar now appeared in support of the application.

ROMILLY, M.R.—You have cross-examined the claimant, and after that you cannot file affidavits. The same rule applies in this case as in the case of answers.

Millar said there were special circumstances in this case. The claimant professed to have in her possession a document in the testator's handwriting which would support her claim. This document had already been submitted by the plaintiff to an examination by one expert, who had given it as his opinion that it was spurious. The plaintiff desired to obtain the opinion of other experts upon the question of its genuineness, but the claimant refused to produce it to him for this purpose.

Field, for Sarah Fisher, the claimant.

H. M. Jackson, for the executors, said that the document was in their possession, but they were ready, if his Honour thought proper, to deposit it with the chief clerk for the plaintiff's inspection.

ROMILLY, M.R., said that he thought, with regard to this particular document, the plaintiff ought still to be at liberty to examine witnesses, and he would allow him to do so within seven days after the document had been deposited with the chief clerk. But the general rule was constant; you must file your affidavits before cross-examination of the witnesses on the other side. He would reserve the claimant's costs of this application, but it was to be understood that in no case was she to pay the costs of it. The costs of the executors must come out of the estate.*

KINDERSLEY, V.C., Dec. 8, 1865.

NOTTLEY v. PALMER.

14 W. R. 170; L. R. 1 Eq. 241; 13 L. T. 647; 11 Jur. N.S. 968.

Not applied, *In re Butler's Will*, 1873, L. R. 16 Eq. 479 (L.C. for M.R.).

Practice—Payment out of court of a share of a fund—Tenancy in tail—Disentailing deed.

INFANT.—One of several infant tenants in tail of a fund in court, representing real and personal estate, on attaining twenty-one, petitioned for payment out of her share, and, the family being in poor circumstances, it was also asked that 150*l.* might be paid to the mother for future maintenance.

Order made without requiring a disentailing deed to be executed.

* See *Besemeres v. Besemeres*, 1 Kay, 17 app.

This was a petition by the five children of a devisee under the will of a gentleman named Nottley, asking for payment out, to one of them (a daughter) of a share of the fund in court, representing the estate, and now consisting of 1,657*l.*, on her attaining twenty-one; and also that a further sum of 150*l.* might be paid to their mother out of the remaining capital, for the maintenance of the other children respectively.

The property, then consisting of real and personal estate, was devised by the will to the petitioners' father for life, with remainder to the petitioners as tenants in common in tail, with cross-remainders, free of succession duty.

The father being dead, the children had lived with, and been supported by, their mother, and portions of the fund had been paid out from time to time, in consequence of the small means there was of maintaining them.

G. Murray appeared in support of the petition, and produced a letter from Somerset House releasing the sums now sought to be dealt with from succession duty. It had been suggested that a disentailing deed ought to be executed by the daughter who had attained twenty-one; but it was submitted that such deed was not necessary. In *Re South-Eastern Railway Company* (9 W. R. 404, 30 Beav. 215), certain compensation-money, representing land taken by the company, to which a tenant in tail was entitled, was paid into court, and, on the execution of the conveyance, he petitioned for payment out to him of the fund under the 69th section of the Lands Clauses Act (8 & 9 Vict. c. 18), to which the company objected, that he ought to execute a disentailing deed; but the Master of the Rolls considered that, inasmuch as the land had been conveyed to the company in fee simple, such deed was unnecessary.

KINDERSLEY, V.C.—On the authority of the case before the Master of the Rolls, I think I may dispense with the execution of a disentailing deed, and I will make the order asked as to the other sum, only suggesting that I hope great care will be exercised in the application of it, as otherwise the whole fund may soon be frittered away by the application of such small sums.

STUART, V.C., Dec. 9, 1865.

Re COMBER'S SETTLEMENT TRUSTS.

14 W. R. 172; 13 L. T. 459; 11 Jur. N.S. 968.

Will—Construction—Power of appointment—General devise.

POWERS.—Where a testator by will (before the Wills Act, 1 Vict. c. 26), after referring to a fund over which he had a power of appointment by will, and declaring that he intended to dispose thereof "as follows," proceeded to dispose of certain parts, less than the whole of the fund, and made a general devise of all the residue of his personal estate.

Held, that the general devise operated as an execution of the power over that part of the fund of which no specific appointment had been made.

By the settlement, made on the marriage of Mr. and Mrs. Comber, a sum of 2,500*l.* bank annuities, was transferred by Mr. Comber to the trustees, upon trust to pay the dividends to Mr. Comber for life, and after Mr. Comber's decease to Mrs. Comber for life, if she survived Mr. Comber; and after the decease of the survivor to stand possessed of the capital of the trust fund, in trust for such person or persons, &c., as Mr. Comber should by will appoint, and in default of appointment, for Mr. Comber's next-of-kin, according to the Statutes of Distribution.

Mr. Comber made his will, which was dated the 24th of November, 1825, and after disposing of his real estate, and some bank 4l. per cent. annuities, standing in his own name, he proceeded as follows:—"Having the disposal of 2,500l. capital stock in the same 4l. per cent. Bank Annuities, now standing in the names of Charles Finch, the younger, and Goodman Francis, trustees named in my marriage settlement, I dispose thereof as follows:—I give the sum of 200l. *part thereof*, unto T. C. Eaglesfield; and I give the sum of 100l. *other part thereof*, unto each of the other children of Mr. and Mrs. Eaglesfield. And I also give 100l. capital stock, *other part* of the aforesaid stocks, unto each of my cousins (naming them). And as to all the rest residue and remainder of *my personal estate*, whatsoever and wheresoever, I give and bequeath the same to my wife, Rebecca Comber, for her own use and benefit.

The testator died in 1829. Rebecca Comber survived the testator, and died, having made a will appointing the petitioner Mr. Hurrell, and Mr. Finch, who was one of the trustees of the settlement, her executors, and they both proved her will. The trustees of the settlement paid the legacies which the testator specifically bequeathed out of the 2,500l., and which amounted to 1,300l. and they transferred the residue (after deducting the costs of the affidavit on transfer) into Court, under the Trustee Relief Act.

The petition was presented by Mr. Hurrell as one of the legal personal representatives of Mrs. Comber, praying for transfer of the entire balance to him. It was opposed by the next of kin of Mr. Comber according to the statutes, who contended that they were entitled to the balance, as in default of appointment.

Malins, Q.C., and *Rigby*, for petitioner.—By the law as it stood before the Wills Act, although, as a rule, a general devise did not operate as an execution of a power, yet, where the testator, by referring to the power, or to the sum over which it extended, showed that he had the power in his mind, that rule was relaxed. It must be taken into consideration also, that the testator was himself the settlor, and that his probable intention was to reserve to himself the entire interest in the fund, giving his wife a life interest if she survived. They quoted *Davies v. Fisher* (5 Beav. 201); *Morgan v. Surman* (1 Taunt, 289); *Standen v. Standen* (2 Ves. Jun. 589); *Churchill v. Dibden* (2 Ld. Kenyon, 2nd part, 69); *Sugden on Powers*, 8 ed. 332.

Bacon, Q.C., and *Westlake*, for the next-of-kin of Mr. Comber.—The testator has given 1,300l. expressly in execution of the power. Where a testator executes a power as a power as to part of the subject of it, one cannot infer that he intended by a general devise to execute it as to the remainder. In *Davies v. Fisher*, and that class of cases, the reference to the power was a sort of general introduction to the other bequests in the will. Here the testator has clearly shown that he knows the difference between property and power. They quoted *Walker v. Mackie* (4 Russ. 76); *Hughes v. Turner* (3 M. & K. 666).

STUART, V.C., said that this was not a case in which any difficulty occurred from the testator's omitting to refer to the power. He had clearly referred to the sum over which he had a power, and had declared his intention to dispose *thereof*. It was, therefore, in his opinion, necessary to look at all the following dispositions made by the testator, and it must be a very strong reason which would induce him to say that the general devise did not affect the balance of the sum which was subject to the power. When he considered the length to which the Court had gone in giving effect to dispositions by will as operating in execution of powers, even where there was no reference to the powers, he did not think that the fact of the testator *having referred to the power* when disposing of parts of the fund over which it extended, and *not having done so* in disposing of the residue of his estate, could affect the question. He felt the force of that objection, but did not think that it was strong enough to override what he considered to be clearly the testator's intention, to dispose of the property subject to the power. There must be an order in terms of the prayer of the petition.

STUART, V.C., Dec. 14, 1865.

MORRALL v. PRITCHARD.

14 W. R. 172; 13 L. T. 425; 11 Jur. N.S. 969.

Practice—Supplemental bill in the nature of a bill of review.

PRACTICE.—After a decree has been made in an administration suit directing the usual accounts, if it is sought to charge the executors with wilful default, a bill must be filed for that purpose, and the leave of the Court to its being filed must be obtained.

The application for leave to file such a bill must be supported by affidavit, showing that the plaintiff did not know, and could not have known, at the date of the decree, the circumstances on which he seeks to charge the executors.

This was a motion by the plaintiff, R. Morrall, made in the above suit and various other suits instituted for the administration of the estate of one Adam Lodge, that the plaintiff might be at liberty to file a bill on behalf of himself and all others the unsatisfied creditors of Adam Lodge against the defendants (Lodge's executors), seeking to charge them with wilful default, and praying that the suit might be taken as supplemental to all the other suits.

It appeared that so long ago as 1842, a suit of *Morrall v. Pritchard* had been instituted by Mr. C. Morrall, who was now represented by plaintiff, and that a decree had been made in that suit in March, 1847, directing the usual accounts.

Before any accounts had been taken under that decree, another suit of *Lodge v. Pritchard* was instituted by a residuary legatee of the testator, Adam Lodge. The bill in that suit was framed so as to charge the executors with wilful default; but the decree, which was made in July, 1851, only directed the usual accounts.

In March, 1859, the chief clerk certified, in the suit of *Morrall v. Pritchard*, that the parties to that suit had agreed to adopt the accounts in *Lodge v. Pritchard*.

On the 11th of March, 1863, an order on further consideration was made by Vice-Chancellor Stuart in these and certain other causes, which order directed payment to the plaintiff, R. Morrall, of a sum of 1,855*l.*, but on the 23rd of July, 1863, the Lords Justices reversed that order, and directed the plaintiff, R. Morrall, to refund so much of the 1,855*l.*, as was required to satisfy certain claims, which they decided had priority over the claims of the plaintiff. Under the last-mentioned order the plaintiff refunded 600*l.*

In June, 1865, the taxing-master certified the amount of costs, and it appeared that after payment of costs the testator's estate would be insufficient for payment of his debts. The plaintiff still remained a creditor of the estate for 600*l.*

The plaintiff, R. Morrall, alleged that the executors had wrongfully paid the debt of a creditor of the testator over whom the plaintiff had priority, that they had neglected to sell the testator's leaseholds specifically bequeathed, and that they had omitted to obtain a return of probate duty, which had been over paid. He also alleged that till the taxing-master's certificate was made he had believed that there would be enough to satisfy his claim without making the executors chargeable for wilful default.

Mulins, Q.C., and *Woodroffe*, for the motion.—It was necessary to apply for leave to file this bill. It was not a supplemental bill in aid of the decree, but a supplemental bill in the nature of a bill of review, and sought to vary the principle of the decree. If we had filed the bill without leave, the executor might have moved to take it off the file for irregularity. [They cited *Hodson v. Ball* (1 Ph. 177); *Partington v. Reynolds* (6 W. R. 388, 4 J. N.S. 201).] On the merits it was clear that the executors had been guilty of wilful default. The plaintiff did not know till June, 1865, that the estate of the testator would be

insufficient to satisfy his claim. He could not, therefore, be blamed for not taking any proceedings sooner.

Bacon, Q.C., and Kay, contra.—It was unnecessary to apply for leave to file his bill. [STUART, V.C.—It is too late in the face of the authorities to contend that. The authorities proceed on the ground that it is inconsistent with the common administration decree to extend it to wilful default.] Assuming that to be so, this is a bill of review.

STUART, V.C.—No. A supplemental bill in the nature of a bill of review. The decree has not been signed and enrolled.

The plaintiff must show that he did not know at any time during the former proceedings, and that he could not, by reasonable diligence, have discovered the facts on which he now seeks to charge the executors. An application like this must be supported by an affidavit that these facts could not be produced or used at the time when the decree was made. The only affidavit here was one by the plaintiff that he did not know the testator's estate would be insufficient to satisfy his claim. It was clear that he could not allege ignorance of what the executors had done, as the bill in the suit of *Lodge v. Pritchard*, the accounts in which had been adopted by the plaintiff, charged them with wilful default. They cited *Lord Portsmouth v. Lord Effingham* (1 Ves. sen., 430); *Ord v. Noel* (6 Mad. 127); *Partridge v. Usborne* (5 Russ. 195); *Bingham v. Dawson* (Jacob. 243); *Young v. Keighly* (16 Ves. 348); Mit. on Plead. 110, n. 1.

Malins, Q.C., in reply.

STUART, V.C., said that in order to justify the Court in allowing such a bill as this to be filed, there must be an affidavit proving that new facts had been discovered, showing a title to relief in the plaintiff, and also that the plaintiff could not have known these facts at the date of the decree. Now, in this case, the bill which it was sought to file only asked the relief which had been prayed by the bill filed twenty years ago, and it was clear the plaintiff could easily have discovered if he did not actually know the facts on which he now relied. The motion must be refused with costs.

Wood, V.C., Dec. 19, 1865.

PENNELL v. DAVISON.

14 W. R. 174; 13 L. T. 533.

Cross-examination—Notice to co-defendant—Statute 15 & 16 Vict. c. 86.

EVIDENCE.—*The cross-examination of one of defendants to a suit was proceeded with without any notice being given to a co-defendant who had given notice to read the first defendant's evidence:—Held, that this proceeding was utterly void.*

This was a summons for the enlargement of the time for the cross-examination of witnesses who had made affidavits in the cause. The summons was adjourned into court for argument. The plaintiff had given notice of motion for a decree, and the defendant's affidavits were filed on the 15th July, 1865. The time for filing evidence in reply would have expired on the 22nd July. On that day the plaintiff obtained an order to enlarge the time for reply to the defendant's affidavits until the 9th August. The result of this was that the fourteen days within which the plaintiff must give notice of cross-examination (the long vacation not being counted) would not expire till the fifth day of

Michaelmas Term. On the 31st October the plaintiff obtained an order enlarging the time for cross-examination till the 13th November. The plaintiff gave notice to the defendant Davison of his intention to cross-examine him on his answer and affidavits, but gave no notice whatever to another defendant, Susanna Emery, of his intention to cross-examine either herself or Davison, she having given notice of her intention to read Davison's evidence on her own behalf. On the 11th November the cross-examination of Davison was commenced before the examiner, but was not then concluded.

On the 16th November the plaintiff applied for another appointment to proceed with the cross-examination, which was made for the 21st November. The defendant Emery was served with notice of this second appointment and her solicitor attended, and he raised the objection that as no notice had been given to her of the first cross-examination, at which she had a right to be present, the whole proceeding was null and void. The examiner, thereupon, held that he had no jurisdiction to proceed. The plaintiff, therefore, took out the present summons on the 4th December. It appeared from the evidence that the plaintiff had given no notice to the defendant Emery, because he wished to cross-examine Davison apart from her.

W. H. Terrell, for the plaintiff, referred to sections 31, 32, 38, of statute 15 & 16 Vict. c. 86. There was no provision there that cross-examination or re-examination should take place in the presence of the parties. There was no oral examination in chief here, and, therefore, it was not a case in which the plaintiff was bound to serve all the parties with notice.

De Gez, Q.C., for the defendant Emery, and *Bovill* for the defendant Davison, were not called on.

WOOD, V.C., said that there was a deliberate intention on the plaintiff's part to abstain from giving notice to Miss Emery of Davison's cross-examination, and it was not a case of accidental omission. There could not be a more complete irregularity. Miss Emery had made Davison her own witness, and she was entitled to be present at his cross-examination. It was impossible to suppose that the statute was intended to do anything so inconsistent with the ordinary rules of justice as what had been contended for in this case. The cross-examination which had been taken was utterly void to all intents and purposes. The present application must be refused with costs.

STUART, V.C., Dec. 15, 1865.

Re GRANT.

14 W. R. 191; 13 L. T. 583.

Petition—Equity to a settlement—Capital of fund.

HUSBAND AND WIFE.—*The Court will not, as against her husband and a mortgagee, direct payment of part of a fund in court, to which a married woman is entitled, to her on her separate receipt, but will settle a proper portion of the fund on her and her children, and direct payment of the residue (if any) to the husband, or his assignee or mortgagee.*

This case came before the Court upon a petition presented by Mrs. Thomas, a married woman, by her next friend, to enforce her equity to a settlement out of a sum of 1,050*l.* stock in court, to which she was entitled under a settlement executed on the marriage of her parents.

In 1853, George Thomas (the husband of the petitioner), with his wife, mortgaged the fund to one Gullan for 600*l.*; but it was contended by the

petitioner that she was not bound by this mortgage, as she signed it without being aware of its effect and without proper legal advice.

The trustees transferred the fund into court under the Trustee Relief Act.

George Thomas, the husband, was, at the time of the petition being presented, in insolvent circumstances, and unable to maintain his wife and children.

The petitioner, beyond the fund in court, possessed property producing an income of about 99*l.*, and an annuity of 34*l.*; and no settlement had been made upon her marriage. She now asked that, after payment of costs out of the fund, a part of the fund, sufficient to realize 350*l.*, might be sold, and the proceeds, together with a dividend of 30*l.*, paid to her on her separate receipt, for the immediate necessities of herself and her children. And that the residue of the fund might be settled in the usual form for their benefit.

The petition was served upon the husband, the trustees, and the personal representative of Gullan, who was dead.

Bacon, *Q.C.*, for the petitioner, asked that an order might be made in the terms prayed. As an authority for paying out the capital of 350*l.* on the separate receipt of Mrs. Thomas, he cited *Gibbons v. Kibby* (10 W. R. 54).

Malins, *Q.C.*, and Langworthy, for the representative of Gullan, asked for half the fund.

Salmon for the trustees.

STUART, *V.C.*, refused to pay out the 350*l.* to Mrs. Thomas, on her separate receipt as asked. His Honour considered the fair and proper course would be to order that so much of the fund as would produce 350*l.* should be transferred to the representative of Gullan, the mortgagee, and that the residue (after providing for the costs of the other parties) should be settled in the usual form on the petitioner and her children. His Honour made no order as to the costs of Gullan's representative.

Wood, *V.C.*, Dec. 20, 1865.

STORMONT v. WICKENS.

14 W. R. 192; 13 L. T. 533.

Suit for assignment of dower—Costs.

HUSBAND AND WIFE.—*The defendant to a suit for assignment of dower set up an assignment of rent which he failed to prove, and entered into evidence as to the improvement of the lands since the title of the dowress accrued.*

Held, that he was liable to pay so much of the costs of the suit as was thereby occasioned.

This was a suit for assignment of dower. The defendant had set up an alleged assignment of rents in lieu of dower, but the Court held that he failed to prove it. He had also gone into evidence as to improvements of the property since the time when the widow first became entitled. The plaintiff, therefore, contended that he should be decreed to pay costs.

Jones, *Q.C.*, and Daunay, for the plaintiff, cited *Bamford v. Bamford* (5 Ha. 203).

Rolt, *Q.C.*, and Winterbotham, for the defendant, cited *Sheaf v. Cave* (24 Beav. 259).

Wood, V.C., directed that the defendant should pay such of the costs of the suit as had been occasioned by his setting up an assignment of rent, and entering into evidence as to improvements.

Wood, V.C., Dec. 22, 1865.

WHITTAKER v. FOX.

14 W. R. 192; 13 L. T. 588.

Specific Performance—Waiver of Agreement.

CONTRACT.—*A valid contract cannot be waived unless both parties assent at the same time to the proposal to put an end to it.*

This was a motion for an injunction to restrain an action at law.

The bill was for specific performance of an agreement for the sale of some houses, and to restrain an action brought by the defendant in respect of it.

The agreement, which was contained in two letters was for the sale of some unfinished houses, and it was alleged by the defendant that the real contract contained a stipulation, not reduced into writing, that the houses should be completed by the plaintiff. On the delivery of the abstract he said that he would not complete the contract till the houses were finished. The plaintiff afterwards wrote to the defendant a letter, stating that he supposed he intended to abandon the contract, and that if he did not hear to the contrary, he would assume that the contract was at an end. The defendant only replied that he had put the matter into the hands of his solicitor; and he shortly afterwards commenced an action to recover a sum of money which the plaintiff was only liable to pay under one of the stipulations of the agreement for sale.

Giffard, Q.C., and *A. E. Miller*, for the plaintiff, urged that the plaintiff's letter could not be taken as a waiver of the agreement, since the defendant, by bringing the action, shewed that he had not assented to the waiver. They cited *Carolan v. Brabazon* (3 Jo. & La. T. 309), *Moore v. Crofton* (3 Jo. & La. T. 445), *Harrison v. Brown*, unreported.*

Wilcock, Q.C., and *Surrage*, for the defendants.

Wood, V.C., said that the defendant, by bringing the action, had shewn that he did not assent to the waiver, and a mutual agreement was necessary to waive a prior contract. The question as to the parol term in the contract would be decided at the hearing. The Court therefore ordered that the action should be stayed, the plaintiff undertaking, if the bill should be dismissed, to abide by any order that the Court might make with respect to what was sought to be recovered in the action, and the costs of the action.

* *Harrison v. Brown* was heard before the Master of the Rolls February 13, 1861.

The defendant had entered into a contract with the plaintiff for the sale to him of a house. He had delivered an abstract, which the plaintiff returned alleging that it showed no title. He then delivered a supplemental abstract, which was returned with the same allegation. The plaintiff thereupon brought an action against the defendant for a return of the deposit. The declaration, however, claimed unliquidated damages for breach of contract, and the defendant, without paying the deposit into court, took out a summons for particulars of demand, but took no other step in the action. The defendant then, without the knowledge of the plaintiff, advertised the property for re-sale, and at the same time the plaintiff, without the knowledge of the defendant, discontinued the action. He then filed a bill against the defendant for specific performance of the original agreement.

The Master of the Rolls held that the defendant, by taking out the summons, showed an intention of relying on the contract, and that there had been no acquiescence in the plaintiff's desire to put an end to the contract. He therefore made a decree for specific performance.

[BAIL COURT.]

Nov. 24, 1865.

REV. FREDERICK JOHNSON, *Appellant*, v. GEORGE SMITH,
Respondent.

14 W. R. 209.

Highway, stopping up part of—Notice of appeal—Commons Inclosure Act, 8 & 9 Vict. c. 118, ss. 62, 63, 64.

COMMON. HIGHWAY.—Section 63 of the Commons Inclosure Act (8 & 9 Vict. c. 118) gives an appeal to the quarter sessions within a certain period against the discontinuing, stopping up, diverting, or altering roads, upon giving to the valuer fourteen days' notice in writing of such appeal, together with a statement of the grounds thereof.

The appellant gave notice of appeal against stopping up part of a road only, which was objected to at the quarter sessions, when the Court refused to hear the appeal.

Held, on application for a mandamus to hear the appeal, that the notice of appeal was sufficient.

Metcalfe (Douglas Brown with him), showed cause against a rule obtained by Markby on the 16th of November last, calling on certain justices of Huntingdonshire to show cause why a mandamus should not issue directing them to enter continuances for the next General Quarter Sessions to hear an appeal.

The appeal was, under section 62, 63, and 64 of the Inclosure Act, 8 & 9 Vict. c. 118, against the stopping up of part of a road, described in the recital contained in the notice of appeal below. It had come on to be heard at the October Quarter Sessions, when it was dismissed.

The notice of appeal was as follows:—

“To George Smith of the Corn Exchange, Northampton, the valuer acting in the matter of the enclosure of the waste and commonable lands situate in the parish of Great Gidding, in the County of Huntingdon.

“Whereas on the 4th of July, 1865, you gave notice that the road from Oundel-road to Luton-corner, at the side of the Tuddington Mere hedge, or near thereto, is intended to be discontinued and stopped up, I hereby give you notice that I intend to appeal to the next General Quarter Sessions of the peace to be holden in and for the said county of Huntingdon against the discontinuance and stopping up of so much of the said road as lies between a certain house occupied by one William Fletcher, and the said point called Sutton-corner.

“And take notice that I shall be injured and aggrieved if this portion of the said road be discontinued and stopped-up.

“And take notice that the grounds of such appeal are:—

“1. That the said portion of road so proposed to be discontinued and stopped-up is necessary and useful to the public.

“2. That if the said portion of road were discontinued and stopped-up I and my tenants, occupiers of certain pieces of land adjoining the said portion of road, and who have heretofore used, and have a right to use the same, and also other persons and the public, would be put to and sustain great inconvenience and delay in going to and from the city of Peterborough and the town of Thrapston, which are the nearest markets of importance to the said land, and in carrying corn and other produce to, and in fetching manure and other things from the said city and town, and in conveying manure, corn, and other produce between the said pieces of land and the residence and farmyard of my said tenant or tenants.

"3. That if such portion of road were discontinued and stopped up, I and my tenants aforesaid, and also other persons and the public, would be compelled to travel to the place to which I and they have theretofore had and shall still have occasion to travel by such portion of road, especially to and fro between the parish of Caldecote and said parish of Luddington by another and more circuitous road, and by a greater distance than I and they would have had to travel if the said portion of road were continued open.

"And take notice that at the hearing of the said appeal I shall avail myself of all or some or one of the said grounds of appeal."

Section 62 of the 8 & 9 Vict. c. 218 enacts:—That, in the first place, the valuer acting in the matter of any inclosure shall, and may, before he shall proceed to make any of the divisions and allotments of the land to be inclosed in pursuance of, or in any manner not inconsistent with the instructions given to such valuer as aforesaid, set out and make public roads and ways and widen public roads and ways in or over the land to be inclosed, and stop up, divert, or alter any of the roads and ways passing through the land to be inclosed, or through any old inclosures in the parish or respective parishes in which the land to be inclosed shall be situate, and the soil of such of the roads and ways so to be discontinued and stopped up as pass through the lands to be inclosed shall be deemed part of the lands to be inclosed: provided always that nothing herein-contained shall authorize the altering or diverting of any turnpike road unless the consent of the majority of the trustees of such turnpike road assembled at public meeting called for that purpose be first obtained: provided also that before any public road or way shall be discontinued, diverted, stopped-up or altered by the valuer acting in the matter of any inclosure, the valuer shall cause to be affixed at each end of such road or way a notice to the effect that the same is intended to be discontinued, stopped up, diverted, or altered, as the case may be, from and after a day to be mentioned in such notice, and the valuer shall also cause the same notice to be given by advertisement for four successive weeks, and also on the church door on the four Sundays of the said four successive weeks, and after the said several notices shall have been so given such road or way shall, from and after the day in such notice mentioned, be deemed to be discontinued, stopped up, diverted, or altered, as the case may be, subject, however, to such appeal as is hereinafter mentioned.

Section 63 enacts:—That it shall be lawful for any person within four months after the first Sunday on which such notice shall have been given on the church door of the intention that such road or way should be discontinued, stopped up, diverted, or altered, as the case may be, to make his complaint thereof by appeal to the justices of the peace at the quarter sessions for the county, riding, division, or other jurisdiction in which such road or way, or the greater part thereof, shall be situate, upon giving to the valuer fourteen days' notice in writing of such appeal, together with a statement in writing of the grounds thereof, but it shall not be lawful for the applicant to be heard in support of such appeal unless such notice and statement shall have been given as aforesaid, nor on any hearing of appeal to go into evidence of any other grounds of appeal than those set forth in such statement as aforesaid.

R. v. Milverton (5 Ad. & E. 841), where an order stopping-up half the breadth of a highway was held bad, was cited.

BLACKBURN, J.—My strong impression is that the legal effect of notice of appeal against stopping up part of the road is notice of appeal against stopping up the whole road. The inquiry might be—whether it is desirable to stop up the whole, and it would be very judicious when it comes before the magistrates to put the matter in such a way that the point might be raised hereafter. The chairman might put the question to the jury divisibly (firstly, whether part of the road was unnecessary, and the appellant aggrieved as to part, and, secondly, whether the whole road was unnecessary and appellant

aggrieved). It might be a question of some difficulty how far a man can keep open a *cul de sac*. As at present advised I am inclined to think this is an appeal against the whole road. I think the appeal should be heard and that this rule for *mandamus* should be made absolute.

Rule absolute for mandamus peremptory in the first instance by agreement.

[PROBATE.]

Nov. 28, 1865.

In the goods of HOOPER (deceased).

14 W. R. 210; 13 L. T. 445.

Misdescription in a will of the person intended to be benefited.

WILL.—Where a legatee was erroneously described as the sister of deceased, being her daughter, the Court, on being satisfied that it was a mistake, allowed the grant of administration cum testamento annexo to pass to such legatee.

Testatrix died in February, 1865, having previously left all her property to Mary Lott and her lawful children in equal proportions. In the will this legatee was described as "my sister Mary Lott." It appeared, however, that the testatrix had no sister of that name, but an illegitimate daughter; and that she had frequently mentioned that it was her intention to leave everything she had to her.

A clergyman who prepared the will stated in his affidavit that he had inserted the words "my sister" under the impression that Mary Lott was the sister of the testatrix.

A difficulty having arisen in the registry as to the grant,

Prideaux now moved for grant of administration with the will annexed.

Sir J. P. WILDE.—It is a mere *falsa demonstratio*. The grant may pass as prayed for.

STUART, V.C., Dec. 10, 1865.

LOVETT v. HANKINS.

14 W. R. 216; 13 L. T. 580.

Void Agreement—No Consideration.

CONTRACT.—An agreement to take, in lieu of arrears of income, in respect of a life interest, recoverable in equity, a certain sum, less than the estimated amount of such arrears, recoverable at law, is, in equity, void for want of consideration, and will not be supported.

This suit was instituted for the purpose of setting aside two agreements, of the 2nd and 11th of May, 1864, respectively, the first having been entered into between the plaintiff, Mary Lovett, widow, and Thomas Hankins, her brother, who died between the dates of the two agreements, and the second having been signed by the plaintiff after her brother's death at the instance

of his representatives, who were the principal defendants in the suit. The circumstances which led to these agreements being signed were as follows:—Joseph Hankins, father of the plaintiff and Thomas Hankins, by his will, dated December 17, 1823, directed a sale of certain real estates, and bequeathed one-third of the proceeds to Thomas Hankins, one-third in trust for the plaintiff for life, with remainder for the benefit of her children (if any), and if none, as to one moiety of the plaintiff's share, to Thomas Hankins absolutely, and as to the other moiety upon such trusts as were declared of the remaining one-third part, which he bequeathed in trust for another daughter, Sarah Penner, for life, with remainder to her children. After the death of the testator (which occurred in 1824) the trustees of his will agreed with Thomas Hankins for sale to him of the real estate for 19,700*l.* At the time of this sale Thomas Hankins only paid 1,320*l.* 10*s.*, which went to clear off incumbrances on the estate. Of the remaining purchase-money (18,379*l.* 10*s.*), a part—viz., 1,002*l.* represented a legacy charged by the testator on his real estate, and the ultimate remainder of 17,377*l.* 10*s.* represented the residuary proceeds of the sale to be divided in thirds and appropriated as above mentioned. It was agreed at the time that Thomas Hankins should retain 5,792*l.* 10*s.* (being his own third part), and should grant a mortgage to the trustees of the will to secure the legacy, and also the two-third parts or shares of his sisters, the plaintiff and Sarah Penner.

To carry this arrangement into effect Thomas Hankins, by an indenture, dated 14th May, 1835, mortgaged the estates to the trustees for 1000 years, to secure the same sums with interest at 4*l.* per cent. Shortly afterwards the legacy was paid.

The plaintiff at the time of the hearing was about seventy-four years old, and had never had a child. Sarah Penner had children who were interested in remainder under the will of the testator.

Shortly after the date of the mortgage above mentioned, Thomas Hankins purchased the reversionary interests of all the children of Sarah Penner, in the sum of 11,585*l.* (being the sum in which the plaintiff and Sarah Penner were interested in moieties during their respective lives), and so became absolutely entitled to that sum, subject only to the respective life interests of the plaintiff and Sarah Penner therein. In order to raise the sum necessary for purchasing these interests, Thomas Hankins was obliged to mortgage the estate, which he did by an indenture dated 17th November, 1852, his sisters, the plaintiff and Sarah Penner, joining therein for the purpose of postponing their security for the 11,585*l.*

By another indenture, dated the same 17th November, Thomas Hankins assigned all the rents and profits of the estate which should accrue during the life of the plaintiff and Sarah Penner (subject to the mortgage of even date) to the surviving trustee of the will of the testator upon trust to satisfy and keep down the interest to become thereafter due to the plaintiff and Sarah Penner.

Sarah Penner died in 1853.

Subsequently to the last-mentioned deed Thomas Hankins made the plaintiff unequal payments on account of her life interest, the income of which fell considerably into arrear.

Thomas Hankins died in May, 1864, having made a will whereby he devised his real estate to his sons, Thomas and William Hankins, and his son-in-law Richard Hobbs, in trust for all his children (two sons and three daughters) in equal shares.

The bill stated that a few days before the death of Thomas Hankins, his son William Hankins came to her and asked her to sign an agreement to take 1,000*l.* (a sum less than the estimated amount of arrears) in discharge of all arrears. The plaintiff was then ill and in bed, and supposing that her brother, Thomas Hankins, was in difficulties, and knowing that he was dying, she consented to sign, and did sign, the first agreement, whereby she agreed

to take 1,000*l.* in full of all arrears and Thomas Hankins agreed to pay the plaintiff 1,000*l.* with interest at 4*l.* per cent., on the plaintiff giving him twelve months' notice requiring payment thereof. And the plaintiff agreed to give to Thomas Hankins, on payment of 1,000*l.* and interest, a receipt for the arrears of her annuity up to the day of the agreement.

The bill proceeded to state that after the death of Thomas Hankins, William Hankins and Richard Hobbs induced the plaintiff to consent to give up her claim for interest on the 1,000*l.*, telling her that it was the only plan to avoid leaving her brother's debts unpaid, and she accordingly signed the second agreement, dated the 11th May, 1864, releasing her claim for interest.

The plaintiff alleged that she was induced by misrepresentation to sign these agreements, and that there was, in fact, no consideration for them. The defendants to the suit were the two sons and three daughters of Thomas Hankins, the respective husbands of two of the daughters, and the representatives of the last surviving trustee of the will of the original testator, who was also trustee of the securities given by Thomas Hankins for the plaintiff's life interest.

Malins, Q.C., and *B. Rogers*, for the plaintiff, contended that the agreements could not stand. They were wholly without consideration. They cited *Cumber v. Wain* (1 Str. and 1 Sm. Lead. Cas. new ed. 288); *Heathcote v. Crookshanks* (2 T. R. 24, 27); *Fitch v. Sutton* (5 East, 230); *Cross v. Sprigg* (6 Ha. 552, 555); *Peace v. Hains* (11 Ha. 151).

Bacon, Q.C., and *De Longueville Giffard*, for some of the principal defendants, argued that there was a consideration for these agreements. Previously the plaintiff had only a general charge in equity for whatever arrears she could claim. The first agreement gave her a distinct legal right to a fixed sum. These agreements were such as would be enforced at law, and there was no ground for setting them aside in equity. They also referred to *Cumber v. Wain*, loc. cit.

Archibald Smith, for other defendants in the same interest, cited *Topham v. Morecroft* (8 Ell. & Bl. 972), and commented upon *Peace v. Haines*, loc. cit.

Freeman and Phear, for the representatives of the last surviving trustee of the will of Joseph Hankins.

STUART, V.C., said that he could not but hold that both agreements had been executed under such circumstances that they could not be supported in equity. The counsel for the defendants had not attempted to uphold the second agreement, but as to the first an attempt had been made to show that it was founded upon a sufficient consideration. It was argued that, before that agreement, the plaintiff had only a right enforceable in equity, and that the effect of that agreement was to give her a remedy at law. His Honour was not aware of any authority for saying that an agreement to take 500*l.* recoverable at law, for 1,000*l.* recoverable in equity, could be said to be founded upon a sufficient consideration. Again, it had been contended that this agreement was one which would be enforced at law: it might be so, but it was not necessarily, on that account, valid in equity. His Honour made a declaration that the two agreements were invalid and ought to be set aside, and directed an account of what was due to the plaintiff for arrears of her life interest.

STUART, V.C., Dec. 22, 1865.

FORBES v. PRESTON.

14 W. R. 217; 13 L. T. 662.

Privity of Contract—Remedy against third parties.

CONTRACT.—Where A. has a right against B. and B. has a right against C., and it is essential to the enforcement of A.'s right against B. that B. should enforce his right against C., and B. neglects to do so, A. may properly make C. party to a suit for enforcing his (A.'s) right against B., although there be no privity of contract between A. and C. And it is not necessary to prove fraud or collusion between B. and C. if a special case is made out.

Hugo Forbes, the plaintiff in this case, was the inventor and patentee of certain improvements in the manufacture of breech-loading fire-arms and in projectiles used with the same. These inventions had been patented in England, France and Belgium. Various and rather complicated transactions took place between the plaintiff and Francis Preston, one of the defendants in the suit, as to the working of the patent by the latter, and the payment of a royalty by him to the plaintiff. Two different deeds were executed with reference to this matter—the second releasing some and altering other clauses contained in the first. Eventually a supplemental agreement was entered into between the plaintiff and Preston, whereby it was agreed that the plaintiff should always receive a royalty at the rate of 5l. per cent. on all articles manufactured upon the principle of his improvements, and that a complete account should be given to the plaintiff by Preston of all articles made and sold either by him (Preston) or by the Mersey Steel and Iron Company—a company which was engaged with Preston in the manufacture of the fire-arms in question.

No contract of any kind was entered into between the plaintiff and the company.

The account was not rendered to the plaintiff in accordance with the agreement between himself and Preston. The bill was filed for the purpose of enforcing this part of the agreement, and contained a statement to the effect, that the defendants, Preston and the company, had colluded together to prevent the plaintiff getting the account required, and that Preston, for that purpose, had neglected to call upon the company to account at all. The Mersey Steel and Iron Company were joined with Preston as defendants.

Malins, Q.C., and Birkbeck, for the plaintiff.

Bacon, Q.C., and Osborne Morgan, for the defendant Preston.

W. M. James, Q.C., and Kay, for the Mersey Steel and Iron Company, argued that the company were not properly brought before the Court. There was no privity of contract between the plaintiff and the company. The plaintiff's only right was against Preston, and he could not call upon the company except upon a special case, which had not been made out. They cited: *Utterson v. Mair* (4 Bro. C.C. 269); *Troughton v. Binkes* (6 Ves. 573); *Alsager v. Rowley* (6 Ves. 748); a *M. S. case*, cited by Lord Eldon in his judgment in *Alsager v. Rowley*; *Jerdein v. Bright* (2 Joh. & Hem. 325); *Benfield v. Solomons* (9 Ves. 77).

Malins, Q.C., in reply, cited Barker v. Birch (1 De G. & Sm. 376), and commented upon *Alsager v. Rowley*, loc. cit.

STUART, V.C., said that the plaintiff was entitled to call upon Preston for an account, and that Preston was entitled to call upon the company; but, inasmuch as no privity existed between the plaintiff and the company, the former could only bring the latter before the Court upon a special case being made out. His Honour did not understand that it was necessary to

prove anything like fraud or collusion. It was enough to prove something which may induce a right to call upon a third party. There must be a special case made out, but it need not be a case of fraud—neglect would form a sufficient ground. In that view, and considering the position of the parties, the company was, in his Honour's opinion, properly brought before the Court.

Account decreed against all the defendants.

Wood, V.C., Dec. 11, 1865.

PACIFIC STEAM NAVIGATION COMPANY v. GIBBS.

14 W. R. 218; 13 L. T. 431.

Practice—Ex parte injunction—Undertaking as to damages—Signature—Registrar's book.

INJUNCTION.—*The Court permitted the undertaking as to damages, on an ex parte injunction obtained by a company, to be signed by an officer of the company on a separate piece of paper and transmitted to the registrar.*

In this case an *ex parte* injunction had been obtained, but as no director or officer of the company was resident in London, it was inconvenient to obtain the signature of any such person to the undertaking as to damages in the Registrar's book, according to the usual practice.

Robinson asked that it might be given on a separate piece of paper, and transmitted to the Registrar.

Wood, V.C., assented.

Wood, V.C., Dec. 18, 1865.

Re SMITH.

14 W. R. 218; 13 L. T. 626.

Railway company—Petition for investment—Life estate—Incumbrancer—Costs.

COMPULSORY PURCHASE.—*On a petition by a tenant for life for the investment of money paid into court by a railway company, the incumbrancer of the life estate being served is entitled to his costs of appearance against the company.*

This was a petition by a tenant for life for the investment of money paid into court by a railway company.

The life estate was incumbered, and the Vice-Chancellor had, on a former occasion, directed that the petition should stand over in order that the incumbrancer might be served.

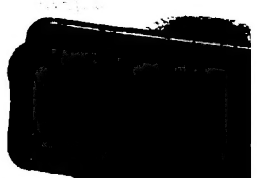
The only question was whether the incumbrancer was entitled to his costs of appearance against the railway company.

Buckton, for the petitioner.

Kingdon, for the incumbrancer, cited *Re Hungerford* (1 K. & J. 413); *Re Brooke* (12 W. R. 1128; 30 Beav. 234).

Waller, for the company.

Wood, V.C., allowed the costs of the incumbrancer.



UNIVERSITY OF MINNESOTA



3 1951 D02 042 982 D

ONE WEEK